**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES COUNCIL**
**PARLIAMENT HOUSE, MONDAY 14TH MAY 2012**

**Members present:** Lord President (Hamilton)
Gerry Moynihan QC
Nicholas Ellis QC
Robert Milligan QC
Graeme Hawkes, Advocate
Gavin MacColl, Advocate
Robin Macpherson, Solicitor
Duncan Murray, Solicitor

**In attendance:** Lord Hodge
Gillian Prentice, Deputy Principal Clerk of Session
Robert Sandeman, SG Justice Directorate (for Colin McKay)

**Secretariat:** Kathryn MacGregor, Legal Secretary to the Lord President
David Smith, Deputy Legal Secretary to the Lord President

**Apologies:** Lord Justice Clerk (Gill)
Lady Dorrian
Gordon Keyden, Solicitor
Syd Smith, Solicitor
Fred Tyler, Solicitor
Colin McKay, SG Justice Directorate
Graeme Marwick, Principal Clerk of Session

**Item 1: Introduction and Welcome**

1. The Lord President welcomed those present and noted apologies. Robert Sandeman was attending the meeting as a substitute for Colin McKay for the Scottish Government.

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

2. The minutes of the meeting on 9 January 2012 were approved. 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**

3.1 Since the last meeting two instruments had been made which amended the Court of Session Rules. The first was an Act of Sederunt which increased the fees payable to shorthand writers under the table of fees in Chapter 42. The second was a miscellaneous amending instrument - Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Miscellaneous) 2012 (SSI 2011/126), which made amendments to the rules relating to: (i) disposals in petition procedure, (ii) the rule on actions based on clinical negligence which are raised as ordinary actions, (iii) the form of petition in an application for judicial review (so that it refers to the standing, rather than the title and interest, of the petitioner) and (iv) the form of petition for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008, to reflect the scope of possible petitioners under that provision. All of the rule changes in the second instrument come into force on 28 May 2012.

3.2 The Council had no observations to make on any of these instruments.

**Item 4: Reports by Associated Groups**

**(i) Inner House Reforms Implementation Group**

4.1 A brief written updated was provided. The Implementation Group had not met since the Council's last meeting. A new Chair of the Group would need to be identified to replace Lord Reed; once this has been done, the next meeting of the Group would be arranged.

**(ii) Diligence Rules Advisory Group**

4.2 A brief written update was provided. The Group was also chaired by Lord Reed before his appointment to the Supreme Court. It had not met for some time. Rules of court relating to heritable removings had recently been made. However, those rules only affected procedure in the sheriff courts.

**(iii) Personal Injuries User Group**

4.3 David Smith provided an oral update on work recently undertaken by the Personal Injuries User Group. The Group last met on 10 May. At that meeting, the Group noted trends from the statistics that are produced on personal injuries cases, particularly on issues like the number of discharged proofs, the number of motions to dispense with the timetable and waiting times for the allocation of proofs. The Group also noted developments in relation to the proposals which the Group is working on with the Outer

House Administrative Judge to allow for the case management of clinical negligence and catastrophic injuries cases.

4.4. Robert Milligan QC queried when the proposed measures relating to case management would be in place. The Council was advised that the Judicial Office had recently received detailed instructions from the Outer House Administrative Judge on a range of rule changes and practice notes to facilitate the case management of different types of cases. The drafting work was now in hand and relevant rule changes would be put before the Council for approval at the earliest opportunity.

**(iv) Administrative Judges**

4.5 In due course, Lord Reed's successor as Inner House Administrative Judge would require to be identified.

4.6 Lord Hodge provided a report on his recent activities as Outer House Administrative Judge. There were developments in two main areas. The first of these was a proposal to invite the Lord President to make a direction under rule 2.2 (circumstance where an aspect of procedure is unsuitable) which would allow for the case management of the 800 or so pleural plaque cases which had been sisted pending the outcome of the *AXA* case in the Supreme Court. A draft direction had been drafted and sent to affected agents for comment. It provided for pursuers to prepare a pursuer's pack and up-to-date medical records and submit these to defenders. Defenders would require to intimate to the pursuer within four weeks of receipt of the pursuer's pack whether they wished to settle the pursuer's claim in accordance with a framework agreement for the calculation of damages. The framework agreement was currently being finalised by solicitors who are acting in these cases; once this was finalised, the direction could be made.

