The Sheriffs and Summary Sheriffs' Association

Scottish Civil Justice Council

Targeted Consultation on the Ordinary Procedure Rules

[01] The Association welcomes the opportunity to participate in this targeted consultation.

[02] At the outset, we note that the draft rules are not intended to be final rules but rather one worked example of possible rules, the purpose of which is to promote discussion and feedback to inform future drafts. We have approached matters from that perspective. Clearly, we would wish to be able to comment further on future drafts and, in particular, any which reflect intended final rules.

[03] We note that the questions for consultation are fairly narrow in scope. However, there are implicit policy choices which underlie the draft and on which the Association has not previously been invited to comment. In general, the Association does not comment on legislative policy choices when those have been made by government or by the Scottish Parliament, unless they have a direct bearing on the practical operation of the sheriff court. Plainly, the draft rules in this consultation do precisely that. We have significant concerns about the practical consequences of the operation of the model of procedure proposed in the sheriff courts. In particular, the model of case management currently envisaged is likely to lead to unmanageable pressure on judicial time and court staff. We have seen the response submitted by the Sheriffs Principal, which addresses these issues at length and with the benefit both of statistics and worked examples. We share the concerns of the Sheriffs Principal as articulated in their response, and we endorse all that has been said by them there.

[04] In the remainder of our response, we approach the draft rules on their terms as they stand, and would comment as follows.

Question 1 – Will the "look and feel" of these consolidated rules provide court users with the simplified, harmonised and user friendly procedure sought?

[05] Whilst acknowledging that it is beyond the realm of the focused/targeted consultation, we recognise the challenges that the Council faces in endeavouring to recast these procedural rules. Whilst we understand that a common set of procedural rules between the Court of Session and the Sheriff Court is a desirable outcome, the redrawing of the rules provides an opportunity to think about what the procedural rules are there to do.

[06] Overall, several balancing exercises require to be carried out:

- The rules require to be comprehensive and cover the many procedural twists and turns that practitioners and judicial office holders are aware litigation can take. In setting out to be comprehensive – which we think is what the rules should be – it cannot come at the cost of being too daunting in their coverage. The rules require to be comprehensible for those coming to them for the first time, i.e. the parties to the case including unrepresented litigants.

  The Simple Procedure Rules are lengthy, and for good reason. They have to cover an action from its inception to conclusion.

- The procedural rules cannot simply provide a roadmap from commencement to conclusion (and beyond). Within the rules, their contents ought to be broad enough to cover that journey of a cause and also to introduce an element of flexibility. Again this is easy to state as an aim but more difficult to bring coherently into focus. If the rules are overly prescriptive in relation to each procedural step they will be found wanting when a case does not fit easily within the procedural route outlined in such rules. Alternatively, if the rules are not prescriptive enough, vague in their terms and introduce too much scope for flexibility there will be opportunity for litigants to, perhaps cynically,

endeavour to take advantage of those lacunae or alternatively for causes - even in good faith - to meander through an uncertain course.

- The ordinary cause rules prior to the introduction of the 'new' rules in 1993 show what happens when the rules are not prescriptive enough. In the wake of lengthy timetables and numerous continuations (the 'adjustment roll' and the 'continued adjustment roll'), the 1993 rules introduced a relatively rigid, though not ungenerous, timetable for a defended cause to proceed to an options hearing, and then on cause shown to a continued options hearing and onwards to proof or debate. Whether that achieved its stated aim of ensuring that ordinary causes proceeded along a quicker timeline than previously is questionable.

  Striking the right balance between these two choices – flexibility and rigidity - is challenging though one that should be grasped at this juncture. This is an ideal opportunity to make those choices once again in light of the experience of practitioners and judicial office holders about the conduct of civil litigation.

[07] Relatedly, for the powers of those presiding in the civil courts to seek progress of the cause or otherwise, the choice is between arming the court with the necessary levers to ensure progress by providing an outline of a timetable to follow and giving it powers to ensure progress. Equally, there must be an element of flexibility in order that the court can respond to the particular case before it.

