

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 10TH MAY 2010**

- Present:** Lord President (Hamilton)
Lord Reed
Ronnie Clancy QC
Graeme Hawkes, Advocate
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor
Duncan Murray, Solicitor
Sydney Smith, Solicitor
- In attendance:** Lord Justice Clerk (Gill)
Colin McKay, SG Justice Directorate
- Secretariat:** Michael Anderson, Legal Secretary to the Lord President
David Smith, Deputy Legal Secretary to the Lord President
- Apologies:** Lady Dorrian
Gerry Moynihan QC
Lesley Shand QC
Eugene Creally, Advocate
Fred Tyler, Solicitor
Graeme Marwick, Principal Clerk of Session
Bob Cockburn, Deputy Principal Clerk of Session

Item 1: Introduction and welcome

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

Item 2: Minutes of previous meeting and matters arising

2.1 In relation to the wording used at paragraph 4.8 of the draft minutes of the meeting of 11 January (relating to the collective proceedings provision in the Financial Services Bill), Mr. Murray indicated that his concern was about multi-party actions being raised both north and south of the border independently by pursuers'/plaintiffs' agents where the claim could prospectively be brought in either jurisdiction. Mr. Murray suggested an alternative form of wording in the minutes to reflect that. Subject to that amendment being made, the minutes of the previous meeting were approved.

2.2 The Council was updated on the position regarding the Financial Services Bill, which had now received Royal Assent and was an Act of Parliament. The Council was advised that the collective proceedings provisions had been deleted from the Act. There was therefore no longer a requirement to develop court rules as a result of those particular provisions.

2.3 Lord Reed advised the Council that the judicial working group on the Civil Courts Review Report had been treating multi-party actions as a priority due to the Financial Services Bill and other developments by the UK Government on this issue. Scottish Government officials had asked the working group whether it considered that these issues would be more appropriately included in primary legislation or in rules of court. The Council was informed that the working group had expressed the view that, primarily for policy reasons, it considered that this was a matter which was more apt for inclusion in primary legislation. Lord Reed confirmed that, in light of the developments in relation to the Financial Services Act, the working group was no longer treating multi-party actions as one of its top priorities.

Item 3: Update on Acts of Sederunt

3.1 The Council noted that since its last meeting, three Acts of Sederunt had been made which amended the Rules of the Court of Session. The first of these was the Act of Sederunt (Rules of the Court of Session Amendment) (Transfer of Functions of the Asylum and Immigration Tribunal Order 2010) 2010 (SSI 2010/16). The second was the Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Causes in the Inner House) 2010 (SSI 2010/30). The third was the Act of Sederunt (Rules of the Court of Session Amendment No. 3) (Miscellaneous) 2010 (SSI 2010/136).

3.2 The Council did not have any comments to make on any of these instruments. In relation to the second of them, however, Lord Reed advised the Council that a webpage on Inner House reforms had been created on the Scottish Courts website and that it contained links to the court rules, a practice note and flow-charts, as well as a list of the members of an implementation group which had overseen the implementation of the new rules. Lord Reed confirmed that the implementation group would be meeting again during the next term and encouraged any comments on the operation of the new rules to be provided to any member of the group.

Item 4: Legislative changes with implications for the Rules: Arbitration (Scotland) Act 2010

4.1 The Council was updated on the development of draft rules in relation to the Arbitration (Scotland) Act 2010 and considered a draft Act of Sederunt which had been formulated by a working group established by the Lord President. The working group had been chaired by Lord Glennie and included two members of the Council (Mr. Hawkes and Mr. Tyler), as well as representatives from the Chartered Institute of Arbitrators' Scottish branch, the Scottish Government and the Private Office.

4.2 The Council noted that the working group had met on three occasions and that its aim had been to develop a free-standing and user-friendly Chapter of the Rules relating to arbitration. Against that background, a short Chapter consisting of ten rules had been developed in the draft Act of Sederunt which was before the Council.

