

SHERIFF APPEAL COURT

(CIVIL)

PRACTICE NOTE

No. 1 of 2021

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## **Introduction**

1. The purpose of this Practice Note is to set out the practice of the Sheriff Appeal Court (“the Court”) in dealing with civil appeals. It comes into force on 6 January 2022 and replaces the Practice Notes of 21 March 2016 and 9 February 2017 (which will continue to apply only in respect of appeals proceeding under the Act of Sederunt (Sheriff Appeal Court Rules) 2015).
2. This Practice Note follows the general structure of the Sheriff Appeal Court Rules (“the Rules”). Miscellaneous procedural matters are dealt with towards the end. Where no provision is made in the Rules or this Practice Note about any aspect of procedure in relation to civil appeals, practitioners may have regard to the practice of the Court of Session in relation to that type of business.

## **Part 2: general provisions**

### *Rules 2.1 and 6.4: applications to appeal out of time*

3. An application to allow an appeal to be received out of time is to be made by motion. That motion is to be made when the note of appeal is lodged. Such a motion must be intimated upon any proposed respondent in accordance with rule 14.1 or rule 15.1, as the case may be.

### *Chapter 3: sanctions for failure to comply*

4. Where a party considers that any other party is in default for any of the reasons set out in rule 3.1, that party should bring the matter to the attention of the procedural Appeal Sheriff by lodging a motion in writing.

### *Rule 4.2: legal representation*

5. Where a party is legally represented, it is expected that the advocate or solicitor who will conduct the appeal hearing should appear at the procedural hearing. That person should be authorised to take any necessary decisions on substantive or procedural questions about the appeal. The Court considers that continuity of representation at procedural and appeal hearings is an important factor in minimising late settlements and the discharge of appeal hearings.

## **Part 3: initiation and progress of an appeal**

### *Rule 6.2(2)(e): request for sheriff’s note*

6. Appellants are reminded that it is their responsibility to request a note from the sheriff where one has not already been produced. The note of appeal requires to include information about the availability of the sheriff’s note and any steps taken to obtain one.
7. Where an appellant fails to take the necessary steps to obtain the sheriff’s note and the appeal proceedings are delayed as a result, this may be taken into account in the determination of any question of expenses.

### *Competency*

8. The Court will refuse to receive appeals which are *ex facie* incompetent (e.g. appeals in which permission is required but has not been granted).

#### *Rule 6.5(1)(b): answers to note of appeal*

9. When the procedural Appeal Sheriff makes an order for intimation and answers, any person who receives intimation may lodge answers, if so advised. The lodging of answers makes the Court and all other parties aware of a respondent's case and the Court considers that answers serve an important function in framing a respondent's lines of argument. Accordingly, it considers them to be compulsory where a respondent wishes to oppose an appeal.
10. Answers need not be elaborate, but they should address each of the grounds of appeal specified in the note of appeal.

#### *Rule 6.6: cross-appeals*

11. Where the grounds of appeal in a cross-appeal have not been dealt with in the sheriff's note, the respondent should include in the grounds of appeal a request that the sheriff write a further note.

#### *Rules 6.12 and 7.3: sist or variation of timetable*

12. A motion under these rules must, like all motions in writing, specify the grounds on which it is made (rule 13.6). Full details of the grounds on which the motion is based should be given, accompanied where relevant by appropriate evidence. Any such motion should be made as soon as possible after the need for a sist or variation is identified. Variation of the timetable may be either by extension or acceleration.
13. A motion to sist must specify the period of sist sought, but parties are reminded that it is for the procedural Appeal Sheriff to determine the period of sist that will be granted. The procedural Appeal Sheriff will seek to avoid any unnecessary delay in the disposal of the appeal. Where an appeal is sisted pending the outcome of an application for legal aid, the expectation is that the period of sist will not exceed 6 weeks.
14. It should be noted that motions for sist or for variation of the timetable will not be granted, even if made of consent, unless sufficient information to justify them is placed before the procedural Appeal Sheriff. Any party opposing such an application will be required to demonstrate that their opposition is well founded.

## Legal aid

15. The Court will expect parties to consider at the earliest possible stage whether they may require to apply for legal aid for the appeal. Delay in making an application for legal aid or in then making a motion to sist the appeal or vary the timetable may lead to the motion being refused. Generally, the Court will expect parties to adhere to guidance issued by the Scottish Legal Aid Board. Parties are reminded that the Board may make legal aid available for especially urgent work undertaken before a legal aid application is determined. This may obviate the need to sist the appeal or vary the timetable. Further information can be obtained in the Special Urgency section of the Scottish Legal Aid Board's website<sup>1</sup>.
16. Where a party makes a motion under rule 6.12 pending the outcome of an application for legal aid, that party should notify the Board electronically within the same period as that party requires to intimate it to other parties. In specifying the grounds for the motion, the party should set out the current position in relation to the application for legal aid.

