

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 11TH OCTOBER 2010**

Present: Lord President (Hamilton)
Lord Reed
Ronnie Clancy QC
Gerry Moynihan QC
Eugene Creally, Advocate
Graeme Hawkes, Advocate
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor

In attendance: Lord Justice Clerk (Gill)
Colin McKay, 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
Lord Hodge
Lesley Shand QC
Duncan Murray, Solicitor
Sydney Smith, Solicitor
Fred Tyler, Solicitor
Graeme Marwick, 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 The minutes of the meeting on 10th May 2010 were approved.
- 2.2 In relation to item 9 in the minutes of the previous meeting, it was noted that the terms of rules had been agreed with Scottish Government and Registers of Scotland policy officials and that the rules had now been made and come into force.

Item 3: Update on Acts of Sederunt

3. Since the last meeting one Act of Sederunt had been made which amended the Rules of the Court of Session. This was the Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Miscellaneous) 2010 (SSI 2010/205). The Council had no observations to make on the instrument.

Item 4: Legislative changes with implications for the Rules: Terrorist Asset-Freezing etc. Bill

4.1 The Council considered a paper and a draft Act of Sederunt regarding the Terrorist Asset-Freezing etc. Bill. The Bill had just passed Committee Stage in the House of Lords.

4.2 The Bill, as it stood at the time of the meeting, would provide for applications to be made to the Court to set aside Treasury decisions in relation to the freezing of assets of persons suspected of being involved in terrorist activity. Provision would also be made for appeals to be made to the Court in relation to designation decisions by the Treasury.

4.3 The Bill provided for the application of sections 66 to 68 of the Counter-Terrorism Act 2008 in the context of both applications and appeals to the Court. Sections 66 to 68 of the 2008 Act made provision for court rules to be made in financial restrictions proceedings under the 2008 Act, including rules relating to disclosure requirements and the use of special advocates. The court rules in relation to those proceedings were set out at Chapter 96 of the Rules. The draft Act of Sederunt which had been prepared in consequence of the Bill therefore sought to insert a new Chapter into the Rules with the effect of applying Chapter 96, with appropriate modification, to terrorist asset-freezing proceedings. The Council had no comments on the draft Act of Sederunt and recommended that it should be made as drafted, subject to any further amendments that might be made in the Bill.

- **Rules to be made accordingly.**

Item 5: Protective expenses orders

5.1 Prior to the meeting, the Council had been provided with an opportunity to provide written comments on a draft Act of Sederunt containing rules on protective expenses orders in environmental cases within the scope of Directive 2003/35/EC. The draft rules were designed to achieve compliance with the requirements of the Directive following the European Commission's Reasoned Opinion that the UK had failed to fully transpose it. No written comments had been received.

5.2 The matter had first arisen when the European Commission issued to the UK authorities a formal notice letter, foreshadowing possible infraction proceedings in relation to access to justice in specified types of environmental cases. Recommendations were subsequently made in the Report of the Civil Courts Review that a general regime of protective expenses orders should be created within the court rules. Against that background, the first instance administrative judge had recommended that the Court should adopt a two-stage approach to the process of making rules on protective expenses orders. The draft Act of Sederunt which was placed before the Council represented stage one of that process.

5.3 The Lord President informed the Scottish Ministers that he was minded to adopt the proposed two-stage process. The Lord President invited the Scottish Ministers to provide any comments on that proposed approach. The Cabinet Secretary for Justice indicated in a letter to the Lord President that he considered it appropriate for the Court to proceed straight to establishing a general regime of protective expenses within the court rules, rather than adopting the proposed two-stage process. The Cabinet Secretary suggested that there was no policy justification for litigants in cases to which the Directive applied being treated differently from litigants in other cases of public interest.

5.4 The Lord President responded to the Cabinet Secretary's letter on 24 August. In his letter, the Lord President indicated that the draft Act of Sederunt which was now before the Council sought to deal only with environmental cases within the scope of the Directive and, in particular, the requirement that such cases should not be prohibitively expensive. This was due to the importance of having rules on protective expenses orders in place as a matter of urgency in light of the Reasoned Opinion and also because the content of those rules appeared to turn on an assessment of what was legally required to comply with the Directive. The Lord President took the view that wider questions of public interest required to be taken into account in relation to the development of more general court rules on protective expenses orders in other cases. The Court would require to consult with those likely to be affected by such rules. The Lord President confirmed that he was unable to move to put in place any general rules on protective expenses orders within the same timescale as the proposed rules relating to environmental cases.