[08] We assume the rules are the beginning of a process whereby specialised chapters of the current rules (such as those for family actions, commercial actions etc.) will eventually be added into the Ordinary Procedure Rules.

[09] The "look and feel" isn't particularly conducive to the foregoing objective. While the current draft rules are presented in a clear and coherent manner, whether that will remain once those additional rules have been added is less obvious.

[10] We note that the numbering system is not consistent with that used in the Simple Procedure Rules, with which these rules are presumably intended to dovetail. Additionally, the "Parts and Chapter" arrangement is not helpful. There may be scope to suggest the adoption of a "Parts and Title" arrangement (along the lines of the Civil Procedure Rules in England and Wales (CPR)) with rules numbered according to Part and with new "Parts" being added when the specialised rules are added.

[11] It might also be asked whether rules 88, 89 and 90 belong in a codified set of procedure rules or whether there should be an Act of Sederunt which appends the Ordinary Procedure Rules, with the matters covered in those rules appearing in the main body of the Act of Sederunt (as is the case for the Simple Procedure Rules).

Question 2 - Are there any individual rules you think users might find difficult to implement and comply with, and if so what would you do differently?

Part 1

[12] Rules 1 to 3 deal with purpose and overarching duties. This is narrowly stated. Rule 2 says that the purpose of the rules is to enable the parties to obtain a "just resolution" of their case, as described in more detail in rule 2(2). The court must take into account take into account the purpose, i.e. the procurement of a just resolution by the parties. The parties must also take that into account when seeking a case management order or assisting the court.

[13] Numerous Tribunal jurisdictions have stated in their procedural rules an "overriding objective". For example, under the CPR this is "enabling the court to deal with cases justly and at proportionate cost". Perhaps this little different from achieving a just resolution of a case but, regardless, such a resolution has to be in compliance with substantive rights, achieved timeously and conducted fairly. It is trite that the

resolution must be in accordance with substantive rights and achieved within a reasonable time. Perhaps the repetition of these aspirations or aims would reinforce their importance.

[14] The impact of economy, proportionality and the efficient use of resources may well prove to be difficult. The manner in which these three issues – economy, proportionality and efficient use of resources - interplay and interact with a fair hearing or in conducting the proceedings in a fair manner is not stated.

[15] Rule 2(c) appears to say that fairness (or justness) may be compromised, or informed, by questions of economy, proportionality and resources. Might it be better to state separately that the court is enjoined to deal with the proceedings in a manner which is proportionate having regard to (i) what is at stake between the parties; (ii) the complexity of the issues; and (iii) the resources of the parties?

[16] As presently stated, economy in the abstract can mean many things. Is it synonymous with efficiency? Similarly, proportionality separately stated may mean very little or could be construed as being rather a lot. What is it that requires to be proportionate? Set against what or having regard to what? Is it not better to put the matter beyond doubt?

[17] One interpretation might be that the use of the court's time and the parties' resources must bear some relationship between (be proportionate with or to) what is at stake. That does not mean – or should not mean – that the court gives little time to relatively minor disputes concerning perhaps hundreds of pounds. What it does mean is that the litigation should be conducted in an efficient and proportionate manner having regard to what is being sued for – what is at stake. That would mean that the court would have power in pursuance of that objective to, for example, fix a timetable in relation to the conduct and timing of hearings, the manner in which evidence is to be elicited and to set time limits for parties' submissions. This should be made express.

[18] Rule 3 encourages alternative dispute resolution by means such as negotiation or mediation. These are different creatures. We note the policy behind the rules is that ADR is not to be compulsory (albeit the possibility of primary legislation to that effect is mentioned in the Procedural Narrative document). Equally, there is no rule applying cost sanctions for failing to consider ADR. It is stated that these matters may be clarified by Practice Note. In the abstract and without such clarification this means and may achieve very little. In simple procedure hearings the support of mediators sometimes works to broker a settlement and sometimes not. Referring the cases to mediation as a matter of course may not be productive. More generally, and as a matter of practicality, a very great deal is likely to depend on the level of resources and funding which are actually made available to support ADR services. As matters stand these are unavailable in many courts.

