

Simplifying Simple Procedure?

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Simple Procedure Rules

- Purpose of Talk
- To take look at some of the common issues which arise in the Simple Procedure Rules.
- To ascertain whether any resolution of these can be inferred from looking at existing legal principles.
- Will look at the basics, in line with our experiences, with the view that these principles can apply at other levels.

Simple Procedure Rules

- Purpose of Talk
- Individual Courts often have differing interpretations
- To quantify which Courts accept which interpretation.
- (i.e. 7 Courts have looked at the issue,
 - 5 Courts have accepted interpretation X
 - 1 Court has rejected interpretation X
 - 1 Court is still considering interpretation X)

Simple Procedure Rules

- Experience
- 5087 Simple Procedure Actions (22 months)
 - Therefore many meetings with Sheriffs (working with the Sheriffs)
 - Feedback from Courts and Party Litigants.
 - Have first hand experience of many issues.
- Involvement in an Appeal on SPR
 - Had sight of the views of 3 Sheriff Principals and two Counsel at the Appeal Hearing.

Simple Procedure Rules

- Limitations
- Essentially Experience is in Contract matters
- (Commercial and Consumer)
- But the principles should be transferable to other fields.
- Currently only actions for payment, delivery or for recovery of possession of moveable property, or actions which order someone to do something specific

Simple Procedure Rules

- Usual Questions
- Are the rules simple?
- Do the rules constitute a procedure?
- (If not, can the inherent jurisdiction of the court assist in providing procedural and practical guidance.)

Simple Procedure Rules

- **English “Simpler” System**
- **We imported a lot directly from England**
 - “Claim”
 - “Claimant”
 - “Respondent”
 - “Pause”
 - etc,

Simple Procedure Rules

- **English “Simpler” System**

- Recently criticised

- “new procedure has grown from 3,993 pages at the end of the old regime in 1997 to 6,488 by April this year — up 62 per cent.”

- “The rules on costs have not been simplified either. In 1997 they occupied 128 pages — by 2016 this had risen to 370.....and 150 pages of guidance.”

- The Court of Appeal has referred to “a cumbrous and confusing three-tier hierarchy of rules and guidance”.

- “As we all know, litigants in person still flounder.”

- **Charles Harris, QC, The Times, 20th September 2018**

- **“There is no access to justice if the public cannot understand it”**

Simple Procedure Rules

- **Simple Procedure Rules in Scotland**
- **Courts Reform (Scotland) Act 2014 (s72)**
- **Act of Sederunt (Simple Procedure) 2016 SSI 2016/200**
- and more recently
- Sheriff Court Rules Amendment) (No 4) (Simple Procedure) 2016/315,
- Act of Sederunt (Sheriff Court Rules Amendment) (Miscellaneous) 2017/154,
- Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2018, SSI 2018/191
- Fundamental question arises as to the nature and scope of the powers which are conferred on the Court.

Simple Procedure Rules

(Can we still use existing Scots Law principles?)

- **Was the legislative intention for Simple Procedure to be a complete departure from traditional “adversarial” litigation?**
- Scottish Government’s policy memorandum document in relation to the (then)
- **Courts Reform (Scotland) Bill (*Paras 154 et supra*):-**
- “Under the existing procedures.....sheriffs find it difficult to help party litigants.....because of their duty to act as the ‘referee’ in what is still essentially an adversarial encounter.”
- “It is in the interests of justice.....that judges.....assist party litigants to present their cases, **though clearly they must do so in a way which does not prejudices the other side.**”
- “The Scottish Civil Courts Review recommended that the rules for the new procedure should be written in as clear and straightforward language as possible.”
- “The rules will.....be based on a problem-solving or interventionist approach, closer to the inquisitorial approach taken in some other jurisdictions.
- “The new approach.....should permit the court to identify the issues and specify what it wishes to see or hear by way of evidence or argument.
- “This is clearly a fundamental shift away from the adversarial approach where the parties control evidence and argument.”

Simple Procedure Rules

(Can we still use existing Scots Law principles?)

- **Support for existing legal principles to be retained?**
- There is a presumption against the common law being changed by statute, and if a deep seated principle of the common law is to be overturned, it must be overturned by a clear, definite and positive enactment, not be an ambiguous one.
- **George Wimpey & Co Ltd v British Overseas Airways Corpn [1955] AC 169, 191** per Lord Reid
- The position with regard to changes effected by statute to rules of practice and procedure is the same
- *“When we have an uniform and long continued rule of practice, we must be very careful not to construe a new Act in such a manner as to introduce an alteration not plainly intended by the Legislature.”*
- **Kinnear v Whyte (1868) 6 M 804, 807** per Lord Ardmillan
- *“...that where a well-known and recognised jurisdiction is invoked by the Legislature for the purpose of carrying out a series of provisions which are important for the public without any specific form of process being prescribed, the presumption is that the ordinary forms of that Court are to be observed in carrying out the provisions.”*
- **Portobello Magistrates v Edinburgh Magistrates (1882) 10 R 130, 137** per Lord Justice-Clerk Moncrieff

Simple Procedure Rules

(Can we still use existing Scots Law principles?)

