

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES  
COUNCIL  
PARLIAMENT HOUSE, MONDAY 9TH JANUARY 2012**

**Members present:** Lord President (Hamilton)  
Lord Reed  
Gerry Moynihan QC  
Nicholas Ellis QC  
Graeme Hawkes, Advocate  
Gavin MacColl, Advocate  
Gordon Keyden, Solicitor  
Robin Macpherson, Solicitor  
Duncan Murray, Solicitor  
Syd Smith, Solicitor  
Fred Tyler, Solicitor

**In attendance:** Lord Justice Clerk (Gill)  
Lord Hodge  
Colin McKay, SG Justice Directorate  
(left before consideration of items 10 and 12)

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

**Apologies:** Lady Dorrian  
Robert Milligan QC  
Graeme Marwick, Principal Clerk of Session  
Robert Jenkins, Acting Deputy Principal Clerk of Session

**Item 1: Introduction and Welcome**

1. The Lord President welcomed those present and noted apologies. It was noted that this would be the last Council meeting that Lord Reed would be attending before departing for the Supreme Court. The Lord President extended congratulations and best wishes to Lord Reed on his appointment.

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

2. The minutes of the meeting on 26 September 2011 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 three instruments had been made which amended the Court of Session Rules. The first was a miscellaneous amending instrument - Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Miscellaneous) 2011 (SSI 2011/385), which made amendments to the rules relating to: (i) election petitions and applications under section 167 of the Representation of the People Act 1983 to recognise innocent acts or omissions, (ii) three new special administration procedures relating to investment banks, (iii) notification of orders imposing reporting restrictions under section 4(2) of the Contempt of Court Act 1981, (iv) the procedure relating to forced marriage protection orders and (v) minor consequential amendments to various rules which refer to provisions in Chapter 41 (appeals under statute).

3.2 The second instrument was Act of Sederunt (Rules of the Court of Session Amendment No. 7) (Taxation of Accounts and Fees of Solicitors) 2011 (SSI 2011/402). This made amendments to the Chapter 42, in relation to the taxation of accounts and fees of solicitors.

3.3 The third instrument was Act of Sederunt (Rules of the Court of Session Amendment No. 8) (Terrorism Prevention and Investigation Measures) 2011 (SSI 2011/441). This substituted a new Chapter 89 into the Rules in respect of proceedings under the Terrorism Prevention and Investigation Measures Act 2011 (which have replaced control order proceedings under the Prevention of Terrorism Act 2005). The new rules took into account comments made by the Council at its last meeting about the recording of proceedings.

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

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

#### **(i) Judicial Working Group on the Civil Courts Review**

4.1 Lord Reed confirmed that there was nothing to report as the Judicial Working Group had not met since the Council's last meeting. However, meetings under the Scottish Government's Making Justice Work Programme were continuing.

#### **(ii) Inner House Reforms Implementation Group**

4.2 The Implementation Group had met on 13 December 2011. The Inner House Section was continuing to produce quarterly reports for the Group's

consideration. The latest report provided encouraging statistics relating to the timeframe on which cases were heard and the percentage of cases in which judgments had been issued within three months of a hearing. There had been a recent drop in the number of appeals (including planning appeals) remitted by the Inner House to the Outer House. The Inner House Clerks had therefore agreed to remind Inner House judges that they had the option to remit such appeals. The Lord President had, in principle, approved a recommendation by the Implementation Group that it should in due course be replaced by an Inner House Users' Group.

### **(iii) Personal Injuries User Group**

4.3 In Lady Dorrian's absence, Gordon Keyden provided an update on work recently undertaken by the Personal Injuries User Group. The Group was still focused on the proposals to formulate new rules facilitating the case management of clinical negligence cases. Those proposals were currently with the Outer House Administrative Judge for consideration. The Group had also noted the Council's comments on proposals to extend the number of rules in Chapter 43 which should apply to clinical negligence cases. The Group was also seeking to encourage discussion among various relevant groups regarding the consistency of application of personal injuries rules in the Court of Session and in the Sheriff Courts. In addition, the Group was considering whether or not it wished to feed in any comments in response to the consultation paper issued by the Taylor Review of Expenses and Funding in Civil Litigation in Scotland.