4.3 The Council was advised that one of the draft rules which provoked the most discussion within the working group was a provision which provided for the court to make an order for intimation and service at the address of a party's agent or other person acting for that party in the arbitration process. The working group was content that inclusion of such a provision was appropriate. Firstly, it was clear that the draft rule applied only where a party had a representative at the time of intimation and service. Secondly, the group considered that such a provision would be of considerable practical use because in international arbitration difficulties can sometimes be encountered in the service of documents. The Council was also advised that the approach taken in that particular rule was consistent with the approach taken in England and Wales and that the working group had considered it important to ensure that the court rules put Scotland in the same competitive position as other jurisdictions on such matters.

4.4 The Council noted points raised by a member of the Faculty of Advocates in relation to two of the draft rules in the week prior to the Council's meeting. The rules in question related to intimation and service requirements and procedures for making applications for leave to appeal and lodging substantive appeals against arbitral awards on ground of legal error. The Council also noted comments in response to those points on behalf of Lord Glennie and the working group. It was noted that the working group was agreed about the approach taken in the draft rules and had reached the conclusion that no changes should be made to the rules as a result of the points raised by the member of the Faculty. The Council indicated that it was content with the rules as drafted.

- **Rules to be made accordingly.**

Item 5: Protective expenses orders

5.1 The Council noted that a Reasoned Opinion had been issued by the European Commission on 18 March 2010, on account of the UK's failure to transpose fully and apply correctly Directive 2003/35/EC relating to public participation in environmental justice. The Council was advised that the Lord President had invited Lord Hodge, in his capacity as judge with responsibility for the administration of first instance business in the Court of Session, to consider what appropriate action should be taken by the court in response to the reasoned opinion.

5.2 The Council was advised that Lord Hodge was currently considering the matter but, as at the date of the Council's meeting, had not yet reached a concluded view on the scope of recommended remedial measures. The Council was also provided with an update on the steps currently being taken in England and Wales and in Northern Ireland in relation to this matter. It was noted that court rules were currently being drafted in England and Wales and in Northern Ireland in relation to protective costs orders in all public interest judicial review proceedings (and not just in environmental cases covered by the Directive).

5.3 Mr. McKay indicated that, as at the time of the Council's meeting, no definitive view had been reached by the Scottish Government on the appropriate scope of remedial action. He suggested that the principled approach would be to apply new court rules to all cases involving a public interest, while a more pragmatic response would be to extend such rules to environmental cases within the scope of the Directive. Mr. McKay advised the Council that a Scottish contribution was being prepared for insertion into a UK-wide response to the Commission's Reasoned Opinion and that that response would be issued shortly. The Council discussed the sanction that might be imposed if a solution were not found in fairly early course.

5.4 Lord Reed advised the Council that the judicial working group on the Civil Courts Review Report had considered this matter in March and had supported the approach which is recommended in the Review Report. The working group also supported the approach of seeking to introduce new measures in relation to all public interest cases, as this would allow the court to deal with the matter on a case-by-case basis. The working group also discussed the application of the principles outlined in the English *Corner House* case and the model recommended by the Australian Law Reform Commission which had been referred to in the Review Report. Lord Reed confirmed that, on balance, the working group favoured the latter model. The

group also considered it important to check any consideration of the matter in Lord Justice Jackson's report.

5.5 It was agreed that compliance measures should be progressed in early course. It was also agreed that the Council should be consulted by correspondence on any detailed drafting work in relation to this matter in the weeks following the Council's meeting.

- **Remedial measures to be progressed in early course with input from the Council by correspondence.**

Item 6: "McKenzie Friends"

6.1 The Council considered a draft set of rules relating to "McKenzie Friends". The Council was advised that the draft rules had been inspired by a petition which is currently being considered by the Public Petitions Committee at the Scottish Parliament. The petition urges the introduction of a facility in the Scottish courts whereby a party litigant may be assisted by a lay supporter.