- Do the Simple Procedure Rules provide for a whole new procedure?
- The Simple Procedure Rules, as enacted, do indeed generally seem to give effect to a more inquisitorial procedure, as opposed to the traditional adversarial approach to litigation in Scots law. By way of example, rules 1.8(2), (3), (11)-(13) and 8.4 confer on the Sheriff a much greater (and pro-active) role in the conduct and, ultimately, resolution of the claim than has traditionally been the case.
- **BUT**
- In construing the Simple Procedure Rules, one should do so on the basis that it will take clear language to innovate upon well-known and established principles of civil procedure, which are (or have been hitherto) generally common to all forms of process.

Simple Procedure Rules

Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12

- **How did the question arise with us?**
- Different Courts, different practitioners and different parties all had differing interpretations on whether documentation was required in undefended cases.
- (i.e. Did the Simple Procedure Rules depart from the long standing principle that Scots law should primarily be based upon pleadings and not evidence?)
- The Sheriffs were saying, *inter alia*, that the authorities which bound them at Ordinary Cause, Summary Cause and Small Claim were not binding in SPR. They claimed, *inter alia*, that the new SPR system provided such new powers that those existing authorities were not considered binding.

Simple Procedure Rules

Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12

- Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12
- Considered extent of the Court's powers in cases which are either undefended or in respect of which a time to pay application has been lodged
- This was a good example of one lack of clarity in the Rules. The principles applied to answering this question, could give guidance on other parts of the Rules where a lack of clarity existed.

Simple Procedure Rules

Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12

- 3 Appeal Sheriff Bench
 - Counsel for Pursuers
 - Q.C. as *Amicus Curiae*, in absence of any Defender.
-
- The question asked of the court by the *amicus*:-
 - Was the legislative intention to confer on the Court essentially the same type of powers or was the intention to confer on the Court, in respect of Simple Procedure cases, a more expansive set of powers and jurisdiction?

Simple Procedure Rules

Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12

- **Court Found (para 72)**
- “The effect of these appeals is, in our opinion, that the sheriff's inherent jurisdiction in undefended causes is largely unaltered by the simple procedure rules.”
- “It is accepted that the rules provide the sheriffs with an array of apparent new powers to make orders to manage the litigation in keeping with both the rules and the principles by which the rules are to be applied.”
- “For reasons already given, the court must operate within its powers and the mere existence of a power to make orders does not thereby extend the court's inherent jurisdiction.”

Simple Procedure Rules

Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12

- Human Rights considered [59]:-
- *“We therefore see no basis for suggesting that such a procedure for granting decree in absence might give rise to a breach by the court of any convention rights. On the contrary, it might be considered unfair procedurally from the claimant's perspective if the court declined to grant decree in absence in circumstances where the claim is competently brought and all procedural rules had been complied with.”*
- Sheriff’s discretion [70]:-
- *“The sheriff has discretion but the discretion is not unfettered.”*
- The court recognised that the use of unless orders
- *“.....in undefended claims.....risks not only the court exceeding its jurisdiction but will inevitably lead to an inconsistency of approach and involve the judiciary, parties and the court system in an intolerably burdensome and unnecessary procedure which would have the effect of delaying justice and imposing unwarranted costs on parties and the justice system.”*
- It is interesting to note that the court took into account the burden, delay and costs aspect. We were aware that this case was having an effect on some companies’ views on Scots Courts as their choice of forum to litigate in.

Simple Procedure Rules

- **Positives**

- The order of the Sheriff encouraging parties to talk
- The general principles
- The ability now provided to Sheriffs to be prepared for the CMDs

Simple Procedure Rules

- The Procedure is not too different from before:-
- Raising Action
- Claim Form [Rule 3, Form 3A]
- Timetable [Rule 3.9, Form 3D]
- Confirmation of Service [Rule 6, Form 6C]
- Form of Response/Time to Pay Application [Rule 4 and 5, Forms 4A and 5A]
- Undefended
- Application for Decision/Change of Timetable [Rule 7, Forms 7A & 3E]
- Defended
- Case Management Hearing (or ADR or Hearing or Dismiss) [Rule 7.6]
- Rule 8 Order [Rule 8, Form 8A]

Simple Procedure Rules

Positives – First Order of the Sheriff

- The order of the Sheriff encouraging parties to talk
- In term of Rule 7.4 the Sheriff must issue a First Order after a response form has been lodged.
- **Rule 7.6(1)** The first written orders may do any of 5 things: (a) refer parties to alternative dispute resolution, (b) arrange a case management discussion, (c) arrange a hearing, (d) if the sheriff thinks that a decision could be made without a hearing, indicate that the sheriff is considering doing so, (e) use the sheriff's powers to dismiss a claim or decide a case under rule 1.8(11), (12) and (13).
- These Order tend to follow standard wording in assigning a CMD and ordering productions, etc.

