

COURTS REFORM (SCOTLAND) ACT 2014

EXPLANATORY NOTES

THE ACT

Part 3 – Civil Procedure

Chapter 1 – Sheriff court

Civil jury trials

110. Sections 63 to 71 provide for civil jury trials in an all-Scotland sheriff court (for example, the proposed Sheriff Personal Injury Court - see sections 41 and 42). The intention is to introduce a procedure similar to that operating in the Court of Session and, accordingly, the provisions largely reflect the language and procedures currently set out in the Court of Session Act 1988.

Section 63 – Civil jury trials in an all-Scotland sheriff court

111. Subsection (1), read together with subsection (7), sets out the types of actions which may require a jury trial. The section only applies to those types of civil proceedings which have been specified in an order made under section 41, and only at the sheriff court or courts which have been specified as having jurisdiction throughout Scotland for those types of civil proceedings. Further, subsection (7) provides that a civil jury trial is only to take place for those types of proceedings which, if they were competent in the Court of Session, would be tried by a jury there, under section 11 of the Court of Session Act 1988.
112. Section 63(2) makes it clear that a jury trial must take place where proceedings have been remitted to probation (that is, where it has been decided to allow evidence to be led to establish the facts). This qualification makes it clear that it is unnecessary to have a jury trial where the pleadings are irrelevant or there is some other fundamental problem. However, subsection (2) also makes it clear that a jury trial will not go ahead if the parties agree otherwise or special cause is shown. The use of the phrase “special cause” is deliberately identical to that in section 9(b) of the Court of Session Act 1988 and subsection (3) explicitly provides that the sheriff will apply that test in the same way as the Court of Session currently does.
113. Subsection (4) sets out the questions which are to be put to the jury, being the “issues” put to the jury in the equivalent action in the Court of Session, in terms of section 12 of the 1988 Act. Again, as with civil jury trials in the Court of Session, a jury will consist of 12 people (subsection (5)).

Section 64 – Selection of the jury

114. Section 64 is based on section 13 of the Court of Session Act 1988, with the continued expectation that practice and procedure in the Court of Session, including with regard to the effect of any challenge to a potential juror, will be adopted in this regard in the sheriff court. Further detailed rules in relation to civil jury trials in the sheriff court,

for example, on how the ballot is to be conducted, may be made in an act of sederunt under section 104.

Section 65 – Application to allow the jury to view property

115. **Section 65** is based on section 14 of the Court of Session Act 1988. It provides for a party to the proceedings to apply to the sheriff to allow the jury to view any property (whether moveable or immoveable) which is relevant to the proceedings.

Section 66 – Discharge or death of juror during trial

116. **Section 64** provides that the sheriff may allow a juror not to take any further part in the proceedings, and for the way in which the proceedings are to continue should a juror be permitted to take no further part or die during proceedings. It is based on section 15 of the Court of Session Act 1988, except that subsection (4) makes further provision if the number of members of the jury falls below 10.

Section 67 – Trial to proceed despite objection to opinion and direction of the sheriff

117. **Section 67** is based on section 16 in the Court of Session Act 1988 and provides similarly that, if an objection is taken during the trial to the opinion or direction of the sheriff, this is not to prevent the trial from proceeding nor the jury returning the verdict and assessing damages.

Section 68 – Return of verdict

118. **Section 68** is drawn from section 17 of the Court of Session Act 1988. It concerns the determination of a verdict by the jury and the status of that verdict, and includes provisions on the selection of a juror to speak for the jury and the ability of the sheriff to discharge the jury and order another jury trial should the jury be unable to agree upon a verdict after a period of three hours. Court rules will be provided under section 104 in relation to giving effect to the jury's verdict.

Section 69 – Application for new trial

119. Subsections (1) to (4) are based on section 29(1) and (2) of the Court of Session Act 1988 except that the application for a new trial from an all-Scotland sheriff court will be to the Sheriff Appeal Court rather than the Inner House of the Court of Session. It concerns the grounds under which a party to the proceedings may apply to the Sheriff Appeal Court for a new trial and what that court may do with such an application. Subsection (4) makes it clear that the powers of the Sheriff Appeal Court are subject to the operation of section 70 which sets out conditions on those powers. Subsection (5) is new and makes clear, for the avoidance of doubt, what the consequences are of granting a new trial. Subsections (6) and (7) are based on section 29(3) of the Court of Session Act 1988 and provide where the Sheriff Appeal Court may, instead of granting a new trial, set aside the decision of the jury and enter a judgment in favour of the unsuccessful party. Subsection (8) sets out that, if the Sheriff Appeal Court consists of more than one Appeal Sheriff, the Court may set aside the verdict of a jury or enter judgment for the party unsuccessful at the trial only if that is the opinion of all the Appeal Sheriffs hearing the appeal.