### **(iv) Diligence Rules Advisory Group**

4.4 Lord Reed advised that he had been contacted by Sheriff Holligan, who was chairing a sub-group tasked to formulate rules of court relating to heritable removings. Sheriff Holligan reported that instructions had now been provided to draft appropriate rules. It was expected that the draft rules would be available by February.

### **(v) Administrative Judges**

4.5 Lord Reed and Lord Hodge provided reports on their respective portfolios. Lord Reed advised that planning assumptions had been made for the coming year which better reflected the actual demands on judges' time to deal with first instance criminal business. Lord Hodge advised of developments in five areas in the Outer House – namely (i) proposals to deal with the 800 or so pleural plaque cases which had been sisted pending the outcome of the AXA case in the Supreme Court, (ii) proposals to amend the

rules relating to judicial review proceedings in order to streamline the way in which immigration and asylum judicial reviews are dealt with in the Outer House, (iii) proposals to amend the court rules to facilitate the case management of clinical negligence cases and other cases transferred out of Chapter 43 procedure at signeting stage, (iv) proposals relating to the case management of intellectual property cases and (v) a proposed guidance note on witnesses in the commercial court.

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

### **Item 5: Disposals in Petition Procedure**

5.1 The Council had before it a draft rule which was intended to give effect to the Lord Justice Clerk's proposal that the Rules should be amended so as to provide that any disposal which is available to the Court in ordinary procedure should also be available in petition procedure. The draft rule was partly modelled on RCS 58.4(b) (disposals in petition procedure). The first part of the draft rule sought to allow the Court the flexibility to make an order to dispose of a petition which might not have been sought by parties. The second part of the draft rule sought to provide that the disposing order was any order that could be made if sought in any action or petition. Unlike RCS 58.4(b), the draft rule did not include an illustrative list of possible disposals. It was considered that omitting such a list would be consistent with the aim of making the rule as flexible as possible.

5.2 The Council confirmed that it was content with the draft rule.

- **Rule change to be made accordingly**

### **Item 6: Standing in Judicial Review Procedure**

6.1 The Council considered a paper prepared by the Judicial Office regarding a proposed rule change arising out of the Supreme Court's Judgment of 12 October 2011 in *AXA General Insurance Limited v. The Lord Advocate and others (Respondents)*. One of the issues covered by the Judgment was whether the title and interest test should continue to be applied in applications to the Court's supervisory jurisdiction in the field of public law.

6.2 In Chapter 58 of the Rules (judicial review) and in related forms, the term "title and interest" is used twice. Firstly, it is used in Form 58.6 (the form of petition for judicial review), where it requires the petitioner to state their "designation, title and interest". Secondly, RCS 58.8(3) refers to title and

interest by virtue of a provision in the Equality Act 2006. Rule 94.2(3) also includes a similar reference.

6.3 Lord Hope (at paragraph 62) and Lord Reed (at paragraph 171) were both clear in their respective Opinions in the AXA case that the title and interest test should no longer apply in the context of applications to the supervisory jurisdiction within the field of public law; instead, the term “standing” was more appropriate, based on the concept of interest.

6.4 While the relevant provision in the Equality Act 2006 remained in force in its current form, it was considered that rules 58.8(3) and 94.2(3) would require to remain tied to the terminology used in that provision. However, there seemed no obstacle to amending Form 58.6 to reflect the AXA decision. A short amendment had been drafted which had the effect of replacing the term “title and interest” with the term “standing” in the form. The Council had no observations to make on that draft amendment.

- **Rule change to Form 58.6 to be made accordingly**

#### **Item 7: Lay Representation**

7.1 Recommendation 149 of the Scottish Civil Courts Review recommended that a person without a right of audience should be entitled to address the court on behalf of a party litigant, but only where the court considered that such representation would be of assistance to it.

7.2 This had resulted in the conferral on the Court of a new power in section 5(e) of the Court of Session Act 1988 to make rules of court which permit a lay representative to appear and make oral submissions on a party litigant’s behalf. New section 5A of the 1988 Act made further provision as to the scope of such rules.