Simple Procedure Rules

Positives – First Order of the Sheriff

- However we find that the first Order of the Sheriff also tends to have the following standard wording:-
- “The claimant and respondent are encouraged to contact each other to seek to settle the case or to narrow the issues in dispute before the case management discussion....”
- We find that sending a copy of this order out to the Respondent, and highlighting this passage, cuts down the amount of work on defended actions.
- This is the intention of the order.

Simple Procedure Rules

Positives – General Principals

- The general principals
 - Rule 1.1
 - “Simple procedure is a court process designed to provide a **speedy**, **inexpensive** and **informal** way to resolve disputes.”
 - We find that, if suggesting any procedure to the court, reference to these 3 criteria is helpful.
 - Rule 1.2(5)
 - “Parties should only have to come to court when it is necessary to do so to progress or resolve their dispute.”
 - Rule 1.8
 - Sheriff’s powers are incredibly wide. However, as Cabot v Gardener demonstrated,
 - “.....the mere existence of a power to make orders does not thereby extend the court's inherent jurisdiction.”

Simple Procedure Rules

Positives – New powers to prepare

The ability now provided to Sheriffs to be prepared for the CMDs

- **7.7 (2)** The purpose of a case management discussion is so that the sheriff may:
- (a) discuss the claim and response with the parties and clarify any concerns the sheriff has,
- (b) discuss negotiation and alternative dispute resolution with the parties,
- (c) give the parties, in person, guidance and orders about the witnesses, documents and other evidence which they need to bring to a hearing,
- (d) give the parties, in person, orders which arrange a hearing.

In discussions with Sheriffs on this matter, they have expressed the wish to be able to deal with the matter at the first CDM if possible.

This is generally the reason for the requests in the first Order.

The Sheriffs generally wish to get the matter dealt with as quickly as possible and now have tools to allow them to do this.

Simple Procedure Rules

- So?
- What are common problems/issues?
- (if any)
- Can existing principles simplify matters?

Simple Procedure Rules

- Issues that we have encountered.
- What is the Civil Justice Committee's position on the issue (where this has been provided).
- Solutions we have put in place with Courts meantime.

Simple Procedure Rules

Some Common Issues

Outline of Issue

Outline of Solution (if any)

Part of Civil Justice Committee's consultation

Outline of Sheriff Courts' positions

Simple Procedure Rules

Common Issues - Raising

- Raising Simple Procedure Actions
- What is required to issue a Timetable (Warrant)
- Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12
- Para 67
- *“In the course of the hearing reference was made to other cases where the sheriff clerk had not registered a claim form. As will be clear from this opinion there is no bar to the registration of a claim where the information supplied follows the information provided here.”*
- The “the information provided here” can be found in paragraphs [4] to [7]
- (Boxes D1, D3, D4, D7, D8, E1, E2 and E3 of the Claim Form)
- No evidence is required to be lodged at the point of raising the action
- (but the Sheriffs may still ask for *pars judice* matters to be addressed in the pleadings).

Simple Procedure Rules

Common Issues - Raising

- Existing Legal Principles
- Trayner's Latin Maxims
- Macphail, Sheriff Court Practice
- McLeod v Prestige Credit Ltd 2016 LR 43
- Watson v Greater Glasgow Health Board [2016] CSOH 93
- Cadbury Bros Limited v T Mahon Ltd 1962 SLT (Sh Ct) 28, 29
- United Dominions Trust Limited v McDowall 1984 SLT (Sh Ct) 10, 15
- British Railways Board v Strathclyde Regional Council 1981 SC 90
- Human Rights Act 1998
- Bank Leumi (UK) plc v Screw Conveyor Limited [2017] CSOH 129
- Hill v Black - 1914 SC 913
- Leach v R [1912] AC 305,
- George Wimpey & Co Ltd v British Overseas Airways Corpn [1955] AC 169,
- Kinnear v Whyte (1868) 6 M 804
- Portobello Magistrates v Edinburgh Magistrates (1882) 10 R 130
- The Stair Memorial Encyclopaedia of the Laws of Scotland, Volume 12, paragraphs 1126-1127
- Rules of the Court of Session 1994, Chapter 19.1(4)
- Ordinary Cause Rules 1993 Chapter 7.2(1)
- Summary Cause Rules 2002 Rule 7.1(7)

Simple Procedure Rules

Common Issues - Raising

- 10 Courts paused cases until the outcome of the Appeal Decision
 - 1 Court has rejected this interpretation
 - This Court is the only one that will not grant a warrant where
 - “..... *the information supplied follows the information provided....*”
 - in Cabot v Gardner and others.
 - Court is asking for documentation to be lodged at Warranting stage.
-
- All other Courts appear to have accepted this.

