MINUTES OF THE MEETING OF THE COURT OF SESSION RULES COUNCIL
PARLIAMENT HOUSE, MONDAY 14TH FEBRUARY 2011

Members present: Lord President (Hamilton)
Lord Reed
Ronnie Clancy QC
Gerry Moynihan QC
Lesley Shand QC
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor
Duncan Murray, Solicitor
Fred Tyler, Solicitor

In attendance: Lord Justice Clerk (Gill)
Lord Hodge
Colin McKay, SG Justice Directorate
Robert Sandeman, SG Justice Directorate
Bob Cockburn, Deputy Principal Clerk of Session

Secretariat: Michael Anderson, Legal Secretary to the Lord President
David Smith, Deputy Legal Secretary to the Lord President

Apologies: Lady Dorrian
Eugene Creally, Advocate
Graeme Hawkes, Advocate
Sydney Smith, Solicitor
Graeme Marwick, Principal Clerk of Session

Item 1: Introduction and welcome

1. The Lord President welcomed those present and noted apologies. Robert Sandeman was accompanying Colin McKay to the meeting, as he had a particular interest in item 6 on the agenda (protective expenses orders).

Item 2: Minutes of previous meeting and matters arising

2. The minutes of the meeting on 11th October 2010 were approved. There were no matters arising.

Item 3: Update on Acts of Sederunt

3. Since the last meeting two amending instruments had been made. The first was Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2010 (SSI 2010/417), which made amendments to the rules relating to service of documents by messengers-at-arms, family actions and building society insolvency. The second was Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Terrorist Asset-Freezing etc. Act 2010 (SSI 2010/459). The Council had no observations to make on either instrument.

Item 4: Reports by associated groups

(i) Judicial Working Group on the Civil Courts Review

4.1 Lord Reed spoke in elaboration of a paper on the work of the Group and the associated issue of the wider arrangements for implementation of the Review. The tri-partite contact group had been wound up and the Scottish Government was now taking forward implementation under the Making Justice Work programme. Work was also going on to devise suitable arrangements for the work falling to the judiciary to progress.

(ii) Inner House Reforms Implementation Group

4.2 Lord Reed had also provided a paper on the work of this Group and provided an oral update to the Council. Work was well in hand in relation to Phase 2 (the new Chapter 41) and in relation to the preparation of a consolidated Practice Note. It was hoped that the new Chapter 41 could be tabled at the next meeting of the Council.

(iii) Personal Injuries User Group

4.3 The Council considered a paper by the Personal Injuries User Group which recommended that a clarifying amendment be made to rule 43.6(1)(b)(ii), to the effect that it should provide that the timetable in a personal injuries case should specify the date by which the pursuer should serve (rather than execute) a commission for recovery of documents. This was considered necessary in order to make the rule consistent with the related Form 43.6 and with the way the timetable currently operates in practice. The Group also recommended that an amendment be made to rule 43.4(4), in order to make that rule consistent with current practice and with the terms of paragraph 3 of Form 43.6. These proposals were agreed.

- **Rule changes to be made accordingly**

(iv) Diligence Rules Advisory Group

4.4 Lord Reed indicated that the Group did not currently have any substantive business to discuss, though instructions for rule changes were currently being drafted in relation to heritable removings. Draft rules would be presented to both the Council and the Sheriff Court Rules Council in due course.

(v) **Administrative Judges**

4.5 Lord Reed and Lord Hodge reported on their respective portfolios. No business for the Council was on the immediate horizon.

Item 5: Citation of Witnesses

5.1 The issue was whether an amendment should be made to Form 36.2-C (the form of certificate of citation of a witness personally or at proof or jury trial) in so far as it provides for citation of witnesses to be witnessed, and for the witness to sign the Form.

5.2 Section 7 of the Criminal Law (Scotland) Act 1830 provided that the citation of witnesses in civil cases does not itself require to be witnessed. On the face of it, there appeared to be a tension between that provision and the wording of Form 36.2-C. A contrast could also be made with the equivalent sheriff court rules and related Forms, in which no provision was made for any witnessing. A further contrast could be made with the terms of section 32 of the Debtors (Scotland) Act 1838 and section 1 of the Citations (Scotland) Act 1846, which provided that more than one witness is not required for service and execution of documents generally.

5.3 It was noted that Form 36.2-C was included in the Court of Session Rules in 1994 and had never been amended. The Council noted comments on the matter which had been provided on behalf of the Society of Messengers-at-Arms and Sheriff Officers. It was agreed that, in the interests of consistency of procedure across all courts and to achieve consistency with the relevant statutory provision, Form 36.2-C should be amended to remove the references to the witnessing of citation of witnesses.

- **Form 36.2-C to be amended accordingly**

Item 6: Protective expenses orders

6.1 At its meeting in October 2010, the Council agreed a draft set of rules which sought to give effect to the recommendations by the Outer House

Administrative Judge in relation to the establishment of a procedure on protective expenses orders in environmental cases. This set of rules represented the first stage of a two-stage process in relation to the introduction of protective expenses orders. It sought to establish a procedure which complied with requirements which were introduced via European Directives in the environmental field.

