

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES  
COUNCIL  
PARLIAMENT HOUSE, MONDAY 24TH SEPTEMBER 2012**

**Members present:** Lord President (Gill)  
Lady Dorrian  
Gerry Moynihan QC  
Nicholas Ellis QC  
Graeme Hawkes, Advocate  
Gavin MacColl, Advocate  
Robin Macpherson, Solicitor  
Gordon Keyden, Solicitor  
Syd Smith, Solicitor

**In attendance:** Lord Justice Clerk (Carloway)  
Lord Hodge  
Gillian Prentice, Deputy Principal Clerk of Session  
Colin MacKay, SG Justice Directorate

**Secretariat:** Kathryn MacGregor, Legal Secretary to the Lord President  
Christopher Nicholson, Deputy Legal Secretary to the Lord President

**Apologies:** Lord Menzies  
Robert Milligan QC  
Duncan Murray, Solicitor  
Fred Tyler, Solicitor

**Item 1: Introduction and Welcome**

1. The Lord President welcomed those present and noted apologies. This was the Lord President's first meeting as Chair of the Council.

**Item 2: Minutes of Previous Meeting and Matters Arising**

2. The minutes of the meeting on 14 May 2012 were approved, subject to the substitution of “suggested that the recommendations made in the Report of the Civil Courts Review were focused on class actions” for “had some involvement with the association and understood their concerns in paragraph 14.4”. There were no matters arising from those minutes which were not otherwise the subject of discussion at today’s meeting.

### **Item 3: Update on Acts of Sederunt**

3. Since the last meeting one Act of Sederunt amending the Court of Session Rules had been made, namely, Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Miscellaneous) 2012 (SSI 2012/189). The Scottish Parliament’s Subordinate Legislation Committee considered the instrument at its meeting on 26 June. The Committee questioned the *vires* of the instrument in so far as Form 12B.2 asks prospective lay representatives to disclose any previous convictions including spent convictions in terms of the Rehabilitation of Offenders Act 1974.

4. The Lord President informed the Council that to have introduced a Form that did not ask for spent convictions to be disclosed would not have been appropriate. The court needed to know whether an applicant had any previous convictions, including spent convictions, before deciding whether to allow that person to act as a lay representative. This was particularly true of those persons with previous or spent convictions relating to crimes of dishonesty. The Council supported this view. The Council were then informed that, in any event, the Scottish Ministers had recently laid before the Scottish Parliament a draft exclusion order under the 1974 which included lay representation. This would, when in force, put the matter beyond any doubt.

5. The Lord President informed the Council that the rule changes approved at the last meeting in respect of Disclosure Orders, Lodging Recordings of Children and the Treaty of Lisbon would be made shortly. The Lord President reminded members that the rule changes in respect of the Charities (Transfer of Assets) (Scotland) Regulations and the Children's Hearing (Scotland) Act 2011 would be made to coincide with the making and coming into force of that legislation.

#### **Item 4: Update on Leith Links Resident's Association Petition**

6. The Council noted the response sent by the then Lord President, Lord Hamilton, to the Scottish Parliament's Public Petitions Committee on its behalf. The Council were informed that the Petition had recently been referred by the Public Petitions Committee to the Justice Committee who were likely to be considering the introduction of multi-party actions as part of the Scottish Government legislative programme to implement the Scottish Civil Courts Review. Mr MacKay confirmed that that the Scottish Government intended to introduce legislation in this regard in the lifetime of the current Parliament.

#### **Item 5: Reports by Associated Groups**

##### Inner House Reforms Implementation Group

7. Lord Menzies had recently been appointed, in place of Lord Reed, Chair of the Inner House Reforms Implementation Group and as the Inner House Administrative Judge. Lord Menzies was unable to attend the meeting but would provide reports in respect of his new roles at the next meeting.

### Personal Injuries User Group

8. Lady Dorrian, the Chair of the Personal Injuries User Group, informed members that the group had last met on 10 May. The Group continued to note trends from the statistics that are produced on personal injuries cases, particularly on issues like the number of lengthy proofs, discharged proofs and woefully inaccurate estimates of time required for proof. The Group continued to work with the Outer House Administrative Judge to allow for the case management of clinical negligence and catastrophic injuries cases and were considering a consultation on the fixing of the discount rate.

