MINUTES OF THE MEETING OF THE COURT OF SESSION RULES COUNCIL
PARLIAMENT HOUSE, MONDAY 16 OCTOBER 2006

Present: Lord President
Lord Nimmo Smith
Ms Lesley Shand Q.C.
Mr Eugene Creally
Mr Graeme Hawkes
Mr Duncan Murray
Mr Sydney Smith
Mrs Glynis McKeand, Scottish Executive Justice Department, in place of Paul Cackette
Mr Bob Cockburn, Deputy Principal Clerk of Session

In attendance: Lord Macphail (item 3 only)
Lord Eassie (item 4 only)
Mr Ruaraidh Macniven, Legal Secretary to the Lord President
Mrs Valerie Montgomery, Deputy Legal Secretary to the Lord President

Apologies: Lady Paton;
Mr John Mitchell Q.C.
Mr Ronnie Clancy Q.C.
Mr Gordon Keyden
Mr Robin Macpherson
Mr Fred Tyler
Mr David Shand
Mr Paul Cackette

1. Introduction and welcome

Members were welcomed and apologies tendered on behalf of absent members.

2. Minutes of previous meeting

The minutes of the previous meeting were approved.

3. IT Committee

A report on the work of the IT Committee was given to the Council. It was noted that the report would explain the contexts in which the Committee was operating, before going on to outline the specific matters on which it is working. It was explained that the Group was initially given its terms of reference by Lord President Cullen, after being set up by the Rules Council at its meeting in 2004. The Sheriff Court Rules Council had its own IT Committee, with more broadly expressed terms of reference. It was felt that the Committees should hold joint meetings and accordingly, revised terms of reference were proposed to correspond with those of the Sheriff Court committee.

It was explained that the Committees now hold joint meetings under the joint chairmanship of Sheriff Iain Peebles Q.C. and Lord Macphail. They are assisted by technical advice from David Morris of the SCS and in relation to drafting by Ruaraidh Macniven of the Private Office.

It was noted that IT was increasingly recognised in the profession as offering opportunity for substantial improvements in the services offered to litigants and providing scope for significant reduction in delay and expense. A recent development was the establishment of the Court Technology Forum under the chairmanship of Paul Motion. It was felt that the Forum demonstrated that there was now an articulate body of informed opinion which recognised that significant progress should be made towards the introduction of IT in the civil courts.

The Council was advised that the Committee was currently working on three matters. The first was the extent to which signature remains necessary. A trawl of primary legislation or the rules of court to identify provisions requiring signature would be unnecessary if an overarching rule providing for electronic signature could be achieved. One of the matters being investigated was whether this could be achieved by the use of an identity card as a means of proving identification as a lawyer and as a basis for a digital signature.

The second matter being considered was the steps in procedure that should be undertaken by electronic means. It was explained that the committee's view was that in principle all papers should be able to be transmitted to and from court in electronic form. This aspiration chimed with the aims of the Scottish Court Service, in particular the Information and Communications Technology Strategy.

A primary issue still to be resolved was whether the electronic system should be provided by a bespoke system developed by SCS or by an off-the-shelf

system. In that regard the Committee had been given a demonstration of an off-the-shelf system provided by Lexis Nexis. The advantages of such a system were highlighted but the Council was advised that the Committee had recognised that there were issues that would require further consideration by SCS.

It was noted that correspondence with the Chief Executive had indicated that, for various reasons, an early decision was unlikely.

The final matter being considered by the Committee was the giving of evidence by video link. The Committee had four recommendations in that regard. Firstly, that there should be a rule in identical terms for the Court of Session and Sheriff Court rules. Secondly, that the rule should cover the giving of evidence as well as the making of submissions. Thirdly, that the rule should cover an audio as well as a video link and finally that the rule should not be accompanied by a practice note. The most important feature was that the procedure should be under the control of the court. The draft rule would be ready soon for consideration by the Lord President.

The Council was asked to agree the expanded remit of the IT Committee.

- **The Council agreed the expanded remit of the IT Committee.**

4. Alternative Dispute Resolution

It was explained that the report of the Working Party on ADR had been circulated to the judges and comments invited on areas of disagreement. Two sets of comments had been received and one of the judges concerned had agreed to attend the Rules Council in order to discuss his comments in relation to the matter of expenses.

The judge expressed some concerns about potentially denying expenses to a successful litigant because he did not engage in ADR. He noted that the draft rule relating to expenses appeared to be wider than suggested by the Working Party in that it was in mandatory terms and also encompassed conduct during the mediation.

His first concern was that if there was a threat of liability in expenses, both parties may be obliged to go through the motions regarding ADR. This was undesirable and was not good for the mediation process.

A further objection of principle was that if a litigant was successful, one would effectively be saying that that litigant should have compromised.

Article 6 issues potentially arose. He also felt that the requirement of "reasonableness" would cause difficulty in advising clients and in judging whether conduct was or was not reasonable. There were issues about lawyer/client confidentiality.

Comments were invited, first of all on whether the draft rule went beyond the recommendations.

It was explained that the draft rule placed an obligation on the court merely to take account of the party's conduct. The weight to be attached to it was still a matter for the court.

However, it was thought that "may" was preferable to "shall" because it would emphasise that the court was simply exercising a discretion. It was also felt that the rule as currently drafted would give rise to practical difficulties in investigating whether or not it was reasonable to go to ADR.