6.2 After the Council's meeting in October, the European Commission was provided with a copy of the draft set of rules. The Commission was also provided with a copy of draft court rules for England and Wales. The Commission had since indicated that it was not content with the approach taken in the draft rules for Scotland or for England and Wales.

6.3 Colin McKay advised the Council that the Commission had raised two main concerns. Firstly, it had queried whether or not the draft rules adequately dealt with situations whereby the question of whether the relevant Directive applied was itself the subject of the litigation which was before the court. Secondly, it was not content with the approach of continuing to allow judicial discretion in assessing whether a limit should be placed on an individual's liability to expenses and, if so, the level at which that limit should be set at; instead it considered that the courts should apply a prescribed limit (which was capable of being lowered but not increased in a particular set of proceedings) and that it would be reasonable to set that limit at a figure of £25,000.

6.4 The Scottish Government and the UK Government had both considered the matter and were both content to proceed as the Commission had suggested. The Scottish Government had therefore prepared a paper requesting changes to the draft rules, based on the Commission's suggestions. The Private Office had prepared a rough draft of revised rules, intended to give effect to the proposed policy. This was presented for consideration by the Council.

6.5 It was noted that the rules would have an impact on local authorities. The Scottish Government agreed to draw their attention to them.

6.6 In relation to the proposal to prescribe a maximum limit of £25,000 (or any other figure) Gerry Moynihan QC noted that in *R (Edwards and another) v. Environment Agency and others (No. 2)* [2011] 1 WLR 79 the Supreme Court had recently referred an issue to the Court of Justice for the European Union for a preliminary ruling. The question referred was what was the correct test for determining whether proceedings were "prohibitively expensive" within the meaning of the relevant Directives on environmental matters.

6.7 The Council discussed the terms of the revised draft Act of Sederunt. Gerry Moynihan QC noted that in line with the Commission's position the draft made special provision in relation to "individuals". He suggested that it was not clear how unincorporated associations would be affected by such references. The most recent Outer House decision on protective expenses orders, issued by Lord Stewart in the case of *Road Sense* [2011] CSOH 10 had involved an unincorporated association. Mr Moynihan also asked how the provisions applied when several individuals were applying in the same proceedings.

6.8 Lord Hodge noted that the special provision for individuals applied except where they had significant funding from a "non-individual". He questioned the logic for confining this draft rule to funding which was provided by non-individuals. It was suggested that the rule should apply instead to funding provided by any person or association of persons. It was noted, further, that the Commission's policy appeared to be that a prescribed maximum limit should apply to any person bringing proceedings, no matter how wealthy or how many assets they have.

6.9 Robert Sandeman indicated that the Commission's priority seemed to be the introduction of measures which would ensure that an ordinary member of the public was not discouraged from bringing proceedings in this area by the prospect of incurring prohibitive expense. That was why a prescribed limit had been suggested.

6.10 Subject to the Commission's further views, it was felt that the policy should be: (a) that the special rules engaging the prescribed limit of £25,000 should apply to individuals but not to unincorporated associations; (b) that the special rules should apply separately to each individual; (c) that in looking at the means of an unincorporated association the court should be taking into account the means of its members; and (d) that in assessing the ability of an individual to access third party funding, account should be taken of funding available from individuals. The Council was, however, alive to the possibility that the Commission may take a different position.

- **Scottish Government to take steps to inform local authorities of the suggested approach outlined in the revised draft Act of Sederunt**

- **Draft to be revised and shown by Scottish Government to the Commission. Rules to be finalised and made as soon as possible once Commission content.**

Item 7: Change of name of parties

7.1 The Deputy Principal Clerk presented a paper to the Council on the possible establishment of a scheme which would enable a single party involved in multiple actions to be able to make a universal amendment to the pleadings where that party changes its name. The matter had arisen in connection with major government or corporate re-organisations. In England and Wales, the matter was usually addressed by the making of a single omnibus direction by the Lord Chief Justice. Those engaged in the re-organisations had asked why a similar process could not be followed in Scotland.

7.2 The need for such universal amendments has arisen infrequently in the context of Court of Session proceedings but it had affected a large volume of cases.

7.3 Under the proposed scheme, the party seeking to amend the pleadings would enrol a single motion in one of the affected cases and would pay a single motion fee. The party seeking amendment would require to attach to the motion a list of the cases affected and intimate the motion to all other parties in the affected cases. An interlocutor would be pronounced in the case in which the motion was enrolled. The interlocutor would allow amendment in that case and in the other listed cases. Court staff would then update the court register and place a copy of the interlocutor in the process of all affected cases. The amending party would still require to amend the pleadings in the affected cases. The expenses of the amendment procedure would be borne by the party changing its name and not by any other party.

7.4 The scheme proposed could save a considerable amount of work and expense, by avoiding the need for separate motions to be enrolled and for separate orders to be pronounced in each of the cases concerned.