Section 70 – Restrictions on granting a new trial

120. **Section 70** is drawn from the provisions of section 30 of the Court of Session Act 1988. It provides for various circumstances where, in the case of an application under section 69(1), the court must grant a new trial, may grant a new trial restricted to the question of damages, or may not grant a new trial. Subsection (4) varies from section 30(2) of the Court of Session Act 1988, however, in that in the circumstances set out in section 70(3), the court must refuse to grant a new trial, whereas section 30(2)

states that the court may refuse to grant a new trial. Subsection (7) explains that, where the Court is constituted by more than one Appeal Sheriff, an application for a new trial may not be granted unless the majority of those Appeal Sheriffs hearing the case agree that it should.

Section 71 – Verdict subject to opinion of the Sheriff Appeal Court

121. **Section 71** is based on section 31 of the Court of Session Act 1988. It provides that a party to the case may apply to the Sheriff Appeal Court for that court to direct that a verdict be returned in whole (or in part) in that party's favour. It further sets out what the Sheriff Appeal Court may do in respect of that application.

Simple procedure

122. At present, cases for sums up to £5,000 fall to be dealt with under small claims or summary cause procedure in the sheriff court. The Scottish Civil Courts Review concluded that it was unnecessary to have two different sets of procedures for cases for £5,000 or less, but that there was a continuing need for a distinct procedure for low value claims. It considered that the financial limit should be set at £5,000 for the time being, but recommended the creation of a new procedure for cases under £5,000 to be dealt with primarily by summary sheriffs. The Act refers to this new procedure as "simple procedure".
123. The Review advocated a flexible procedure based on a problem-solving, interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. The new procedure should be accessible to party litigants, with clear, straightforward court rules in plain English and under which the summary sheriff would be able to assist the parties to reach settlement.

Section 72 – Simple procedure

124. Subsection (1) establishes a new type of civil proceedings in the sheriff court called simple procedure. Simple procedure replaces the form of procedure known as summary cause which will be abolished through the repeal of sections 35 to 38 of the Sheriff Courts (Scotland) Act 1971 by paragraph 6 of schedule 5 to this Act. The abolition of summary cause proceedings will also mean the abolition of small claim proceedings which are a subset of summary cause proceedings. Subsection (2) makes it clear that most of the provisions about simple procedure will be made by court rules made under section 104(1).
125. Subsection (3) lists the types of proceedings which can only be brought by simple procedure, providing a monetary limit of £5,000 with respect to such proceedings. No other types of proceedings can be brought subject to simple procedure. Subsection (4) makes clear that the limitation on the type of case which must be brought under simple procedure does not prevent cases already raised under different forms of procedure from being transferred to simple procedure under section 78, or affect the operation of section 83 which provides that cases which are subject to summary cause procedure will become subject to simple procedure. It also makes clear that this limitation does not prevent a simple procedure case from being transferred out of that procedure under section 80.
126. Subsection (5) makes it clear that the obligation to raise an action falling within the description in 72(3)(a) by simple procedure does not apply where such a case is also of a type affected by section 73 (proceedings in an all-Scotland sheriff court), nor where it is also of a type affected by section 74 (proceedings for aliment of small amounts under simple procedure). Subsection (6) provides that court rules made by an act of sederunt by the Court of Session will determine the way in which the sum in subsection (3) may be calculated. Subsection (8) enables rules of court to clarify when proceedings are of a type that are to be subject to simple procedure. The method through which the court has determined whether a case must be raised under summary cause procedure is set

out in the case of *Milmor Properties v W & T Investments Co.Ltd.* [2000]. This power permits rules of court to adopt or modify this method.

127. Subsection (9) ensures that the term “simple procedure case”, when used in Part 3 of the Act includes cases which have been transferred to simple procedure under sections 78 and 79 and cases which have been made subject to simple procedure by other enactments. Subsection (12) provides that the £5,000 limit may be varied by the Scottish Ministers by order (which is subject to the affirmative procedure by virtue of section 133(2)(a) of the Act).

Section 73 – Proceedings in an all-Scotland sheriff court

128. **Section 73** provides that where proceedings for the payment of a sum of £5,000 or less may be brought in an all-Scotland sheriff court (for example, the proposed Sheriff Personal Injury Court) by virtue of an order under section 41(1), then those proceedings are not subject to simple procedure in the specialist court. The claimant has the choice of raising his or her claim in the local sheriff court under simple procedure, or in the all-Scotland sheriff court.