7.3 The Lord President had agreed to establish a working group (which included representatives of both the Court of Session Rules Council and the Sheriff Court Rules Council) to make recommendations on how the Court should exercise the new rule-making powers. The working group was chaired by Lord Pentland and also included Gerry Moynihan QC and Gordon Keyden. It had met twice and had carried out a public consultation exercise to inform its recommendations. Those recommendations were set out in a report to the Lord President. The report was accompanied by a set of draft rules amending the Court of Session Rules. These were both placed before the Council for consideration.

7.4 The following comments were made about the draft rules:

- Duncan Murray, Syd Smith, the Lord Justice Clerk and Lord Reed all supported inserting into the draft rules a prohibition on the lay representative receiving any remuneration or reward from the litigant – whether “directly” or “indirectly”.
- The Lord Justice Clerk noted that the draft rules and form did not contain any provision or declaration relating to the character and conduct of the lay representative. He considered that such a declaration should be included in the form. The declaration could refer to any previous convictions, prosecutions or vexatious litigant proceedings involving the proposed lay representative.
- Lord Reed queried how a paragraph in the draft rule relating to the disclosure of documents or information by a party to a lay representative would operate in the context of any statutory prohibition on disclosure. Lord Reed also queried whether a deeming provision in the same paragraph fell within the scope of the Court’s new rule-making power.
- Given that the Working Group had recommended that applications (by motion) for permission for the appearance of a lay representative were ordinarily to be made in advance of the relevant hearing, Duncan Murray suggested that it would be helpful if the draft rules imposed a more rigid time limit for making such motions. He suggested that the rules should provide that any exceptions to that time limit should apply where the Court was satisfied that it was not practicable for the applicant to make the application within the time limit.
- Robin McPherson queried how the provision laying down a condition prohibiting the lay representative receiving remuneration or reward from the litigant would operate alongside another draft provision which provided that expenses incurred by the litigant in connection with the lay representation would not be recoverable expenses in the proceedings.

7.5 It was agreed that these observations would be communicated to Lord Pentland for further consideration.

- **Judicial Office to communicate the Council’s observations to the Working Group for further consideration**

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

8. Colin McKay advised the Council that the Scottish Government consultation paper on this matter would be issued within one or two days of the date of the present meeting. Scottish Ministers would be proposing that new Court of Session Rules should be made on the topic. They would be proposing that those rules should cover both judicial reviews and also statutory reviews which fell within the scope of the Public Participation Directive. They would also be proposing that protective expenses orders should limit the liability of a petitioner or applicant to pay the respondent's expenses to £5,000 and also limit the liability of the respondent to pay the petitioner's or applicant's expenses to £30,000. The consultation period would be 3 months. Once the consultation closed, the Scottish Government intended to present detailed policy proposals to the Council to consider, with the aim of developing rules of court thereafter.

- **The Council noted these developments**

## **Item 9: Taylor Review of Expenses and Funding of Litigation in Civil Litigation in Scotland – consultation paper**

9.1 Sheriff Principal Taylor's Review of Expenses and Funding of Litigation in Civil Litigation in Scotland had issued a consultation paper in November 2011. Responses to the consultation had been invited by 16 March.

9.2 The Council's attention was drawn to some questions in the consultation paper which were relevant to procedure in the Court of Session. The Council had no observations to make on those questions, but the Lord President advised that if any individual members wished to provide any comments on matters raised in the consultation paper, it was open to them to do so. Comments could be directed to the Judicial Office.

## **Item 10: Judicial Rate of Interest**

10.1 Following the Council's last meeting, the Judicial Office had contacted officials in the Ministry of Justice to make them aware of the decision in the Outer House in *Farstad Supply AS v. Enviroco* [2011] CSOH 153 and to seek clarification that there were still no plans to change the judicial rate of interest in England and Wales. Ministry of Justice officials had noted the *Farstad* decision with interest but had confirmed that there were no plans to change the rate south of the border at present. The Judicial Office had also provided the Scottish Representative of the Forum of Insurance Lawyers with an update on the matter.