7.5 Lord Hodge observed that court staff would still require to carry out a considerable amount of work under the proposed scheme, particularly in putting interlocutors in process in a large number of cases. He suggested that payment of a single motion fee did not accurately reflect the cost of this work to the court and that it would be more proportionate for an increased fee to be chargeable. The Council was mindful that the Scottish Ministers had responsibility for controlling the level of such fees. Colin McKay indicated that an increased fee for this work seemed sensible. He confirmed that the matter would be put to the Scottish Ministers for consideration.

- **Question of court fee chargeable under the proposed scheme to be put to the Scottish Ministers for consideration**

- **Rules to be drafted to give effect to the proposed scheme**

Item 8: Chapter 64: Timescales for searches under the Administration of Justice (Scotland) Act 1972

8.1 The Council considered the terms of correspondence regarding a perceived flaw in the terms of RCS 64.12 and Forms 64.6 and 64.9. The question arose in circumstances where a Commissioner appointed under the Administration of Justice (Scotland) Act 1972 wished to start or resume a search when a haver was taking legal or professional advice on the question of whether an order granted under the 1972 Act should be varied. Since the Council's last meeting, the correspondent had provided further details of the difficulties arising.

8.2 Gerry Moynihan QC presented a paper on the matter. The annotations suggested that the relevant Court of Session rules were intended to follow the approach taken in the equivalent court rules for England and Wales. If the haver were taking advice on the question of whether an order should be varied, the rules as they stood appeared to require the Commissioner to halt the search. This could be contrasted with the equivalent court rules in England and Wales, which provide in similar circumstances for a delay in starting a search for a period of up to two hours or such longer period as the Supervising Solicitor (the equivalent in England and Wales to a Commissioner) permitted.

8.4 Rule 64.12 effectively suspended the power to search while legal advice was being taken. This could defeat the object of the relevant provisions and appeared to create an unintended gap in the Court of Session Rules. The European Court of Human Rights had, in the case *Chappell v. United Kingdom* (1990) EHRR 1, upheld the safeguards against arbitrary interference and abuse which existed under the procedure which applied in England and Wales. Given that, and the fact that the intention appeared to have been that the Court of Session Rules should follow the procedure applicable in England and Wales, the Council agreed that the relevant Court of Session rules and Forms should be amended on this point to bring them into line with the approach taken in the English rules and Forms.

8.5 The Council noted that the rules in England and Wales did not specify whether or not the Supervising Solicitor was to remain in the premises where a search was delayed. It was agreed that the Commissioner should be able to

remain in the premises in these circumstances. The Court's observations in the Chappell case should inform the issue of whether or not a specific court rule could be introduced on that matter.

- **Rule changes to be drafted to bring Chapter 64 procedure into line with the court rules and Forms in England and Wales. Consideration to be given to the scope for specifying in the revised rules that the Commissioner can remain in the premises when a search is delayed.**

Item 9: Contempt of Court

9.1 Following the recommendations of the Lord Justice Clerk in the case of *Robertson & Gough v. HMA* 2007 SLT 1153, the Lord President established a working group with a remit to consider procedure for contempt in the face of the court and instruct rules of court accordingly.

9.2 The group had first focused on the development of a set of rules for the criminal courts. These had been approved by the Criminal Court Rules Council and had been made by the High Court and come into force in August 2009.

9.3 The Council had before it a draft set of rules for the Court of Session and for civil proceedings in the sheriff court. These rules had been devised by the Private Office with the ongoing assistance on the members of the working group. They were essentially intended to translate the existing arrangements for criminal proceedings to the civil context. The Council confirmed that it was content with the draft rules.

- **Rule changes to be made in due course**

Item 10: Service and Evidence Conventions

10.1 The Council considered a paper by the Scottish Government which set out proposed rule changes arising as a result of a change in the designated central authority for Scotland for the purposes of the 1965 Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

10.3 The Council confirmed that it was content for the suggested rule changes, which were wholly technical in nature, to be made.

- **Rule changes to be made**

Item 11: Parental Responsibility Convention

11.1 The Council considered a draft Act of Sederunt which had been prepared in consequence of the Parental Responsibility and Measures for the Protection of Children (International Obligations) (Scotland) Regulations 2010. The 2010 Regulations were made by the Scottish Ministers in May 2010, in anticipation of the coming into force in the UK of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

11.2 Regulation 7 of the 2010 Regulations provided that the Court of Session was to have jurisdiction to entertain certain applications under the Convention for recognition, or non-recognition of a measure taken in another Contracting State. It also provided that the Court had jurisdiction to register a measure taken in another Contracting State for enforcement.

11.3 The Council confirmed that it was content for the suggested rule changes, which were partially framed along similar lines to Part XI of Chapter 62, to be made.

- **Rule changes to be made**

Item 12: Any other business

12. There was no other business. The next meeting takes place on 9th May 2011 at 10.30am.