### *Rule 7.5: appendix to appeal print*

17. The appendix should be made up in accordance with rule 7.5. However, it should only contain such material as is necessary for understanding the legal issues and the argument to be presented to the Court.

## Notes of evidence from proof

18. Where the parties seek to submit the notes of evidence from a proof for consideration by the Court, they are reminded of the terms of rule 29.18(11) of the Ordinary Cause Rules 1993. Where the evidence has been recorded by Webex or tape recording, the appellant must request from the sheriff clerk a transcript of the recording. In the rare cases where a shorthand writer has been instructed, the appellant must inform the shorthand writer that the notes require to be extended for the purpose of the appeal. If the recording will not be transcribed or the notes will not be extended before the appendix must be lodged, the appellant should inform the Clerk as soon as possible.

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<sup>1</sup> [Special urgency Archives - Scottish Legal Aid Board \(slab.org.uk\)](https://www.slab.org.uk)

### Form of appendix

19. The appendix should be lodged in electronic (pdf) form. The appendix should utilise a pagination system that is consistent throughout so as to assign a unique sequential page number to each page of every document contained within the appendix; they must be numbered in ascending order throughout. Pagination should begin with the first page of the first document and should be continued throughout. These requirements are to ensure that the Court and parties may locate quickly a given page in a document by reference to its unique page number. The use of hyperlinks and bookmarks is strongly encouraged wherever practicable as these allow the Court to navigate quickly to a particular page or document during a hearing. The pagination system adopted should insert page numbers in a form which can be clearly distinguished from any other pagination on the document. Where any marking or writing in colour on a document is important, the document should be copied in colour or marked up correctly in colour. Documents which are not easily legible should be transcribed and the transcription placed adjacent to the document transcribed.
20. The appendix ought to contain only documents which were before the court or tribunal of first instance. An appendix should, however, comprise the minimum material necessary to conduct the appeal. Other than in exceptional circumstances, it should not be necessary to reproduce all of the material which was placed before the sheriff at first instance. Parties are accordingly encouraged to weed out extraneous material.
21. If a document has not been lodged in process, i.e. as a production, it should not be in an appendix (*Grierson v Mitchell* 1912 SC 173, Lord Salvesen at 173; *British Thomson-Houston Co v Charlesworth Peebles & Co* 1924 SC 175). The same rule applies to material that was not before the court or tribunal of first instance. If a party is seeking to introduce a new document, which was not before the sheriff at first instance, it must first be lodged as a production before it can form part of an appendix (*Scotch Whisky Association v Lord Advocate* 2017 SC 465, Lord President (Carloway) at para [104] et seq).
22. Any questions as to the contents or form of the appendix may be raised with the procedural Appeal Sheriff.
23. An appendix which does not conform to rule 7.5 and this Practice Note may be rejected by the Court, which may also find that no expenses are payable, or modify any award of expenses, in respect of the rejected appendix.
24. Where documents are included in an appendix unnecessarily, the Court may also find that no expenses are payable, or modify any award of expenses, in respect of the appendix.

*Rule 7.7: notes of argument*

25. Parties are reminded that rule 7.7 makes detailed provision about how notes of argument are to be prepared. A note of argument which does not comply with that rule may be rejected by the Court, which may also find that no expenses are payable, or modify any award of expenses, in respect of the rejected note of argument.
26. Any questions as to the form of notes of argument may be raised with the procedural Appeal Sheriff.
27. A single date will be specified in the timetable for the lodging of notes of argument. As a matter of good practice, parties should exchange draft versions of their notes of argument in advance of the date specified in the timetable. Whenever possible, the drafts should be exchanged in sufficient time to enable each party to answer, in its note of argument, the arguments advanced by the other parties.

*Rule 7.8: estimates of duration of hearings*

28. Where a party is legally represented, the certificate of estimate of the duration of the hearing in Form 7.8 should be given by the advocate or solicitor who will conduct the appeal hearing. Where a party is not legally represented, it should be given by the party.
29. Any estimate exceeding one day should be fully explained in writing.
30. The 'Court expects that persons making oral submissions at an appeal hearing will confine their submissions so as to enable the hearing to be completed within the time indicated in the estimate. If additional time is required, that person must seek the Court's permission.