6.2 The Council noted that the draft rules before it did not seek to confer any rights of audience on lay persons. It also noted that the Civil Courts Review Report had included a recommendation for the conferral of such a right. The Council was advised that it was not thought that this recommendation would be capable of implementation by rules of court without further primary legislation. However, the Council noted that it was understood that this recommendation was under consideration for early implementation by the Scottish Government.

6.3 In relation to the provision of lay assistance to party litigants through means other than addressing the court, the Council noted the terms of correspondence between the Public Petitions Committee and the Lord President. It was noted that the Lord President had invited Lord Reed and Lord Hodge, as judges with responsibility for administration of Court of Session business, to consider the matter and make recommendations. Following on from recommendations made by Lord Reed and Lord Hodge, the Lord President had agreed that it would be appropriate to make an Act of Sederunt amending the rules in certain respects to acknowledge and regulate lay assistance. The draft provisions before the Council sought to achieve this.

6.4 The Council noted that the Public Petitions Committee at the Scottish Parliament had indicated that it was content for the Lord President to proceed to make the court rules on this matter. It was noted that the latest draft of the

rules had been adjusted to take into account points that had been recently been raised by the Committee in correspondence.

6.5 The Council discussed the extent to which the provisions should be included in the body of the rules or by declaration in a form. It also discussed the extent to which the draft rules would discourage or prevent the provision of lay assistance by persons who might be unsuitable for the role. It was agreed that the Private Office would consider the Council's discussions on these matters in finalising the Chapter which is to be inserted into the Rules.

- **Rules on this matter to be finalised and made in early course.**

Item 7: UK Supreme Court

7.1 The Council considered a set of draft amendments to the Rules in consequence of provisions of the Constitutional Reform Act 2005. It was noted that the 2005 Act had the effect of transferring to the Supreme Court the jurisdiction of the House of Lords to hear appeals from cases decided in the Court of Session.

7.2 The draft set of rules sought to do three things. Firstly, it sought to amend a rule relating to personal service of Court of Session documents elsewhere in the United Kingdom, so as to reflect the re-naming of relevant courts which are referred to in that rule. Secondly, it sought to replace references to the House of Lords with references to the UK Supreme Court, and to replace other relevant terminology, in a rule dealing with intimation in actions of reduction of inferior courts or tribunals. Thirdly, it sought to replace the Chapter and rule which currently deals with applications to apply judgments of the House of Lords, so that that the new Chapter and rule refers instead to applications to apply judgments of the Supreme Court.

7.3 The Council had no observations on the draft rules and recommended that that the Court should proceed to make them.

- **Rules on this matter to be made.**

Item 8: Judicial rate of interest

8.1 The Council was provided with an update on the proposals made by the Forum of Insurance Lawyers (FOIL) and others to reduce the judicial rate of interest from the current rate of 8%. The Council had considered this matter at its previous four meetings. It noted that the Private Office had received

confirmation in late March that there were no plans at that time to change the judicial rate of interest in England and Wales from the current applicable rate.

8.2 Following discussion, and noting that the 8% rate in England and Wales had not been changed, the Council considered that it was important to maintain consistency throughout the United Kingdom in relation to this matter. It was therefore agreed that the judicial rate of interest should not be altered in Scotland and that FOIL should be advised of the Council's position.

- **Private Office to contact FOIL and confirm the Council's decision.**

Item 9: European Enforcement Orders

9.1 The Council considered a paper from the EU and International Law Branch of the Justice Directorate of the Scottish Government regarding proposed changes to the Rules which would facilitate the implementation of a new procedure for foreign creditors who are applying for enforcement of a European Enforcement Order.

