

**MINUTES OF THE MEETING OF THE  
COURT OF SESSION RULES COUNCIL**

**PARLIAMENT HOUSE, MONDAY 14 JANUARY 2013**

**Members present:** Lord President (Gill)

Lord Menzies  
Gerry Moynihan QC  
Graeme Hawkes, Advocate  
Robin Macpherson, Solicitor  
Gordon Keyden, Solicitor  
Syd Smith, Solicitor  
Duncan Murray, Solicitor

**In attendance:** Gillian Prentice, Deputy Principal Clerk of Session  
Colin MacKay, SG Justice Directorate  
Robert Sandeman, SG Justice Directorate

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

**Apologies:** Lord Justice Clerk (Carloway)  
Lady Dorrian  
Lord Hodge  
Nicholas Ellis QC  
Robert Milligan QC  
Gavin MacColl, Advocate  
Fred Tyler, Solicitor

**Item 1: Introduction and Welcome**

- 1 The Lord President welcomed those present and noted apologies.

## **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 “intended to” for “would” in paragraph 6. 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 two Acts of Sederunt amending the Court of Session Rules had been made, namely, Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Fees of Solicitors) 2012 (SSI 2012/270) and Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2012 (SSI 2012/275). The Council had no observations to make on any of these instruments.

## **Item 4: Reports by Associated Groups**

### Inner House Reforms Implementation Group

4. Lord Menzies informed the Council that there was little left [of Lord Penrose's recommendations] to implement and that the Inner House Reforms Implementation Group would be changing into a User's Group. The Group would meet once its composition had been established and Lord Menzies was keen to have practitioners regularly appearing and instructing work in the Inner House to be involved.

### Personal Injuries User Group

5. In the absence of Lady Dorrian, the Chair of the Personal Injuries User Group, and Fred Tyler, a member of the Group, the secretariat provided the Council with an update. The Group last met on 4 October 2012 and 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 awaited sight of the draft rules facilitating the case management of clinical negligence and catastrophic injuries cases. The Group had also considered a consultation paper on the fixing of the discount rate.

### Outer House Administrative Judge

6. Lord Hodge was unable to attend the meeting but had submitted a Paper for circulation outlining his activities as the administrative judge for the Outer House. This included initiatives for: the case management of clinical negligence and catastrophic injury cases (item 5 on the agenda); the promulgation of a Practice Note in relation to immigration and asylum judicial reviews; and a re-draft of Chapter 55 (causes relating to intellectual property). The Council noted the terms of the Paper.

### **Item 5: Case Management in the Outer House**

7. The Council considered a draft Act of Sederunt making provision for the case management of clinical negligence and catastrophic injury cases. The draft was based upon a timetable prepared by the Personal Injuries User

Group and had been considered by Lord Hodge. The Council agreed the draft rules.

#### **Item 6: Protective Expenses Orders in Environmental Cases**

8. The Council considered a draft Act of Sederunt providing for Protective Expenses Orders (PEOs) in environmental cases. The draft had been prepared on the basis of the Scottish Government's policy paper considered and approved at the last meeting of the Council meeting.

9. Lord Menzies enquired whether the test set out in draft rule 58A.2. (6) (the circumstances in which the court may refuse to make a PEO) was intended to be conjunctive. The secretariat informed the Council that it was. Members were of the view, however, that it made more sense for the test to be an “or” rather than an “and”; the Lord President agreed and this change, together with the correction of a typographical error in draft rule 58A.5 (1) (e), was agreed to. Lord Menzies then asked whether the reference to a respondent in the draft rules was intended to apply to all respondents that may feature in proceedings. The secretariat informed the Council that it was. The Council was of the view that it would be helpful if this was clarified in rule 58A.1 (application and interpretation of this Chapter) and that the draft be amended accordingly.

10. Mr Moynihan asked whether the ability of the court to raise the (respondent's) “cross-cap” provided for in draft rule 58A.4 (4) ought to be dependent on the applicant having had their cap lowered. The secretariat confirmed that the draft provision was consistent with the policy instructions. Members were of the view, however, that the condition should simply be “on

cause shown” like that of the applicant and that this should be amended. Mr Moynihan also noted that, as a result of this change, rule 58A.4 (4) (e) required to amended; the Council agreed.

11. Mr Murray enquired whether the statement of the applicant's funding mentioned in draft rule 58A.4 (c) (i) required to be submitted in confidence standing the terms of rule 58A.4 (5). The secretariat confirmed that this was an ambiguity arising from the instructions received. The court would, presumably, need information as to the applicant's means in order to reach a view as to whether the proceedings would be prohibitively expensive in the absence of a PEO. The Scottish Government confirmed that the policy intention was that the applicant should not have to disclose their means directly to the respondent. Members noted that this could result in wealthy applicants being granted PEOs. The Scottish Government confirmed that the availability of a PEO was linked to a class of person (i.e. those involved in proceedings to which the Chapter applied) rather than the means of a person. The Council agreed that the draft be amended to reflect this.

12. The Lord President informed members that the changes agreed to would be made and a revised draft circulated to members before being finalised and thereafter made. In addition, a copy of the finalised draft would, as a matter of courtesy, be intimated to interested parties before the instrument was made.

#### **Item 7: Miscellaneous Amendments Instrument**

13. The Council considered a draft Act of Sederunt which proposed to amend the Rules in respect of two miscellaneous matters, namely, the

*Draft minutes – to be approved at the meeting of the Council on 13 May 2013*

correction of two errors that were contained in the Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2012 (SSI 2012/189) which recently amended Chapter 57 (causes relating to intellectual property) and Chapter 74 (companies) in consequence of the coming into force (in April 2013) of the Energy Act 2011 and the corresponding implementation rules, the Energy Administration (Scotland) Rules 2013. The Council agreed the draft rules.

**Item 8: Reporting restrictions: amendment of Chapter 102**

14. One of the cases referred to in Paper 8 was the subject of reclaiming motion which the Lord President was due to hear and it would not be appropriate for the matter to be discussed in any sort of detail. The matter was, therefore, moved to the agenda of the next meeting of the Council.

**Item 9: A.O.C.B.**

15. The next and final meeting of the Council would be on 13 May 2013. A legacy paper outlining any outstanding work of the Council would be prepared for that meeting with a view to it being communicated to the Council's successor, the Scottish Civil Justice Council.