5.5 The Lord President attached to his letter to the Cabinet Secretary a copy of the draft Act of Sederunt which was now before the Council. The Cabinet Secretary had been invited to provide any comments on the content of the draft Act of Sederunt, but no comments had been received.

5.6 Mr McKay confirmed that, while the Cabinet Secretary had suggested an alternative approach in his letter to the Lord President, the Scottish Ministers were comfortable with the two-stage approach which had been outlined in correspondence. The Council had no comments on the terms of the draft Act of Sederunt.

5.7 It is anticipated that the work necessary to take forward stage two of the process will be commenced immediately following the implementation of stage one, with a view to bringing proposals for appropriate rules relating to protective expenses orders more generally before the Council at the earliest opportunity.

- **Rules to implement stage one of this matter to made accordingly.**

Item 6: Mediation in certain civil and commercial matters

6.1 The Council considered a letter from the Legal System Division of the Scottish Government regarding the implementation of Directive 2008/52/EC on mediation in certain civil and commercial matters. The Council noted that the Scottish Ministers were currently drafting a set of Regulations to implement the Directive. However, the letter from the Scottish Government had invited the Council to consider whether consequential changes would require to be made to the Court of Session Rules to reflect the requirements of the Directive. It had been suggested in the letter from the Scottish Government that court rules might be introduced in relation to Articles 5 (recourse to mediation), Article 6 (enforceability of agreements resulting from mediation) and Article 7 (confidentiality) of the Directive.

6.2 The Council took the view that it would always be open to a judge to invite parties to consider using mediation in an individual case. Doubts were therefore expressed as to whether it would be necessary to introduce a court rule specifically to give effect to the requirements of Article 5 of the Directive.

6.3 In relation to the enforcement of mediation agreements under Article 6, the Council noted the suggestion from the Legal System Division of the Scottish Government that a rule might be made that such agreements should be registered in the Books of Council and Session, to assist in clarifying the Court's jurisdiction in such matters where cross-border disputes are involved. However, the Council expressed some doubts as to whether a rule in those terms would clarify any doubts that might exist about the Court's jurisdiction in an individual case.

6.4 The Council noted that Article 7 of the Directive was essentially concerned with the issue of whether certain persons were compellable as witnesses. It took the view that that was a matter of substantive law, rather than a procedural matter for the rules of court. It therefore took the view that it was unlikely that any court rule would be required specifically to give effect to the requirements of Article 7 of the Directive.

6.5 The Legal System Division of the Scottish Government had also invited the Council to consider whether the existence of RCS 49.23, which provides that the Court may refer certain family actions to a mediator accredited to a specified family mediation organisation, should be extended to cover all family actions. The Council noted the recommendation of the Civil Courts Review Report (Chapter 5) in relation to the equivalent sheriff court ordinary cause rule. It took the view that the existence of RCS 49.23 did not preclude judges from inviting parties in any family or other action to use mediation. It therefore took the view that the Directive, in itself, did not necessitate an extension of RCS 49.23.

6.6 More generally, it was noted that consideration would require to be given to the implementation of the recommendations of the Civil Courts Review on alternative dispute resolution.

- **Council's views on the need for any court rules arising from the Directive to be communicated to the Legal System Division of the Scottish Government.**

Item 7: Chapter 64 – Timescales for searches under the Administration of Justice Act 1972

7.1 The Council considered the terms of a letter regarding a perceived flaw in the terms of RCS 64.12 and Forms 64.6 and Form 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.

7.2 The correspondent drew the Council's attention to the equivalent court rules in England and Wales, which provided 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. In comparison, the Court of Session rules and related forms simply provided that a search was not to take place while legal or professional advice was being taken on possible variation of the order. It

was suggested that the present approach created practical difficulties for Commissioners. The Council was therefore invited to consider whether the Court of Session rules (including the relevant forms) should be amended to adopt a similar approach as that taken in the rules in England and Wales.

7.3 The Council noted that Form 64.9 already advised the haver to seek legal or professional advice “as soon as possible” and that any steps to vary an order should be taken “at once”. It was also noted that Form 64.6 already included a general order that the haver must not destroy, conceal or tamper with listed items except in accordance with the order. However, a balance required to be struck between the Commissioner’s control of the search process and allowing the haver the opportunity to exercise his or her rights to seek legal or professional advice.

7.4 The correspondent referred to a recent or ongoing case in which practical difficulties had arisen. The Council therefore agreed that the correspondent should be invited to provide fuller details of the difficulties which had arisen in that case, once it was complete.