*Rule 7.9: procedural hearing*

31. The procedural hearing is an important aspect of Chapter 7 procedure. It is intended to be the final procedural step and is presided over by the procedural Appeal Sheriff.
32. The primary purpose of the procedural hearing is to make sure that no case is sent for an appeal hearing (i.e. a hearing on its merits) unless the procedural Appeal Sheriff is satisfied that the parties are prepared for it.
33. Where a party is legally represented, the Court expects that the advocate or solicitor who will conduct the appeal hearing should appear at the procedural hearing (see paragraph 5 above).
34. At the procedural hearing, the Court expects that parties will be in a position to discuss the issues involved in the appeal and how they can be disposed of. Parties should address the procedural Appeal Sheriff on their state of preparation.
35. If the procedural Appeal Sheriff is satisfied that parties are prepared to proceed to an appeal hearing, the procedural Appeal Sheriff will fix the appeal hearing and determine its length. Parties are reminded that due priority must be given to appellate business when the court is fixing appeal hearings.

36. If the procedural Appeal Sheriff is not satisfied that parties are prepared to proceed to an appeal hearing, the procedural Appeal Sheriff will make an order to secure the expeditious disposal of the appeal. The procedural Appeal Sheriff may direct the Clerk to fix a further procedural hearing. The Court considers that it is important that further procedural hearings be avoided unless they are necessary. If any difficulty arises in complying with the order of the procedural Appeal Sheriff, the parties should bring this to the attention of the Court. The parties should confirm whether:
- (a) the order has been complied with (and if not, why not);
  - (b) further time is required (and if so, why);
  - (c) a further hearing is genuinely required.

*Rules 7.10 and 8.4: authorities*

37. When an appeal hearing is fixed, the appellant must, after consultation with the respondent and any other party to the appeal, lodge a bundle of the authorities cited in the notes of argument upon which each party will rely at the hearing in the form stipulated by the Court in terms of rules 7.10(4) and 8.4(5).
38. The joint list should be prepared in accordance with rule 7.10 or rule 8.4, as the case may be. For the purposes of those rules, any legislation that is included within the joint list does not count towards the limit on authorities set out therein.
39. Where the Court orders that the bundle of authorities be lodged in electronic form, the bundle should utilise a pagination system that is consistent throughout so as to assign a unique sequential page number to each page of every document contained within the bundle; they must be numbered in ascending order throughout. Pagination should begin with the first page of the bundle and should be continued throughout. These requirements are to ensure that the Court and parties may locate quickly a given page in an authority by reference to its unique page number. The use of hyperlinks and bookmarks is strongly encouraged wherever practicable as these allow the Court to navigate quickly to a particular page or authority during a hearing. The pagination system adopted should insert page numbers in a form which can be clearly distinguished from any other pagination on the document.



### Form of bundle of authorities

40. If a case is reported in Session Cases or the Law Reports published by the Incorporated Council of Law Reporting for England and Wales, it should be cited from those sources. Where a case is not reported in Session Cases or the Law Reports, references to other recognised reports may be given.
41. Unreported judgments should only be cited if they contain an authoritative statement of a relevant principle of law not to be found in a reported case or if they are necessary for the understanding of some other authority.
42. The bundle of authorities should be assembled in chronological order, with an index page.
43. The bundle of authorities should be paginated, each page being numbered individually and consecutively, with page numbers being inserted in a form which can be clearly distinguished from any other pagination on the document.
44. The passages upon which each party intends to rely (as specified in that party's note of argument) should be marked or highlighted.
45. Any questions as to the contents or form of the bundle of authorities may be raised with the procedural Appeal Sheriff.
46. A bundle of authorities which does not conform to this Practice Note may be rejected by the Court, which may also find that no expenses are payable, or modify any award of expenses, in respect of the rejected bundle.
47. Where authorities are included in a bundle unnecessarily, the Court may also find that no expenses are payable, or modify any award of expenses, in respect of the bundle.

### **Part 5: incidental procedure: standard procedures**

#### *Chapter 20: expenses*

48. The closing submissions for each party in an appeal hearing should deal with expenses: parties should either make their submissions about expenses at that point, or invite the Court to reserve all questions of expenses to a further hearing after it has determined the appeal.
49. Accounts of Expenses arising out of civil appeals in the Court are to be lodged for taxation with the Clerk of the Sheriff Appeal Court within the court offices in Parliament House for onward transmission to the auditor as required by Chapter 20 of the Sheriff Appeal Court Rules.
50. Such Accounts of Expenses are to be taxed by the Auditor of the Sheriff Appeal Court, Parliament House, Parliament Square, Edinburgh EH1 1RQ (office entered though 120 Cowgate, Edinburgh). Tel: 0131 240 6789.
51. All cheques and other remittances in respect of audit fees are to be made payable to 'The Auditor of the Sheriff Appeal Court'.