Simple Procedure Rules

Common Issues – Pleading Evidence (Section E)

- Raising Simple Procedure Actions
- Issue:- Forms – Section E
- In these Boxes the forms ask the Claimant (or the Claimant's agent) to specify what evidence will be produced.
- Our issue with this was
- a) Scots Law is based on pleadings, you should not plead evidence
- b) If there was no defence, then no evidence should be led
- but more importantly
- c) In order to know what evidence might be required, one must first of all know the defence. This is generally not known at the date of raising the action. As the Claimant's solicitor, it is a potential conflict of interest to create and thereafter respond to a defence.

Simple Procedure Rules

Common Issues - Pleading Evidence (Section E)

- Existing Legal Principles Applied
- Macphail, Sheriff Court Practice, 3rd Edn
- *“.....the parties.....must aver only the facts which they offer to prove, and not the evidence by which they propose to prove them.”*
- Neilson v Househill Coal and iron Co, (1842) 4 D, 1193
- *“The beauty of the Scotch system is, that, without disclosing what is properly called evidence, you must at least state the line of defence, and the main facts and points in the enquiry on which you rest, so that the other party shall be fully able previously to investigate the case, and be prepared for it” – L.J.C Hope*
- Only the forms provide for this, not the Simple Procedure Rules themselves.
- *“There is a presumption against the common law being changed by statute, and if a deep seated principle of the common law is to be overturned, it must be overturned by a clear, definite and positive enactment, not be an ambiguous one.”*
- **George Wimpey & Co Ltd v British Overseas Airways Corpn [1955] AC 169, 191** per Lord Reid

Simple Procedure Rules

Common Issues – Pleading Evidence (Section E)

- Raising Simple Procedure Actions
- Issue:- Forms – Section E
- In order to get around this issue we first of all narrated
- “No defence at this stage, so no evidence required”.
- This was accepted by most courts.
- In the Cabot -v- McGregor case it was commented upon.

Simple Procedure Rules

Common Issues – Pleading Evidence (Section E)

- Raising Simple Procedure Actions
- Issue:- Forms – Section E
- Not all Sheriffs were happy with this wording.
- We discussed the matter with individual Sheriffs.
- In general Sheriffs agreed with our position but they wished assistance in preparing for CMDs
- Accordingly we adopted a form of wording that seems to comply with the form and assists the Sheriffs.

Simple Procedure Rules

Common Issues – Pleading Evidence (Section E)

- Raising Simple Procedure Actions
- Issue:- Forms – Section E
 - “No defence at this stage, so no evidence required”.
 - “If [common defence] X then production Y”
 - “If [common defence] A then production B”
 - “Otherwise will complete this when defence is known”
- In relation to witnesses, our position is that the main witnesses (the Claimant and Respondent) do not require to be named.

Simple Procedure Rules

Common Issues – Pleading Evidence (Section E)

- This seems to assist most courts in Scotland
 - 9 Courts have raised the issue with us
 - 8 Courts have accepted our interpretation
 - 1 Court has rejected our interpretation.
- However the Court that rejected our interpretation wanted less information, not more.

Simple Procedure Rules

Common Issue:- Time to Pay Applications – v Time Orders

- Form 5A refers specifically to both a) time to pay under the Debtors (Scotland) Act 1987 and b) Time to pay under the Consumer Credit Act 1974
- (These are very different Statutory Remedies)
- However the form does not have a section where the Respondent states which of these he/she is applying for.
- The Form does not match the Rules.
- The Simple Procedure Rules do not refer to either the Debtors (Scotland) Act 1987 or the Consumer Credit Act 1974
- Rule 5 actually refers to a “Time to Pay Application”.
- This has traditionally been used to refer to an Application for a “Time to Pay Direction” under the Debtors (Scotland) Act 1987.
- (A “Time Order” can do a lot more than just allow for additional time to pay.)
- So which remedy does the court grant?