4.7 Lord Hodge also advised the Council of case management developments in four other areas. Lord Hodge had provided instructions to the Judicial Office to draft rule changes (and, where appropriate, accompanying Practice Notes) 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. The drafting work on each of those proposals was now in hand.

4.8 The Council noted all of these developments and had no further observations to make.

**Item 5: Lay Representation**

5.1 The Council considered two papers prepared by the Judicial Office on this matter; the first addressed the comments made by the Council about the draft rules of court which were considered at the Council's last meeting. Some changes had been made to the draft Act of Sederunt as a result of those comments; in particular, the inclusion of a prohibition on a lay representative receiving direct or indirect remuneration or reward from the party litigant and the insertion of two additional declarations in the form to be completed by the prospective lay representative, in relation to any previous convictions or vexatious litigant declarations.

5.2 An "exceptional reasons test" was included in the rule relating to the circumstances in which an application can be made on the date of the hearing to which the application relates. It had been suggested previously by Duncan Murray and by the Scottish Government's representative on the Working Group chaired by Lord Pentland that that rule was too onerous. After discussion of the matter prior to today's meeting, Lord Pentland and the Judicial Office were of the view that the test remained appropriate and that, applying the ordinary dictionary meaning of the word "exceptional", the test did not seem unduly onerous. Duncan Murray indicated that he was prepared to respect that view and was not minded to press his original concern on this point. No further comments were made by the Council. It was therefore agreed that the "exceptional reasons test" should apply.

5.3 A supplementary paper prepared by the Judicial Office outlined three additional comments that had been made by the Sheriff Court Rules Council following its most recent meeting on 4 May. Again, Lord Pentland and the Judicial Office had discussed those comments prior to today's meeting and had provided their views on them. Those views were outlined in the supplementary paper. One of the matters raised by the Sheriff Court Rules Council was a fundamental point about the correct scope of the equivalent draft sheriff court rules. For a number of reasons (including the fact that the suggested approach appeared to run entirely counter to the policy intention of the Scottish Government when introducing the new rule-making powers), it was suggested in the supplementary paper that the point was misconceived. The Council agreed.

5.4 The second suggestion made by the Sheriff Court Rules Council was that a company should be permitted to charge upfront appearance fees for lay representatives. The Court of Session Rules Council agreed that this seemed to be precisely the type of indirect remuneration or reward that the rules were designed to prohibit. In the absence of any persuasive policy argument why

such an exception should be made to that prohibition, the Council agreed that no provision should be made for it in the Court of Session Rules.

5.5 The third suggestion by the Sheriff Court Rules Council was that an additional declaration should be included in the draft Form about persons who have been struck off or disciplined by a professional regulatory body. The Court of Session Rules Council was invited to consider whether such a declaration in the terms suggested was really needed, given that it appeared to raise practical questions about what the scope of that declaration would be. The Council was of the view that it would not be necessary to include in the Form an additional declaration in the terms suggested.

5.6 The Council was advised that the Judicial Office was aware of at least one ongoing case in the Inner House in which the lay representative rules were likely to be utilised as soon as possible once they were brought into force. There was therefore some practical pressure to make the Court of Session rules on this matter in fairly early course.

5.7 The Council agreed that (i) the Court of Session rules, as revised following the Council's last meeting, should be made in early course, (ii) the "exceptional reasons test" should remain in the rules, and (iii) despite the most recent comments of the Sheriff Court Rules Council, the scope of the rules should remain unaltered and the two suggested additional declarations should not be included in the Form to be completed by the prospective lay representative.