Part 2

[19] Rule 6 deals with prior intimation of a case. Prior intimation before the commencement of proceedings is already sound practice and if not followed may have repercussions in the question of expenses. If prior intimation leads to dispute resolution the action is not necessary. If the matter is resolved after the institution of proceedings and without prior intimation, the action was not necessary and this will consequences for expenses. We are not convinced that introducing a mandatory requirement for prior intimation by way of correspondence before the raising of the court action serves any useful purpose.

[20] Assuming, however, that there is to be intimation then it will be important that the intimation makes clear what the recipient requires to do if they wish to respond in terms of rule 7.

[21] What is meant by "inappropriate" in rule 6(3)(a)? We can foresee the exception being relied upon regularly without that being clarified.

[22] In terms of rule 8, a case "commences" when a summons is lodged with the court. We would ask whether this seeks to alter the existing position (e.g. for prescription purposes) that it is the date of *citation* which is relevant? The summons is registered and then an order for service is given. Little is said about the content of the summons, which seems odd given that the content of defences is prescribed in rule 12. That is particularly so given the power (mentioned further below) to refuse permission to proceed. On a related matter, we note that the Procedural Narrative document suggests (at para. 2.8) that pleas in law should be dispensed with, with the approach to personal injury actions being adopted for all actions. Instead it is said (at para. 2.3) that the summons should set out "the legal propositions supporting the action." We consider that the removal of discrete pleas in law would be a retrograde step. The legal propositions involved in the narrow field of personal injury cases are few and limited. Self-evidently that is not the case for actions more generally. Experience in simple procedure actions, where sheriffs routinely need to spend significant time hunting for the legal basis, if there is one, upon which a claim proceeds, demonstrates strongly the utility value of retaining pleas in law. We consider the retention of pleas in law would actively *expedite* judicial case management.

[23] Separately, there is reference to a 5,000 word limit for the summons (and also for defences and any counterclaim). Why is that thought to be necessary? We understand that prolix documents can serve to obscure disputes, but sometimes the provision of further information is necessary and helpful.

[24] Rule 9 appears to envisage a sift procedure under which a party who is not legally represented will require to have the court's permission to proceed. This may be thought to impinge upon access to justice for those who are unrepresented. Further, if, as it appears, the court's decision is not capable of being appealed then the filter or sift decision is a final decision. That strikes us as a significant interference with access to the court and we wonder whether the implications of such a system have been fully considered. Separately, from a practical perspective, this new procedure would require substantial judicial resource and particularly so given the requirement for

written reasons if a summons is refused.

[25] The provisions with regard to service in rule 11 are substantially less detailed than those in the OCR which provide greater clarity as to how this (crucial) step is to be effected (e.g. furth of Scotland).

[26] Rule 12(5) we note involves an innovation on the current position in terms of which matters within knowledge and not denied are deemed admitted, which has the positive effect of narrowing matters in dispute. Significantly, this appears to be part of a wider policy to depart from traditional form of pleading with matters being admitted, or not known and admitted, or denied. The Procedural Narrative document suggests (at para. 2.28) that, in future, defences will need to focus only on that which is in dispute. If that is correct then does rule 12(5) not go against that?

[27] Rule 15 deals with undefended actions. Where nothing happens following upon service, the court may grant decree in absence after the expiry of 10 months "only on cause shown". It may also dismiss the case if it considers it appropriate to do so. Should this be with or without prior intimation of the court's intention; putting the party on notice about the matter as opposed to handing down a significant decision without prior recourse to parties?

[28] Chapter 5 deals with case management. Rule 18 envisages a procedure whereby the aspiration is that a single judicial office holder is identified to deal with the case. We note that such a system would have important ramifications. We anticipate there will be resource implications in facilitating that arrangement. One can easily envisage administrative problems in relation to allocation of cases and assigning case management hearings with knock on effects for other business in the court, especially if these hearings in individual cases are to be fixed for a particular judge.