It was suggested that an alternative approach might be to allow a successful party to seek an uplift in expenses where the other party should have agreed to mediation. It was noted that the Report did not say anything about the cost of ADR. Since it was not part of the process, the expenses of ADR were not available.

Concerns were also raised about paragraph (b) of the draft rule which referred to conduct during mediation. As the mediation process was confidential, it was felt that this provision would be unworkable.

Some concern was also expressed with regard to the effect of the proposals on the procedure under the Coulsfield Rules. Mechanisms were already in place to encourage parties to agree settlement and appeared to be working well. It was suggested that taking a case out to ADR might derail the procedure under those Rules.

It was reported that the Sheriff Court Rules Council had recently consulted on its ADR Report and the responses were being analysed.

It was agreed that the draft rules would be considered further by the Lord President in the light of those views.

- **The issues raised by the Council in relation to the draft rules to be considered further.**

5. Update on Acts of Sederunt

The Council considered the paper which set out the amendments made to the Rules of the Court of Session since the last meeting of the Rules Council. The Rules had been amended by 3 statutory instruments.

6. Printing of records

The Council was referred to the letter from Mr Taylor, Scottish Regional Representative of the Forum of Insurance Lawyers regarding the requirements in Chapter 22 of the Rules in relation to the number of copies of open and closed records to be provided to the court and to the other parties. The Forum felt that it was sufficient for one copy to be lodged in process and intimated. It was noted that the numbers specified for the Court were required for the clerk, the judge and, in the case of closed records, for the Keeper. So far as providing copies to other parties was concerned, it was suggested that the cost of producing extra copies was marginal and that such cost would be recoverable at the end of the day. On the other hand, it was felt that a defender could make such additional copies as were required. It was noted that this area was ripe for technology. The views of members were noted and it was agreed that the Lord President would take them into account in progressing this matter.

- **The Lord President to consider the views of members.**

7. Enterprise Act 2002 – effect of reclaiming on interim enforcement orders

The Council's attention was drawn to the letter received from the Office of the Solicitor to the Advocate General (OSAG) which suggested that an exception to the general principle that the marking of a reclaiming motion suspends all execution on a decree should be created in respect of interim enforcement orders under section 218 of the Enterprise Act 2002. It was noted that such an exception already exists in relation to orders for custody, access or aliment. It was explained that, having reflected further on this, the Private Office was not sure that what OSAG said in relation to the effect of reclaiming on these orders, which are orders not to do something, is correct. Some further investigation would be required but any views Council members wished to express would be welcome. No views were expressed.

The second issue related to a perceived uncertainty in section 218(9) of the 2002 Act in relation to the point at which an enforcement order is determined. OSAG had asked for Rules of Court to confirm the position. The general view

was that clarification of the meaning of section 218(9) was a matter for primary legislation or determination by the court and not for Rules of Court.

It was agreed that the Lord President would take into account the views expressed by the Council in responding to OSAG.

- **The Lord President's Private Office to take into account the Council's views in responding to OSAG.**

8. Inner House Review

The Council's attention was drawn to the Report on Inner House Business by Lord Penrose. The Report had made 18 recommendations and the Council was advised that the Lord President had asked the judges for comments on the recommendations. It was also pointed out that some of the matters required primary legislation and that the prospects of an early legislative slot being found were understood to be slim. Some of the recommendations were also dependent on I.T. developments. Members were invited to give their initial views of Council members on the proposals.

It was noted that already this term there had been considerable problems with timetabling and that the impact of single bills meant that the substantive business did not commence until 11.30am or so. This was often caused by party litigants. A new procedure for processing party litigants would be beneficial. It was suggested that devoting one day to incidental business might provide a solution. It was also noted that delay was often caused by the availability of a particular counsel. This was a difficult position for the system to maintain. Additionally, the length of time people take to fix a date with the Keeper was also worth highlighting.

- **The Council noted the recommendations made in Lord Penrose's report.**

9. Report from Personal Injuries User Group

The Council was referred to the proposals set out in the report from the Personal Injuries User Group to deal with the situation where the pursuer in an action died. It was explained that that situation had caused difficulty for the new personal injuries procedure. The Council agreed that the proposals were sensible and that the matter should be taken forward in Rules.

- **The Council agreed that the proposals of the PIUG should be taken forward in Rules.**

10. Improving claims handling for mesothelioma

The Council considered the letter from Department of Work and Pensions seeking views on improving the handling of mesothelioma cases. The Council's attention was drawn to the draft response that had been prepared and further comments on the matter were invited. It was noted that the Compensation Act 2006 which dealt with the *Barker* judgement extended to Scotland and had been the subject of a legislative consent motion in the Scottish Parliament. It was also noted that the Scottish Parliament is currently legislating in relation to the rights of relatives in mesothelioma cases. The Council was content with the draft letter.

- **The Council agreed to the terms of the draft letter to the DWP**

11. Representative Actions in Consumer Legislation

The Council considered the Consultation Paper from the DTI regarding representative actions in consumer protection legislation. It was noted that many of the matters raised in the paper were policy issues and did not appear to the relevant to the Rules Council at this stage. It was noted that there had previously been a Scottish Law Commission project on class actions but it was not clear what had resulted from it. It was also noted that the matter of assigned claims had caused problems in the court. However, the Council did not wish to make any substantive comment on the matters raised in the consultation paper.

- **The Council agreed to make no further comment on the DTI Consultation Paper.**

12. A.O.C.B

The date of the next meeting was fixed for Monday 18th June 2007, at 10am.