10.2 Duncan Murray suggested that the matter might not be one which was within the control of the Council in any case. He noted that the Judicial Rate was in line with the rates payable in terms of the Late Payment of Commercial Debts (Interest) Act 1998 implementing the Late Payment Directive. He suggested that the real concern was in relation to pre-decree interest where it appeared that the English practice was to award interest on general damages at 2% and on special damages at a rate, over the period, on the court special account (0.5% since 1 July 2009). He referred to the recent Employment Tribunal case of *Michalak v. Mid Yorkshire NHS Trust and others*. This decision applied regulation 3 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 which provides that the applicable rate of interest in England and Wales is the Special Investment Account under rule 27(1) of the Court Funds Rules 1987 and, in Scotland, the rate fixed by the Act of Sederunt (Interest in Sheriff Court Decrees or Extracts) 1975. Had the calculation used the Scottish Judicial Rate, in relation to the injury to feelings award this would have resulted in an 82% increase in the level of interest.

10.3 Duncan Murray referred to a consultation exercise carried out by the Scottish Government in January 2008 on a draft Interest (Scotland) Bill and suggested that a rate of interest change could be instigated by such a vehicle. He wondered whether the Scottish Government might be invited to reconsider introducing such a Bill. It was agreed that enquiries should be made of the Scottish Government on that matter.

10.4 In the meantime, it was noted that the *Farstad* decision was the subject of a reclaiming motion. A procedural hearing was scheduled to take place in the Inner House later in January. It was agreed that the Council should take no further decision on this matter pending the outcome of the reclaiming motion.

- **Judicial Office to contact the Scottish Government and seek confirmation on the likelihood of the draft Interest (Scotland) Bill being revived**

#### **Item 11: Sensitive productions**

(for the convenience of those attending, this item was considered after items 8 and 13)

11.1 At its last meeting, the Council had agreed to postpone its consideration of a paper submitted by the Scottish Government relating to the treatment of sensitive productions involving children. This was to enable a working group established by the Sheriff Court Rules Council to report back

to that Rules Council and instruct the preparation of draft rules for the sheriff court on the same matter. It had been agreed that it would be preferable to adopt a similar approach across each set of affected court rules.

11.2 The Sheriff Court Working Group had had one meeting, but had still to conclude its discussions. Scottish Government policy officials had confirmed that they were content with the aim of consistency across the rules. They were therefore content that the Council should again postpone substantive consideration of this matter until the approach to be taken for the sheriff court rules was known.

### **Item 12: Actions of Division and Sale**

12.1 The Council considered a paper which provided an update on this matter. The Sheriff Court Rules Council had made a policy decision to extend one of its new rules on actions of division and sale so that it applied to both heritable and other property. The Court of Session Rules Council was provided with further information on the reasoning for the Sheriff Court Rules Council's decision. Further background was provided on the matter in various textbooks on Court of Session Practice. Information obtained from the clerks suggested the division and sale of non-heritable property was very rarely sought in the Court of Session. It was thought that if such a request were made the Court could deal with it under existing procedures.

12.2 In light of that, the Council saw no compelling reason to amend RCS 45.2(1) to make it consistent with the new equivalent sheriff court ordinary cause rule. It agreed to take no further action on this matter.

### **Item 13: Any other business**

(for the convenience of those attending, this item was considered after item 8)

13.1 The Lord President advised the Council that the Scottish Government had notified the Judicial Office in early December that the Scottish Ministers intended to add the three existing Rules Councils to the list of public authorities covered by the Freedom of Information (Scotland) Act 2002. Scottish Ministers had agreed to hold off making the order until the Lord President had had an opportunity to comment on the proposals.

13.2 Colin McKay indicated that it was still the aim of the Scottish Government to bring the Rules Councils within the scope of the 2002 Act by 1st April this year. The policy justification was that the Scottish Ministers considered that statutory bodies such as the Rules Councils should be included within the scope of the legislation unless there was a compelling

reason why they should not. There was a brief discussion about the type of information generated by, or for, the Council which would be subject to disclosure under the 2002 Act. The Lord President indicated that he intended to provide more detailed observations to the Scottish Ministers in due course.

13.3 It was also noted that the Scottish Government's consultation on the proposed establishment of a Scottish Civil Justice Council to replace the Court of Session and Sheriff Court Rules Councils had now closed. Colin McKay confirmed that if any individual member of the Council wished to make additional comments on that matter, they could still be considered if they were submitted in early course.

The next meeting takes place on 14 May 2012 at 10.30am.