Simple Procedure Rules

Common Issue:- Time to Pay Applications – v Time Orders

- Most Courts simply grant a Time to Pay under the Debtors (Scotland) Act 1987
- However some court have asked which one they should grant.
- At no point in Rule 5 is there any reference to “Time Orders”. The reference throughout this Rule is to “Time to Pay Application”. It is only the for that refers.
- In Form 5A Section B1 is ticked. This section states that the Respondent “...admits the claim...”. Admission of the claim is only required under a Time to Pay Direction, not a Time Order.
- A Time Order does not require a claim to be admitted or denied. As the form makes reference to the claim being admitted we believe that it should properly be considered an application for a Time to Pay Direction.
- A Time Order *must* grant either a s129(2)(a) Order (vary the repayment rate) or a s129(2)(b) Order (remedy of a breach). The form does not allow the Respondent to select any type of “Time Order” sought

Simple Procedure Rules

Common Issue:- Time to Pay Applications – v Time Orders

- A Time Order can be granted simply on the basis that the Sheriff considers that it is “just” to do so. A Time to Pay Direction has different specific criteria.
- Importantly a Respondent can make an application for a Time Order at any time by separate application (s129(1)(a), (b) and (c)) or within an action for enforcement (s129(1)(d)).
- The forms would appear to lend themselves to a lack of *consensus in idem*. The Claimants intention may be to accept an application for a Time to Pay Direction. The Respondent may not.
- While the granting of an instalment Time to Pay Direction allows Decree to be granted, brings the agreement to an end and provides the Respondent protection, a Time Order does not do all of this.
- In cases where the agreement is still ongoing, further contractual charges and interest may become due. The Consumer Credit Act 1974 prevents this in terminated agreements unless complex procedures are followed.
- If the agreement has not been terminated and is still ongoing there arise possible additional duties on the original Creditor such as the issuing of annual statements and further default notices, etc.
- If these obligations arise they may be obligations for the Original Creditor, not an Assignee. The Original Creditor should therefore, arguably, receive intimation of the application.

Simple Procedure Rules

Common Issue:- Time to Pay Applications – v Time Orders

- Existing Legal Principles Applied
- Debtors (Scotland) Act 1987 Part 1 Extension of Time to Pay Debts
- Consumer Credit Act 1974 Section 129
- Murie McDougall Ltd -v- Sinclair 1994 SLT (Sh Ct) 74
- First National Bank -v- Syed 1991 WL 837921
- 10 Cabot Financial UK Ltd -v- Robert McGregor and Others [2018] SAC (Civ) 12

Simple Procedure Rules

Common Issue:- Time to Pay Applications – v Time Orders

- 5 Courts have raised the issue with us
- 4 Courts have accepted our interpretation
- 1 Court has rejected our interpretation.

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

- Rule 18.2(4)
- *“After formally serving a document, a Confirmation of Formal Service must be completed and any evidence of delivery attached to it.”*
- Some Courts advised that they would not process “Confirmations of Service” unless a “Track and Trace” printout was attached.
- Courts were, on occasion, dismissing Applications for a Decision on the basis that they did not consider the Claim had been served without a “Track and Trace” printout.
- We did not think that this was correct.

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

There were 3 reasons that we thought that this was incorrect

- 1. There is a presumption in Scots Law that “..... *a letter which is posted is received.....*”
- 2. Track and Trace is not mentioned in the rules
- 3. The balance of prejudice lay with not insisting on a track and trace printout.

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

There is a presumption in Scots Law that “..... *a letter which is posted is received.....*”

- *Chaplan -v- Caledonian Land Properties, 1997 SLT 384*
- *Walker & Walker, Evidence Para 3.6.6*
- *McBryde The Law of Contract in Scotland, Third Edition, paragraph 6-116*

The Simple Procedure Rules do not explicitly change this important legal principal.

- *“There is a presumption against the common law being changed by statute, and if a deep seated principle of the common law is to be overturned, it must be overturned by a clear, definite and positive enactment, not be an ambiguous one.”*
- **George Wimpey & Co Ltd v British Overseas Airways Corpn [1955] AC 169, 191** *per Lord Reid*

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

- “Track and Trace” is not mentioned in the rules.
- While Track and Trace can be indicative:-
 - In our experience the Track and Trace system is extremely unreliable
 - On many occasions simply wrong
 - We have experience of matters being served where the Track and Trace system says it is not served
 - We have experience of matters not being served where the Track and Trace system says it is served
- Additionally, and crucially, the time limits on “Track and Trace” do not comply with any of the Court Rules
- The system is not designed for use with the Court Rules and we feel it is inappropriate to rely on the Track and Trace system in terms of the Court Rules.