## **Part 7: special appeal proceedings**

### *Chapter 29: applications for new trial*

52. The procedure in an application for a new trial is closely modelled on Chapter 7 procedure. Accordingly, the guidance on Chapter 7 procedure given above applies equally (with any necessary modifications of terminology) to applications for a new trial under section 69 of the Courts Reform (Scotland) Act 2014.

### *Chapters 30 and 32: appeals by stated case*

53. The procedure for requesting a stated case continues to be governed by the Summary Cause Rules 2002 or the Act of Sederunt (Child Care and Maintenance Rules) 1997.
54. The Court reminds parties that great care should be taken to focus as precisely as possible the question of law (or procedural irregularity, in Chapter 32 appeals) on which the appeal is to proceed. If an advocate is to be instructed to conduct the appeal before the Court, it may be prudent to consult that advocate about the formulation of the question of law and any proposed adjustments to the draft stated case.
55. Parties are also reminded that the permission of the Court must be obtained if a party wishes at the appeal hearing to raise a question of law of which notice has not been given (see rules 30.4(2) to (3) and 32.3).
56. Where parties disagree about the occurrence of events in the sheriff court proceedings, the Court will normally accept the account of events which is given in the stated case.

## **Miscellaneous procedural matters**

### *Communication with the Court*

57. The Court considers that it is important to avoid unnecessary hearings: hearings before the Court should not take place unless the matter in issue cannot otherwise be resolved. Hearings can often be avoided by means of email or other communication between solicitors and the Clerk, with the involvement of the procedural Appeal Sheriff where necessary.

### *Communication where appeal is not to proceed*

58. Parties are reminded that those involved in litigation have an obligation to take reasonable care to avoid situations where court time would be wasted. Where a party or that party's legal representative considers that it is likely that the appeal may not proceed, the Clerk must be informed immediately.

### *Core bundles*

59. In cases where the appendix comprises more than 500 pages (exclusive of notes of evidence) the appellant should, after consultation with the respondent, also lodge a core bundle. The core bundle should be lodged at least 7 days prior to the procedural hearing. It should contain the documents which are central to the appeal and it should not ordinarily exceed 150 pages. As with the appendix, the core bundle should be lodged in electronic (pdf) form. The core bundle should utilise a pagination system that is consistent throughout so as to assign a unique sequential page number to each page of every document contained within the core bundle; they must be numbered in ascending order throughout. Pagination should begin with the first page of the first document and should be continued throughout. These requirements are to ensure that the Court and parties may locate quickly a given page in a document by reference to its unique page number. The use of hyperlinks and bookmarks is strongly encouraged wherever practicable as these allow the Court to navigate quickly to a particular page or document during a hearing. The pagination system adopted should insert page numbers in a form which can be clearly distinguished from any other pagination on the document. Where any marking or writing in colour on a document is important, the document should be copied in colour or marked up correctly in colour. Documents which are not easily legible should be transcribed and the transcription placed adjacent to the document transcribed.
60. Any questions as to the contents or form of the core bundle may be raised with the procedural Appeal Sheriff.

### *Reading Lists*

61. Where the Court orders a reading list to be prepared, parties must ensure that this is restricted to material which it is essential for the Court to read before the substantive hearing over and above the pleadings, notes of argument and decision appealed against. If it is thought essential for the Court to read any of the evidence given in the court below, the list must clearly identify the particular passages in the transcripts of evidence that the Court is invited to read.

### *Appeal hearings: preparation by the Court*

62. Before the appeal hearing, the Appeal Sheriff(s) who will hear the appeal will normally have read:
- (a) the appeal print;
  - (b) the note of appeal and answers to the note of appeal;
  - (c) any grounds of appeal (and answers) in a cross-appeal;
  - (d) the appendix;
  - (e) parties' notes of argument;
  - (f) any core bundle;
  - (g) the bundle of authorities.

*Disposal by consent*

63. If the parties have reached agreement as to how the appeal should be disposed of, they may prepare and lodge a joint minute setting out that agreement in clear and comprehensive terms. It should include terms as to expenses. It should also state the terms of the interlocutor that the parties wish the Court to pronounce.
64. Where the parties have agreed that the appeal should be allowed and the sheriff's decision recalled or varied because it is wrong, the joint minute must also explain why cause has been shown for the appeal to be allowed. Detailed submissions should be made, with appropriate reference to authority.
65. Where the parties have agreed that the appeal should be allowed because they wish the sheriff's interlocutor to be recalled or varied for practical reasons (but they do not consider that it was wrong), the joint minute must explain those practical reasons. It must also state that the parties do not seek a determination of the merits of the appeal.

Edinburgh

22 December 2021

MHAIRI M STEPHEN QC

President of the Sheriff Appeal Court