9.2 Rules 62.2 and 62.88 currently require that, where a European Enforcement Order is expressed in a currency other than sterling, the applicant, before applying to the Keeper of the Registers for enforcement of that Order, must lodge in the Petition Department: (a) a certified statement of the rate of exchange prevailing at one of three alternative dates, and (b) a certificate of currency conversion. The Council noted that Scottish Government officials had expressed the view that the current procedure did not comply with the spirit of Regulation (EC) 805/2004, which seeks to enable creditors to obtain quick and efficient enforcement abroad without involving the courts in the Member State where enforcement is applied for.

9.3 In effect, the proposal made by the Scottish Government was that the current requirements for a foreign creditor, when applying for an enforcement of a European Enforcement Order, to lodge a certified statement on an applicable rate of exchange and a certificate of currency conversion should be removed from the Rules. Instead, it had been proposed that provision should be made for certificates of currency conversion to be presented directly to the Keeper of the Registers when such an application is made.

9.4 The Council considered the terms of a draft rule on this matter. The draft rule sought to amend rule 62.2 and 62.88 to give effect to the Scottish Government proposals. A member of the Council queried how the Keeper of the Registers would be satisfied that any certificate of currency conversion

presented was validly made by a competent authority in another EU Member state. Another query was also raised as to whether there was a danger of permanent regression if every Member State in which enforcement was sought had a procedural rule which referred to the currency conversion requirements of the Member State from which the European Enforcement Order originated.

9.5 The Council was advised that both Scottish Government officials and officials at the Registers of Scotland had seen the draft rule and confirmed that they were content with its terms. The agreed approach among those officials, based on the overarching principle of mutual recognition upon which the EC Regulation was founded and the approach taken in other jurisdictions, was that the Keeper of the Registers should not have to look behind the face of an application to verify that a currency conversion was made in accordance with the issuing State's procedures. However, it was agreed that the Private Office should give further consideration to the queries raised by the Council and should raise these with both Scottish Government and Registers of Scotland officials before the final rule changes on this matter were made.

- **Private Office to raise the queries made by the Council with relevant policy officials. Rule changes to be made provided relevant parties are content.**

Item 10: Interim payments of damages in personal injuries cases

10.1 The Council considered a report by the Personal Injuries User Group (PIUG) which recommended that an amendment be made to rule 43.11 (interim payment of damages). The Council noted that the proposed rule change arose from correspondence received from a firm of solicitors in the wake of an opinion by Lord Malcolm in the case of *Cameron v. Gellatly & AXA Corporate Assurance SA*. In that opinion, Lord Malcolm had suggested that consideration might be given to a clarifying revisal being made to make clear that the scope of the rule extends to persons in respect of whose liability an insurer under section 151 of the Road Traffic Act 1988 will be liable to make payment.

10.2 The Council was advised that the PIUG had considered that the intention behind rule 43.11 when it was originally drafted was to include within its scope insurers under the Road Traffic Act 1988. However, the PIUG had concluded that a rule change should be made to put the matter beyond any doubt. A draft rule change had been included in the PIUG report. The Council agreed that the rule change should be made.

- **Rule change to be made on this matter.**

Item 11: Administrative judges and the work of the Rules Council

11.1 The Lord President referred the Council to the work carried out by Lord Hodge and Lord Reed as judges with responsibility for the administration of, respectively, first instance business and Inner House business in the Court of Session. It was noted that that work was closely linked with the work of the Rules Council and that Lord Reed, as a member of the Council, already provided an important link to administrative developments in the Inner House.

11.2 It was suggested that it would be beneficial if Lord Hodge were to be invited to attend future meetings of the Rules Council (with “observer” status) and were to be given sight of the papers for such meetings. The Council agreed that this would be appropriate.

- **Lord Hodge to be accorded “observer” status at future meetings of the Council.**

Item 12: Any other business

12.1 The Council noted that in the in the week prior to the meeting, a letter had been received from the Scottish Government inviting the Council to consider what changes to the Rules may be required to give effect to Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters. It was agreed that this matter should be considered by the Council at its next meeting.

12.2 The next meeting of the Council was fixed for 11th October 2010 at 10.30am.