[29] For individual judicial office holders there will also be important effects. There will

have to have sufficient time to enable them to keep up to speed with the procedural progress of the case which seems to be envisaged will take place, at times, on a dynamic basis. Parties can enrol for something to happen and the court requires to react promptly. Further it is envisaged that there may well be a series of hearings and at each the purpose and scope of the hearing will require to be identified in advance – probably when the hearing is set. In advance of the hearing it is envisaged that parties will lodge a note or other information to enable that to be conducted on an informed basis.

[30] It is clear that the rules envisage that the court will take the initiative in relation to what should happen. This moves on from the recognition in the 1993 OCR that the court will have the power to progress the cause. The initiative (or inertia) will not simply be left to the parties or their solicitors. Again that has important consequences: to allow hearings to be conducted properly there will need to be provision for preparation; for sound administrative support and timetabling within the judicial officer holder's control.

[31] Rules 19 – 26 deal with case management more generally. However, what that means in any particular case, and what alternative options are to be available in terms of case management, is unclear. We note that it is stated in the Procedural Narrative that "*the active management of cases is strongly in the interests of the court in managing its time efficiently; however, it is noted that this is a resource intensive endeavour which must be reserved for appropriate cases.*" There will undoubtedly be "appropriate" cases where full, active case management with detailed case management hearings etc. will be justified, but also many others (for example many matters currently dealt with by summary application) where it is not. What are the options for such cases? The rules do not make these clear. Perhaps the detail will be found in the case management questionnaire which is to be sent to parties in terms of rule 20, but this should be set out clearly in the rules. For example, there is reference in rule 21(2) to an "expedited procedure" but then no further detail as to what that is.

[32] For those appropriate cases where active case management is justified it is envisaged that after a cause is defended, instead of an options hearing being fixed and a timetable produced, the case will slip into a series of procedural or case management hearings. The conduct or progress of these hearings onwards to a substantive hearing is very much dependent upon information to be provided by parties about what the nature of the dispute is and the view of the court in relation to how that is to be resolved.

[33] There is a difficulty, on the one hand, in relation to the flexibility which is introduced of that being an excessively prolonged process. There will be cases where that is justified having regard to the number and nature of disputed issues, both legal and factual. There will be many cases where that is not justified – see, for comparison purposes, the indeterminate number of CWHs in family procedure as a dispute may be managed with a view to avoiding the severity of a proof.

[34] Absent a specific exhortation or restatement that the parties should be conducting the case management hearings only with a view to a substantive hearing being fixed and everything/everyone working towards that goal, there is the potential for numerous case management hearings. Much of that will be down to the individual attitude of the presiding sheriff or judge. Rule 22, which explains the purpose of a case management hearing, is in vague terms: focusing the issues in dispute; ascertaining where parties are ready for a substantive hearing and facilitating a just resolution of the case. Is this enough?

[35] Chapter 6 deals with substantive hearings. Rule 28 seems oddly expressed. It is difficult to see where the court would consider that the interests of the public would not be conducive to a hearing being held in public. This is to be contrasted with the public interest. There is a wealth of jurisprudence about closed courts and the abrogation of the principle of open justice. This statement in rule 28 does not appear to recognise this.

[36] Rule 28(2) could usefully clarify that it is only "information" which oral evidence which requires oath/affirmation. "Information" is defined widely and extends beyond "items and oral evidence". Presumably not *everything* said requires to be on oath/affirmation

[37] Chapter 7 deals with "information". In relation to the notice to admit and note of objection in rule 33, there does not appear to be a power to review this, for example, if the objection or opposition to it comes late. This may have disproportionate consequences.

[38] In connection with an application for recovery of information, in light of the fact that that may well be dealt with without the necessity of a hearing should that application require to outline the basis of: (i) the court's power to order recovery, and (ii) why it should do so in the particular circumstances of this case – with reference to the averments or to the nature of the issues in dispute?