- **Correspondent to be invited to supply further details on the practical difficulties referred to in the letter.**

Item 8: Change of name of parties

8.1 The Council had previously been advised of the terms of new RCS 2.2 and the circumstances which led to the introduction of that rule. The rule was introduced to facilitate case management arrangements by providing for the Lord President to make a direction where it was apparent in advance that existing procedures under the Rules were unsuitable in particular proceedings, or for a particular type of proceedings. The first direction had been made on 23rd September, in relation to personal injury litigation concerning the drugs vioxx and celebrex.

8.2 Separately, issues had arisen in the Scottish courts about the procedural arrangements where a party to a large number of cases – such as a government department or financial institution – changed its name. A question arose as to whether this might best be done by a direction-making power.

8.3 The Lord President indicated that he had doubts as to whether RCS 2.2 could be used for that purpose. The Council had no views to offer and the Lord President decided to reflect further on the matter.

- **Lord President to give further consideration to this matter.**

Item 9: Foreign decrees in family and civil partnership actions

9.1 The Council considered a set of draft rules which had been prepared in light of Sheriff Jamieson's proposal to amend the Rules in relation to the treatment of foreign decrees in family and civil partnership actions. The Council had originally considered Sheriff Jamieson's proposals at its meeting on 11 January 2010. Representatives of the Private Office and the Sheriff Court Rules Council secretariat had met with Sheriff Jamieson in April 2010 to discuss the implications and the intended practical effect of the proposed rule changes. Further correspondence between the Private Office, Sheriff Jamieson, the Deputy Principal Clerk of Session and the Sheriff Court Rules Council secretariat had followed on from that meeting.

9.2 Sheriff Jamieson had put forward three proposals for rule changes. The first proposal was that actions for declarator or recognition or non-recognition of non-EU decrees of divorce, nullity of marriage or separation should be dealt with as a family action for the purposes of Chapter 49. The Council was advised that a consensus had emerged among those involved in discussions that the Rules should be amended to that effect.

9.3 The second proposal was that amendments should be made to apply the existing rules in Chapter 62 dealing with registration of foreign decrees, so that those rules applied to applications for non-recognition of EU decrees of divorce, legal separation and marriage annulment, as well as to applications for recognition of such decrees. A consensus had emerged among those involved in discussions that it would be appropriate to extend the relevant rules so that they applied to applications for non-recognition.

9.4 The third proposal was that consideration should be given as to whether separate rules should be made in Chapter 62 in relation to declarator of recognition or non-recognition of an order for dissolution or annulment of a civil partnership or separation of civil partners pronounced by a court of an EU member State. A consensus had emerged among those involved in discussions that the Court had insufficient powers to make such rules, as there appeared to be no statutory requirement or requirement under EU law to underpin them.

9.5 The Council had no observations to make on the terms of the draft Act of Sederunt and indicated that it was content for the rules to be made.

- **Rule changes to be made.**

Item 10: Use of envelopes in service of documents

10.1 The Council considered a letter received from the President of the Society of Messengers-at-Arms and Sheriff Officers (SMASO) which raised an issue as to whether envelopes should be used when documents are served by messengers-at-arms by way of being deposited or left under RCS 16.1(1)(a)(ii) and (iii). The letter referred to variations in practice when service is carried out by these methods. Complaints had been received that distress could arise when envelopes were not used when documents were served by these methods, as this could result in family members becoming aware of matters which persons believe ought to be their private business.

10.2 There was presently no requirement under the Rules for documents to be sealed in an envelope when served by these methods. Under RCS 16.3(3), it was only when documents were physically left in the hands of another person that the requirement to use an envelope arose. The Council did not consider that that RCS 16.3(3) precluded the use of a sealed envelope when a document is served by depositing it, or leaving it at a dwelling place or at work premises. It agreed with an assertion made in the letter from the President of SMASO that the question of whether or not an envelope should be used in those circumstances at present came down to the discretion of the messenger-at-arms.

10.3 The Council was of the view that, in order to remove any uncertainty, it would be appropriate to amend RCS 16.3(3) so that it provided that, where service of a document was executed by depositing or leaving it under RCS 16.1(1)(a)(ii) or (iii) or (b)(i), the document should be placed in a sealed envelope, regardless of whether it was placed in the hands of another person or was otherwise deposited or left in a dwelling place or place of business.

- **Rule change to be made on this matter and SMASO to be informed accordingly.**

Item 11: Any other business

11. There was no other business. The next meeting takes place on 10th January 2011 at 10.30am.