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

- Balance of Prejudice to Parties
- If, for any reason, the Respondent wishes to deny service at a later date, the Defender has a right of recall.
- (Unless the Defender pays all the sums in the Decree or unless six months have elapsed after a Charge is served personally upon him.)
- However, if service has been effective but T&T says no, unnecessary Sheriff Officer Fee.
- There would be a prejudice to Claimant
- Can lose his legal rights simply because Track and Trace system is simply wrong.
- Can allow a Respondent attempt to evade service

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

- Existing Legal Principles Applied
 - *Chaplan -v- Caledonian Land Properties, 1997 SLT 384*
 - *Walker & Walker, Evidence Para 3.6.6*
 - *McBryde The Law of Contract in Scotland, Third Edition, paragraph 6-116*
 - *George Wimpey & Co Ltd v British Overseas Airways Corpn [1955] AC 169*

Simple Procedure Rules

Common Issue - Service “Evidence of Delivery”

- The certification of an Officer of Court, together with the long standing presumption in Scots Law, equates to “evidence of delivery”
- 6 Courts have raised the issue with us
- 5 Courts have accepted our interpretation
- 1 Court is still considering the matter.

Simple Procedure Rules

- Raising Simple Procedure Actions
- Issue:-
- Change of Timetable – When to lodge

- The Simple Procedure Rules do not specify when a Change of Timetable Application requires to be lodged if service is unsuccessful.
- However almost all courts consider that Rule 7.4 applies (as the Confirmation of Service has been lodged and no response has been lodged.). Accordingly you have 2 weeks from the Last Date for a Response.
- One court disagrees with this. They believe that the Change of Timetable Application should be lodged before the response date.

Simple Procedure Rules

- Only 1 Court has raised the issue with us
- However this Court is currently dismissing actions where this is not complied with.
- Rules still bedding in. Consistency.

Simple Procedure Rules

Common Issues:- Intimation of Form of Response

- Intimation of Form of Response
- Almost never done by a party litigant.
- Result – Most first CMDs are either redundant or by ambush.
- We have had cases where a Sheriff sought to dismiss a Claim where we had not had the form of response intimated upon us.
- (or where only part of the response had been intimated to us)

Simple Procedure Rules

Common Issues:- Intimation of Form of Response

- Existing Legal Principles Applied
- Macphail, Sheriff Court Practice, 3rd Edn, 9.07
- *“The function of pleadings is to give fair notice of the case which has to be met.....”*
- Morrison’s v James Rome and Sons, 1964 S.C. 160
- *“It is a fundamental rule of our pleadings that a party is not entitled to establish a case against his opponent of which the other has not received fair notice.....”*
- Lord Guthrie

Simple Procedure Rules

Common Issues:- Intimation of Form of Response

- There is not much that the courts can do in relation to this.
- Most Courts will charge you for a copy of the Response and you may not get it before the CMD.
- The issues has been raised with the Civil Justice Committee.

Simple Procedure Rules

Common Issues – Proof by Ambush

- Clients need practitioners to be able to advise them properly.
- Proof by ambush means that a practitioner cannot reasonably provide that advice.
- Ordinary Cause Rules
- A Diet of Debate (or Motion for Summary Decree) can ensure that pleadings are focussed and issues narrowed before a Proof is assigned. This provides certainty in writing on issues going into Proof.
- Small Claims/Summary Cause Rules
- Rules 8.3(3)(a) and 8.3(3)(a) - Prior to assigning any Proof the Sheriff had to
- “...identify and note on the summons the issues of fact and law which are in dispute....”
- This could effectively be used as a Debate, which provided certainty in writing on issues going into Proof.
- Simple Procedure Rules
- No Equivalent

Simple Procedure Rules

Common Issues – Proof by Ambush

- Most Sheriff use the new management powers to narrow the issues for Proof. They can use the principles of the SPR
- **1.2 What are the principles of simple procedure?**
 - (1) Cases are to be resolved as quickly as possible, at the least expense to parties and the courts.
 - (2) The approach of the court to a case is to be as informal as is appropriate, taking into account the nature and complexity of the dispute.
 - (3) Parties are to be treated even-handedly by the court.
 - (4) Parties are to be encouraged to settle their disputes by negotiation or alternative dispute resolution, and should be able to do so throughout the progress of a case.
 - (5) Parties should only have to come to court when it is necessary to do so to progress or resolve their dispute.
- **1.4 What are the sheriff's responsibilities?**
 - (1) The sheriff must take into account the principles of simple procedure when managing cases and when interpreting these rules.
 - (2) The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged.
 - (3) The sheriff must encourage cases to be resolved by negotiation or alternative dispute resolution, where possible.
 - (4) If a case cannot be resolved by negotiation or alternative dispute resolution, the sheriff must decide the case.
- But there is no obligation upon the Sheriff avoid a Proof by Ambush.

Simple Procedure Rules

Common Issues – Proof by Ambush

- Existing Legal Principles Applied
- None
- We have simply asked the Civil Justice Committee to consider re-instating the obligation which was contained within the Small Claims/Summary Cause Rules

Simple Procedure Rules

Common Issues – Proof by Ambush

- 3 Courts have a tendency to remit matters to Proof without narrowing the issues.
- (Not in all cases, by any means)
- Such Proofs can be unwinnable.