Section 74 – Proceedings for aliment of small amounts under simple procedure

129. **Section 74** re-enacts and updates the drafting of section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963. It provides that, regardless of the general rules in any enactment on simple procedure, that an action for aliment where the amount claimed does not exceed a certain sum may be brought subject to simple procedure. The sum set by the section may be varied by an order made by the Scottish Ministers, subject to negative procedure. Given the re-enactment of section 3, the 1963 Act is now wholly repealed by paragraph 21 of schedule 5 to this Act.

Section 75– Rule-making: matters to be taken into consideration

130. **Section 75** establishes that, as far as possible, the rules of court which govern simple procedure will enable an interventionist and problem-solving approach. It is to be read subject to the obligation on the Scottish Civil Justice Council to draft the rules in accordance with the principle that they should be as clear and easy to understand as possible, in terms of section 2(3)(b) of the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013. The obligation to make rules of court which reflect such principles is deliberately framed to be exercised “so far as possible” in order to avoid any obligation to create rules that may be inconsistent or contradictory with one another. Paragraph (d) is intended to ensure that the rules are flexible enough to allow a sheriff to follow the procedure that is most appropriate to the circumstances of the case.

Section 76 – Service of documents

131. **Section 76**, which is derived from section 36A of the Sheriff Courts (Scotland) Act 1971, permits rules made under section 104(1) to provide for the sheriff clerk to be required to effect service of any document on behalf of parties in a simple procedure case.

Section 77 – Evidence in simple procedure cases

132. Subsection (1) is based on section 35(3) of the Sheriff Courts (Scotland) Act 1971 and is a reflection of the desire to make the simple procedure less bound up in technical, legal rules. Subsection (2) restates section 36(3) of the 1971 Act which was included as ordinary cause rules in the sheriff court require the recording of evidence. Ordinary cause procedure will not exist after the Act is fully commenced (by virtue of the repeal of Schedule 1 to the Sheriff Courts (Scotland) Act 1907 by schedule 5 paragraph 4(h) of this Act). However the new rules of procedure are likely to require the recording of evidence in at least some cases and so section 77(2) is necessary to make it clear that such recording is not required in simple procedure cases.

Section 78 – Transfer of cases to simple procedure

133. **Section 78** provides for cases which are not being dealt with under simple procedure to be transferred to that form of proceedings, provided they are now of a type that could be brought under simple procedure. Accordingly if proceedings develop to such an extent that, if they had been raised at that point, they would have had to have been raised under simple procedure, they may be transferred to simple procedure. Subsection (2) (b) permits cases to be transferred to simple procedure if the parties agree, even if the sum sought would exceed the usual monetary limit for simple procedure cases. In such a transfer there is no obligation that the sum sought requires to be lowered to meet the financial limit set out in section 72(3) or 74(2). Accordingly the parties' agreement to continue subject to simple procedure does not have the effect of capping the sum sought to those financial limits. The sheriff has no discretion and must give effect to the parties' joint application. Unlike sections 79 and 80, a single party cannot make a section 78 application.

Section 79 – Proceedings in an all-Scotland sheriff court: transfer to simple procedure

134. This section provides for a party to a case raised in an all-Scotland sheriff court to apply to have it transferred out of that court and into simple procedure in another sheriff court having jurisdiction, on special cause shown. The sheriff has discretion as to whether to give effect to the application.

Section 80 – Transfer of cases from simple procedure

135. **Section 80** provides for the transfer of cases out of simple procedure. Given the abolition of ordinary cause rules, it is left to court rules under section 104 to determine if a uniform set of rules is to be adopted for all remaining cases outwith simple procedure or if different rules are to apply to different kinds of case. This provision simply states that cases will be transferred from simple procedure without specifying the procedure to which they are being transferred. As with section 79, a single party may make an application and the sheriff has discretion as to whether to give the application effect.

Section 81 – Expenses in simple procedure cases

136. **Section 81** re-enacts section 36B of the Sheriff Courts (Scotland) Act 1971 with modifications to reflect the new system of simple procedure. Subsection (1) provides that the Scottish Ministers may prescribe, by order (subject to the affirmative procedure by virtue of section 133(2)(a)), categories of simple procedure to which alternative expenses rules will apply. In other words, in those cases the normal rules on expenses will not apply. Subsection (2) makes it clear that these categories will be defined by reference to the value of the claim or the subject matter of the claim, permitting types of actions, for example personal injury, to be excluded from any limitation on expenses.
137. An order under subsection (3) could also specify some civil proceedings where different expenses could apply, excepting them from categories set out in subsection (2).
138. Subsection (4) then sets out cases in which those rules are disapplied. Subsection (5) is based on section 36B(3) of the 1971 Act and lists the circumstances in which the restrictions on expenses should not apply owing to the behaviour of one of the parties to the case. Subsections (6) and (7) allow the sheriff to make a direction disapplying the restrictions on expenses in an order under subsection (1) in complex cases.