- **Rule changes to be made accordingly in early course**

**Item 6: Children's Hearings (Scotland) Act 2011**

6. The Council considered a policy paper prepared by the Scottish Government on possible rule changes arising from the 2011 Act. It also considered a paper by the Judicial Office which offered views on the need for rule changes. It was considered that some of the matters raised in the policy paper either did not impinge on the Court of Session Rules, would not be relevant in the context of appeals by stated case or, alternatively, were already adequately catered for in the Rules. However, some rule changes were proposed in Part V of Chapter 41. The changes involved updating existing statutory references so that they referred to provisions in the 2011 Act. A draft Act of Sederunt containing such rule changes was considered by the Council. The Council had no observations to make on the draft rules. The latest indication from the Scottish Government was that the 2011 Act was likely to be brought into force in around May 2013.

- **Rule changes to be made to coincide with the implementation of the 2011 Act.**

**Item 7: Treaty of Lisbon (Changes in Terminology)**

7. The Council considered a paper and draft rules containing technical amendments to certain rules in Chapters 62, 65 and 87 so that they referred to the correct Treaty names and Articles following the signing of the Treaty on the Functioning of the European Union in Lisbon in December 2007. The changes to the court rules would coincide with the Foreign and Commonwealth Office making an Order which made amendments to other provisions in primary and secondary legislation. These provisions represented the second stage of a two-stage process. The Council had no observations to make on the draft rules.

- **Rule changes to be made to coincide with the making and coming into force of the Foreign and Commonwealth Office Order.**

**Item 8: Charities (Scheme for the Transfer of Assets) (Scotland) Regulations**

8. The Council considered a draft set of Regulations upon which the Scottish Government had recently consulted. The Regulations sought to make provision about schemes for the transfer of assets of charities under provisions in the Charities and Trustee Investment (Scotland) Act 2005. Some draft consequential rule changes had been drafted; these were simply technical amendments to update references in certain rules in Chapter 63 (applications relating to trusts and charities) so that they referred to the correct provisions of the 2005 Act. The Council had no observations to make on the draft rules.

- **Rule changes to be made to coincide with the making and coming into force of the Scottish Ministers' Regulations.**

**Item 9: Visual or audio-visual recordings lodged as productions**

9.1 The Council considered a paper on this matter which had been prepared by the Judicial Office. The Judicial Office paper incorporated a policy paper received from the Scottish Government. The policy paper proposed that changes should be made to the Court of Session Rules to ensure the careful management of access to sensitive documents such as visual recordings of joint investigative interviews with children.

9.2 A set of draft rules had been prepared; this was based on the terms of the policy paper and the approach taken in equivalent draft rules for sheriff court procedure. The Council considered the terms of the draft rules, which sought to make provision that where a party seeks to ensure that an audio or audio-visual recording of a child is lodged as a production, the recording must be sealed in a clearly marked envelope which is to be kept in the custody of the Deputy Principal Clerk of Session and is not to form a borrowable part of the process. Provision would be made for an exception to the latter requirement where the court granted a motion by a party to gain access to and to listen to or view the recording. The Council considered that provision should be included which required the party lodging the production to ensure that the recording was in a format that could be heard or viewed by means of equipment available in court. Otherwise the Council offered no observations on the draft rules.

- **Rule changes to be made accordingly.**

**Item 10: Protective Expenses Orders in Environmental Cases**

10.1 Robert Sandeman provided an oral update on behalf of the Scottish Government. The Scottish Government's consultation concluded at the beginning of April. Over 100 responses had been received and the Scottish Government was currently analysing those responses. A report on the consultation process would be published: it was estimated that that would be available by mid-July. The Scottish Government would then consider its options in light of the responses to the proposals set out in the consultation paper, with a view to putting a policy paper to the Council in time for its next meeting.