### Outer House Administrative Judge

9. Lord Hodge informed members that the majority of his report on his recent activities as Outer House Administrative Judge would be dealt with under Item 7 on the agenda (case management in the Outer House). He did, however, inform members that the Lord President had recently made a Direction providing for the case management of the pleural plaque cases. The Direction was having the desired effect in that it was already allowing cases to settle without the need for further procedure and the cost to parties that incurs. The nomination of a judge (Lady Clark) in the Direction was a useful step and Lord Hodge had spoken to the Lord President about the possibility of having a dedicated clinical negligence and catastrophic injury judge. Lady Dorrian informed members that such a move accorded with the view of the Personal Injuries User Group.

### **Item 6: Scottish Civil Justice Council and Criminal Legal Assistance Bill**

10. The Lord President informed members that he had given evidence to the Scottish Parliament's Justice Committee on Part 1 of the Bill, which provides for the establishment of a Scottish Civil Justice Council in place of the current (civil) rules councils, on 4 September 2012. A copy of the Official Report of that evidence session was with the papers. The current timetable being discussed proposed a coming into force date of the relevant provisions sometime in May 2013. If this was to be the case then the Lord President proposed that the Council meet two more times (i.e. January and May) with a view to "clearing the decks" for the new Council.

11. Mr MacKay informed members that the Cabinet Secretary for Justice had also given evidence on the Bill. Subject to some questions about the composition of the Council, the general feeling was that the relevant proposals had been favourably received. The Lord President agreed, in relation to the composition of the Council, it was important that there was sufficient flexibility when appointing members and the Bill, as currently drafted, provided for this.

#### **Item 7: Case Management in the Outer House**

12. Lord Hodge recapped for the Council the project underway in relation to extension of case management in the Outer House. Lord Hodge had provided instructions to the Lord President's Private Office to draft rule changes to facilitate further case management of: (i) immigration and asylum judicial reviews, (ii) intellectual property cases, (iii) clinical negligence and catastrophic injury cases, and (iv) commercial actions.

13. The project was now two-phased. The rule changes in relation to commercial actions, immigration and asylum judicial reviews and intellectual

property cases were contained within a draft Act of Sederunt for the Council's consideration. The rule changes in relation to clinical negligence and catastrophic injury cases would be drafted in time for the next meeting of the Council along with a substantial redraft of Chapter 55 (causes relating to intellectual property); it had become apparent when drafting the case management amendments to Chapter 55 that the Chapter would benefit from some general updating to reflect developments in that area of law and, in particular, the growing influence of the law of the European Union.

14. The Council considered the draft. Mr Ellis noticed that, unlike proposed new rule 55.3(2)(e), proposed new rule 47.12(2)(c) did not provide for the lodging of "documents" as well as affidavits. Members discussed the decline in the use of affidavits; an increasing number of parties preferred signed witness statements. The use of the word "documents" provided for this and members agreed that proposed new rule 47.12(2)(c) be amended accordingly. Mr Hawkes, who had considered the draft with Mr MacColl, identified two superfluous references to proof before answer (rule 1.3 RCS (interpretation etc.) provides that "proof" includes proof before answer) and a typographical error in paragraph 2(2) of the draft. Members agreed that the draft be amended accordingly.

15. Mr Ellis queried the requirement to lodge a report of a skilled person prior to the procedural hearing (draft rule 47.12(1) (c) and 55.3(1) (c)). Such reports were not always available prior to the procedural hearing. Mr Ellis suggested the draft rules be amended to accommodate this. Lord Hodge was of the view that the requirement should be the default position though if such a report was not available the requirement could, on cause shown, be dispensed with. The Council agreed and the draft, as amended, was approved.

### **Item 8: Protective Expenses Orders in Environmental Cases**

16. The Council considered a policy paper submitted by the Scottish Government requesting that rules be drafted to provide for Protective Expenses Orders in environmental cases. It was noted that the Scottish Government's position and the resulting instructions differed from their counterparts in the UK Government. Members discussed the possible implications of two different regimes within the UK. The Council agreed that draft rules should be prepared on the basis of the Scottish Government policy paper for consideration at the next Council meeting. The Council deferred any decision to consult on the rules until the January meeting.

### **Item 9: Any other business**

17. There was no other business. The next meeting is on Monday 14 January 2013 at 10.30am.