Simple Procedure Rules

Common Issue – Unless Orders

Obviously in relation to undefended matters these should not generally be used:-

- *“Although technically competent, the use of “unless orders” in undefended proceedings is not appropriate other than to determine matters within the court's limited scope of enquiry such as jurisdiction, competence and prescription.”*

Sheriff Principal Stephen, Cabot Financial UK Ltd v Gardner and Ors, [2018] SAC (Civ) 12

However, at this point, there is no “checks and balances” system for these in defended matters.

We have seen “Unless Orders” ordering documentation that does not exist, otherwise the case will be dismissed.

Simple Procedure Rules

Common Issue – Unless Orders

- Existing Legal Principles Applied
- We have suggested to the Civil Justice Committee that there should be a stipulation in the Rules that the same principles that apply to motions for specification should be applied to “Unless Orders”
- Most Sheriffs adhere to that anyway.
- Generally when it is not adhered to, it is through a mistake or misunderstanding.
- However, we argue that there should be a process in place to remedy such mistakes or misunderstandings.
- Suggested:-
 - Macphail, Sheriff Court Practice, 3rd Edn, P15.53 supra
 - Fife CC v Thoms (1898) 25 R 1097
 - Earl of Morton v Fleming 1921 1 SLT 205

Simple Procedure Rules

Common Issue – Unless Orders

- Every court that has issued an irrelevant unless order has accepted that and not enforced the order.
- It has generally taken at least one hearing, together with delay and expense.

Simple Procedure Rules

Some common issues that may not be resolved through established principles

Simple Procedure Rules

Common Issue - Jurisdiction

- Section D2 of the claim form narrates:-
- “You should set out where the events described above took place. **if** any part happened online, please state this. This is so that the court and the respondent can make sure that this is the right court to hear this claim.”
- However this paragraph does not cover all the basis of jurisdiction.
- The courts are currently adopting a practical approach to this.
- They tend to look at the remedy and infer the jurisdiction from that.
- Practitioners tend to put in the address relating to the jurisdiction.
- This seems to have become the convention and the wording of the form is largely ignored.

Simple Procedure Rules

Common Issue - Jurisdiction

- Only the original Court in Cabot v Gardner brought this up as an issue.
- One of the Sheriffs, in his Stated Case, narrated that he felt that the way we had completed the form was an averment that the Respondent had completed the agreement within his home (and therefore a particular section of the CCA applied)
- The Appeal Court accepted the explanation at the hearing, but there is no mention of it within the Appeal Decision.
- The Civil Justice Committee is aware of the issue.
- Until it is remedied within the Rules, there is little else a practitioner can do at the moment other than abide by the informal convention that seems to have arisen

Simple Procedure Rules

Common Issue:- “List of Evidence Forms”

- The forms are not designed for more than 10 productions.
- The forms are not designed for more than 1 form to be lodged.
- The courts are content to allow the practitioners to adopt their own solutions at this point.
- But the scope for confusion and delay in Proofs is very evident.
- This will have a significant impact on PI actions in the future.

Simple Procedure Rules

Common Issue:- Forms

- In essence there is an argument that there are too many forms.
- There is also an argument this, by its nature, detracts from the aims of SPR.
- In Ordinary Cause, most requests can be dealt with by way of a Motion.
- In Summary Cause/Small Claims most requests could be dealt with by way of an Incidental Application.
- In Simple Procedure, not including “Standard Orders”, there are than 50 forms.
- (Not sure why. The forms mostly follow the same layout. A tick box system could be simpler.)
- In our experience, party litigants are not using the forms correctly.

Simple Procedure Rules

Common Issue:- Forms

- Issue:- Forms
 - Often, a practitioner will want to do more than one thing.
 - This can require many forms.
 - For example, the “Application to Restart” does not have a box for the practitioner to specify the next procedure.
 - Without an accompanying Incidental Application, this can generally result in the unnecessary expense and delay of a CMD hearing.
 - The forms all require the same information to be filled out time and time again. For a party litigant, who does not have a computers system to automatically populate this, this can be a lot of work. (Not to mention that the courts must get tired of reading the redundant parts)