10.2 The Council noted the progress that was being made on this matter.

**Item 11: Judicial rate of interest**

11.1 The Council noted that a Summar Roll hearing was set down in the *Farstad* reclaiming motion for late June. Following Duncan Murray's comments at the Council's previous meeting about the possibility of the draft Interest (Scotland) Bill being revived, the Scottish Government's Law Reform Division had provided some comments on that matter. Their position was that there were a number of difficulties with the draft Bill, in the form in which it had been consulted upon. There appeared to be little prospect of the Bill being revived, although the possibility of bringing forward a much narrower Bill was not completely out of the question.

11.2 Lord Hodge indicated that he had noted the comments of the Scottish Government with interest. The decision in the *Farstad* case concerned the pre-decree rate of interest, rather than the post-decree rate. Lord Hodge suggested that there might still be some merit in the Scottish Government pursuing a narrow Bill which gave the Court a wider discretion on the fixing of a pre-decree rate of interest. The current restrictions might be viewed as penal. Depending on the outcome of the *Farstad* reclaiming motion, Duncan Murray suggested that the Council might make representations to the Scottish Government once the decision was issued. The present situation was that the rate of pre-decree interest was out of kilter with the position in England and Wales; that seemed unsatisfactory.

11.3 The Lord President stated that he hoped the decision in the *Farstad* reclaiming motion would be available by the time of the Council's next meeting. Once the decision was known, a decision could be made as to whether rules of court or primary legislation was required in this area, or whether the matter could be dealt with by judicial development.

**Item 12 – Second Appeals test: permission to appeal against a decision of Upper Tribunal**

12.1 The Council considered the terms of the decision of an Extra Division in the application for leave to appeal *KP and MRK v. The Secretary of State for the Home Department*. The Extra Division held that rule 41.57 and its predecessor rule 41.59, which set out the test for the court to apply in considering applications for permission to appeal against decisions of the Upper Tribunal (the second appeals test), were *ultra vires* and of no effect. The Extra Division viewed the rules as making provision on a matter of substantive law rather than practice and procedure.

12.2. A paper was provided which provided background on the insertion of the original rule and the Council's previous consideration of the matter. The Lord President noted that the second appeals test was referred to positively by Lord Hope in the Supreme Court decision of *Eba*, albeit in the different context of judicial review against a decision of the Upper Tribunal which could not be the subject of an appeal.

12.3 After discussion, the Council agreed that it would be a matter for the UK Government now to consider its policy on whether provision should be made in primary legislation which would allow the second appeals test to be re-established in the context of applications for permission to appeal to the Court against decisions of the Upper Tribunal. To be consistent with the measures in place in other jurisdictions in the UK, it was likely that any such

provision would confer a specific power on the Court to makes rules which applied the second appeals test.

12.4 Lord Hodge considered that there would be merit in the Council or the Court encouraging the UK Government (and, depending on the outcome of any discussions on legislative competence, the Scottish Government) to make such provision in primary legislation; there was a risk of forum-shopping in appeals from the Upper Tribunal if the second appeals test applied in other UK jurisdictions but did not apply in relation to appeals to the Court of Session. A decision whether the Court should exercise such a power could be taken in the light of its experience of, in particular, the numbers of immigration and asylum appeals and whether they created a problem. It was agreed that the Lord President would take steps to encourage the UK Government to bring forward legislative provision to that effect.

12.5 In the meantime, it was agreed that rule 41.57 and (insofar as it still had effect by virtue of transitional and savings provision) rule 41.59 should both be formally revoked. Any new legislative provision would take effect on its own terms (whether or not it had retrospective effect). It would also be misleading to court users to keep the provisions on the face of the Rules if they were of no effect. A draft revocation provision was provided for consideration by the Council. The Council had no observations to make on its contents.

- **Relevant rules to be revoked in an Act of Sederunt.**
- **Lord President to make representations to the UK Government about bringing forward legislative provisions on this matter.**

**Item 13: Disclosure Order petitions under the Proceeds of Crime Act 2002**

13.1 The Deputy Principal Clerk of Session spoke to a paper on this matter. Section 391 of the Proceeds of Crime Act 2002 provides for the Court to grant a disclosure order in connection with civil recovery investigations. When an application is made for such an order, a certain amount of information about an investigation will require to be provided to the Court. If such information were to be released to persons holding property which is the subject of that investigation, this may result in property being disposed of or concealed. There is also a need to ensure that any confidential information does not identify or endanger sources.