Section 82 – Appeals from simple procedure cases

139. This section provides that an appeal on a point of law may be taken under section 110 to the Sheriff Appeal Court, however only against the final judgment of the sheriff ("final judgment" is defined in section 136(1)). No further provision is required in this section for onward appeals of simple procedure cases from the Sheriff Appeal Court to the

Court of Session since such appeals will be governed by the general rules applicable to section 110 appeals.

Section 83 – Transitional provision: summary causes

140. **Section 83** makes provision to deal with the transition between summary cause procedure and its replacement, simple procedure. This ensures that all references in legislation which refer to summary cause are to be read as referring to simple procedure.

Interdicts and other orders: effect outside sheriffdom

Section 84 – Interdicts having effect in more than one sheriffdom

Section 85 – Proceedings for breach of an extended interdict

141. **Section 84** gives a sheriff competence to grant an interdict or interim interdict having effect outwith the sheriff's sheriffdom (i.e., within any other sheriffdom in Scotland).
142. **Section 85** sets out that these types of interdicts are to be known as "extended interdicts" and that proceedings for a breach of an extended interdict will be capable of being validly raised and enforced by an action in a number of sheriff courts: in the sheriffdom in which the defender is domiciled; in the sheriffdom in which the interdict was granted; and in the sheriffdom in which the alleged breach occurred.
143. However, on the application of a party to the proceedings or on the sheriff's own initiative, a sheriff may transfer proceedings to a sheriff of another sheriffdom, if satisfied that this would be more appropriate. This sheriff may transfer the proceedings to any other sheriffdom in this case and is not limited to the sheriffdom in which the defender is domiciled, the sheriffdom in which the interdict was granted or the sheriffdom in which the alleged breach occurred. Where a case is transferred to another sheriff in this way, then that sheriff has the competence to consider and determine the proceedings.
144. This provision is a permissive one, however and makes it clear that the sheriff will be able to use discretion in determining whether proceedings should be raised before them. This discretion applies to the operation of all the rules in the section. It is anticipated that, by providing that the test does not affect the power of the sheriff to decline jurisdiction, a sheriff will continue to be able to decline jurisdiction on the basis that his or her court is not an appropriate forum for determining the matter in dispute (*forum non conveniens*).

Section 86 – Power to enable sheriff to make orders having effect outside sheriffdom

145. **Section 86** enables the Scottish Ministers to provide by order (subject to the negative procedure) for the types of orders (including interim orders) which a sheriff has competence to make which would be capable of having effect and be able to be enforced outwith the sheriffdom in which they were granted. This provides that other types of court proceedings may be identified and the effect and enforcement of these proceedings extended in a similar way to that of interdict (which is dealt with in sections 84 and 85).

Execution of deeds relating to heritage

Section 87 – Power of sheriff to order sheriff clerk to execute deed relating to heritage

146. **Section 87** provides, where the grantor (as defined in subsection (6)) of any deed relating to immoveable property (i.e. land and buildings), is unable, refuses or fails to execute a deed relating to such property, or cannot be found, that the sheriff may make an order

which dispenses with the need for the grantor to execute the deed and directs the sheriff clerk to execute the deed. The effect of an execution by the sheriff clerk is that the deed is taken to have the same effect as it would have if it had been executed by the grantor. This section is intended to restate and to have the same legal effect as section 5A of the Sheriff Courts (Scotland) Act 1907, though the distinction in section 5A(2) between applications and summary applications is not perpetuated as the latter are no longer to be a defined category of proceedings in the Act. The grantee will simply make an application for an order in either of the cases mentioned in subsection (1).

Interim orders

Section 88 – Interim orders

147. Previously, there have been no statutory powers conferring on sheriffs a general power to grant interim orders corresponding to section 47 of the Court of Session Act 1988. This suggests that there has been a real doubt regarding the power of a sheriff to grant an interim order *ad factum* praestandum (that is, an order requiring that something (other than the payment of a sum of money) be done pending the final determination of the proceedings). Section 88 rectifies this by conferring an express power on sheriffs to make such orders along with the power to grant orders regarding the interim possession of any property to which the proceedings relate. Section 90 concerns similar provision as regards the Court of Session.