Simple Procedure Rules

Form 2A - Lay Representation Form	Form 11A - List of Witnesses Form
Form 3A - Claim Form	Form 11B - Witness Citation Notice
Form 3B - Further Claimant Form	Form 11C - Child Witness Notice
Form 3C - Further Respondent Form	Form 11D - Vulnerable Witness Application
Form 3D - Timetable	Form 11E - Special Measures Review Application
Form 3E - Change of Timetable Application	Form 13A - Decision Form
Form 4A - Response Form	Form 13B - Application to Recall (1)
Form 5A - Time to Pay Application	FORM 13B - Application to Recall (2)
Form 5B - Time to Pay Notice	Form 15A - Charge to Pay
Form 6A - Notice of Claim	Form 15B - Alternative Decision Application
Form 6B - Service by Advertisement Application	Form 16A - Appeal Form
Form 6C - Confirmation of Formal Service	Form 16B - Appeal Report
Form 7A - Application for a Decision	Form 17A - CJEU Reference Form
Form 8A - Order of the Sheriff	Form 17B - Application to Intervene
Form 9A - Application to Pause	Form 17C - Invitation to Intervene
Form 9B - Application to Restart	Form 17D - Application to Change a Damages Management Order
Form 9C - Additional Respondent Application	Form 17E - Application for Instructions about a Damages Management Order
Form 9D - Application to Amend	Form 17F - Application for a Child's Property Administration Order
Form 9E - Abandonment Notice	Form 19A - Translation Certificate
Form 9F - Application to Represent	Form 19B - Method of Service Abroad Certificate
Form 9G - Incidental Orders Application	Form 20A - Provisional Orders Application
Form 10A - List of Evidence Form	Form 20B - Provisional Orders Hearing Notice
Form 10B - Recovery of Documents Application	Form 20C - Provisional Orders Reconsideration Application
Form 10C - Application to Open Confidential Document	Form 20D - Arrestment Notice
Form 10D - Special Recovery of Documents Application	Form 20E - Confirmation of Formal Service of Arrestment Notice

Simple Procedure Rules

Common Issue - Cost

- There is no fee recoverable for attendance at any hearings on undefended actions
- (For example Time to Pay Hearings)
- Obviously the general rule in Scots law is “Expenses follow success”
- The simple procedure rules did not explicitly provide for any departure from this rule.
- We have therefore written to those drafting the fees to ask whether this is an oversight, as there appears to be no provision to authorise the departure from this general principle.
- As part of the Civil Justice Committee’s consultation, we asked them to take into account that the Simple Procedure Rules require much more work from practitioners and therefore asked them to recommend that the fees reflect this.

Simple Procedure Rules

**Civil Justice Committee Consultation
on
Simple Procedure Rules**

Simple Procedure Rules

- Simple Procedure Consultation – Issues highlighted include:-
-
- Claim Forms
- 1. The Claim Forms appear to be confusing (and too long) for Party Litigants
- 2. Important information on the Claim Forms is not obvious - Party Litigants
- 3. Important information on the Claim Forms is not handy or obvious
- 4. Claim Forms do not allow for Claims in the name of Trading Names
- 5. Boxes E1, E2 and E3 – Presumption of any Defence leads to a conflict of interest
- 6. Jurisdiction - Section D2 does not allow for this to be properly specified
-
- TTPA Forms
- 1. The Form does not specify which remedy the Defender is seeking
- 2. The Income/Expenditure information requested could be more detailed
- 3. The Form does not appear to request the information required for a Time Order
-
- Service
- 1. Certification by Officer of Court
- 2. Reference to “evidence of delivery” in Rule 18.2(4) should be removed.
-

Simple Procedure Rules

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- Post Response
- 1. Suggest a procedural/negotiation pre-CMC hearing.
- 2. Rule 4.4. Not complied with in the majority of Defended cases.
- 3. Adjustment
- 4. Obligation on Sheriff to identify the issues in dispute and to Note, in writing, issues for Proof.
- 5. Can the Rules make provision for a CMC to be discharged if settlement is achieved.

- Incidental Applications
- 1. A Rule that a copy of any response should be sent to the other party.
- 2. Unless Orders (Rule 8.4) – Not in undefended actions
- 3. Unless Orders (Rule 8.4) – Checks and balances
- 4. Too many Different Forms
-
- Evidence/Witnesses
- 1. There is currently no scope to identify different List of Evidence Forms

Simple Procedure Rules

- Hearings
- 1. Suggest a procedural/negotiation pre-CMC hearing (which does not address the merits).
- 2. Guidance to Courts on Timetable and for Proofs
-
- Other matters
- 1. Expenses in undefended actions appear to be missing
- 2. Expenses in both undefended and defended
- 3. Inconsistency of Approach
- 4. The delay in receiving a Decision Form

Simple Procedure Rules

- Conclusion

It is hoped that the general principles outlined here, together with the examples of some of these in practice can assist in reducing some of the work involved in Simple Procedure and reduce the some of the scope for uncertainty.

- Make sure your Claim Forms contain the information set out in paragraphs 4-7 of Cabot v Gardener, and others
- Avoid creating defences when issuing a claim
- But assisting the Sheriff can bring the action to a conclusion earlier
- Check the list of Forms before doing anything.
- Refer the Court to Rule 1.1 when requesting anything:- “speedy”, “inexpensive” and “informal”

Simple Procedure Rules

END