13.2 An interim practical solution had been put in place which restricted the access which interested parties had to inspect the process in such proceedings. Provision was made in a Practice Direction in England and Wales which

specifically placed restrictions on persons gaining access to the court file in such proceedings.

13.3 A draft rule change was provided for the Council's consideration. Where an application is made for a disclosure order, the rule change would have the effect of disapplying the existing rule on borrowing items from process. It would also provide that no documents lodged in process (except the disclosure order itself) would be made available by the court to any person other than the petitioner, except with the permission of a judge.

13.4 The Lord President queried whether provision should be included in the rules which would allow the restriction on access to the process to be lifted when it was no longer required. The Deputy Principal Clerk of Session indicated that this would be prudent as the process would be forwarded to NAS after a five-year period. She would consider the point further. The Council had no further observations to make on the draft rule change.

- **Rule change to be made once clarification obtained on the issue of making provision for the proposed restriction to be lifted.**

**Item 14: Any other business**

14.1 The Council considered correspondence received from the Public Petitions Committee at the Scottish Parliament regarding a public petition received on behalf of Leith Links Residents' Association. The petition called upon the Scottish Government to encourage the Rules Council to (i) use rule 2.2 to allow multi-party actions, as a temporary measure before legislation is made to implement the recommendations made on that topic in the Civil Courts Review Report, and (ii) introduce a pre-action protocol on the recovery of documents in multi-party actions.

14.2 Some doubts were expressed as to whether a direction made under rule 2.2 could apply to the initiation of a single group action, rather than simply providing a mechanism by which existing court proceedings could be case-managed.

14.3 In relation to pre-action protocols, there was some discussion about the extent of any responsibility that the Court or the Lord President has for the efficient disposal of disputes generally (beyond the Lord President's statutory responsibility for the efficient disposal of the business of the Scottish courts). The remit of the Lord President or the Court to introduce pre-action protocols was considered to be subject to limitations at present. The Council also noted that provision was already made in section 1 of the Administration of Justice

(Scotland) Act 1972 for the recovery of documents prior to an action being raised.

14.4 Nicholas Ellis QC had some involvement with the association and understood their concerns. Lord Hodge indicated that the purpose behind rule 2.2 had been to avoid a "one size fits all" approach to case management. Lord Hodge suggested that, in responding to the Committee, the Court could point to a number of measures or current developments within its remit which would facilitate multi-party actions pending the preparation of primary legislation on multi-party actions. Those were matters which could be dealt with by way of rules of court, practice notes or directions. Lord Hodge also emphasised that in any multi-party procedure there would still be a need for the Court to recover a proportionate amount of the costs of such actions. If rule 2.2 were used to assist the Leith Links Residents' Association and the Scottish Ministers wished to reduce their court fees, they might need to make subordinate legislation to allow the charging of reduced fees for the signetting of actions which are to proceed under that rule. It was agreed that a response should be sent by the Council to the Public Petitions Committee, reflecting the comments made at today's meeting.

14.5 Robert Sandeman provided an update as to where provisions about multi-party actions currently stood in the Scottish Government's planned legislative timetable for implementing recommendations of the Civil Courts Review Report. It remains the Scottish Government's intention to put forward legislation to enable multi-party actions. It is currently estimated that provisions on this matter would be brought forward around 2015 or 2016. It too would require to respond to the Committee in due course.

- **Judicial Office to prepare a draft response to the Public Petitions Committee on behalf of the Council.**

This was Lord Hamilton's last meeting as Lord President and Chairman of the Council. On behalf of the Council, Gerry Moynihan QC expressed a few words of appreciation to the Lord President and wished him well in his retirement.

The next meeting takes place on 24 September 2012 at 10.30am.