[39] Rule 33(4) provides only 7 days which we anticipate may be challenging e.g. if client instructions are required.

Part 3

[40] Rule 39(2) reflects the existing position, but it might be suggested that 2 working days is more realistic.

[41] Chapter 2 deals with applications i.e. what were previously motions/minutes etc. Rule 43 appears to envisage a new pre-application protocol. Compared to existing motion procedure it might be queried whether this additional step is helpful. In addition, the timescales may be challenging e.g. if client instructions are required.

[42] Similarly, rule 45 envisages expenses being in issue and argued at the stage of the application. Compared with existing motion procedure (where expenses routinely are not discussed) this will be an additional procedure.

[43] We are not entirely clear what rule 48 is intended to address. Presumably any application can only be made by a party, or their representative acting on proper instructions?

[44] Rule 56(4) could usefully state that it be 14 days or such other period that the court orders. Similarly it could provide that that the court can also require to be addressed on the matter before any disposal is made.

[45] Rule 57(4) appears to allow no discretion to vary the 8 week timescale which seems unhelpfully inflexible.

Question 3 – Can you suggest any additional rules, or changes in layout, that would improve these consolidated rules?

Part 1

[46] In relation to chapter 2, should there be provision for a wasted costs order made express on the face of the rules. Should the court be able to make an "unless order" (as in the Simple Procedure rules)?

Part 2

[47] Similarly, there appears to be no provision allowing a sist or pause in proceedings. This is inconsistent with the Simple Procedure Rules which expressly deal with the matter.

[48] Rules 8 and 10 require that a summons/counterclaim "must" be lodged by online submission. As a default position that is unobjectionable, but the alternative (currently

set out in Rule 85) for those without online access could usefully be referred to expressly here.

[49] Rule 11 (4)(e) could usefully also include evidence of receipt, if available.

[50] Rule 16(2) could usefully state that any application to recall should state the terms of any defence/reasons for recall.

Part 3

[51] Rules 63-65 could usefully provide for the court to deal with the case if no application is made within a specified period.

Part 5

[52] Part 5 seems awkwardly titled and in a manner which fails to reflect the content. Interim diligence is arguably about security for a debt, not enforcement, which is diligence in execution. It deals only in part with the contents of chapter 30 of the OCR. The remaining contents, such as consigned funds and decrees in foreign currency, are not included. Nor does Part 5 deal with the contents of chapter 6 of the OCR relating to interim diligence.

Part 6

[53] The contents of Part 6 are too much of a miscellany. The rules about forms and interpretation require their own Parts, at the beginning, not the end of the rules. The references to "thing" in rule 84 seem odd.

General

[54] There is no provision for "Practice Directions" to supplement the rules as per the CPR. For example, rule 58 gives a lot of detail about witness statements, which should be in a Practice Direction, but says nothing about the function of a witness statement, which is to stand as the evidence-in-chief of the witness.

[55] Importantly, there is no rule to accommodate statutory applications and statutory appeals in the sheriff court, including the time limits applicable thereto, upon the intended abolition of summary application procedure. Statutory appeals to the Court of Session will presumably continue to be governed by Chapter 41 of the RCS 1994 on a transitional basis. Although the new rules will abolish summary application procedure, they will not abolish the numerous statutory applications and appeals to the sheriff, nor common law summary application such as for breach of interdict. We consider there may be an opportunity to outline discrete procedures for (i) statutory appeals to the sheriff (or to the sheriff principal/Sheriff Appeal Court) and (ii) statutory and common law applications, given the different considerations which apply to each. These could be based on Part 8 of the CPR with separate forms for the different types of application/appeal and allowing for a simpler procedure where there is need for urgent resolution or little in the way of contested evidence. It may be that the "expedited procedure" (see para [31] above) is intended to apply to such matters, but this is not made clear.

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27 October 2023