

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 27TH APRIL 2009**

Present: Lord President
Lord Nimmo Smith
Ronnie Clancy QC
Gerry Moynihan QC
Lesley Shand QC
Graeme Hawkes, Advocate
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor
Duncan Murray, Solicitor
Sydney Smith, Solicitor

In attendance: Lord Justice Clerk
Michael Anderson, Legal Secretary to the Lord President
David Smith, Deputy Legal Secretary to the Lord President
Bob Cockburn, Deputy Principal Clerk of Session
Colin McKay, SG Constitution, Law and Courts Directorate

Apologies: Lady Dorrian
Graeme Marwick, Principal Clerk of Session
Eugene Creally, Advocate
Fred Tyler, Solicitor

Item 1: Introduction and welcome

1. The Lord President welcomed those present and intimated the apologies for absence.

Item 2: Minutes of previous meeting and matters arising

2. The minutes of the previous meeting were approved. It was noted that a draft Act of Sederunt was currently being prepared in relation to electronic motion procedure in the Outer House. It was expected that the revised draft instrument would be available shortly and that a short consultation exercise could then be undertaken on its terms, prior to the instrument being considered by the Rules Council. It was reported that a consultation process was still ongoing in relation to the proposed rules relating to contempt of court. It was also reported that there had been no significant developments

since the Rules Council's last meeting in relation to the proposed rules on alternative dispute resolution. It was considered appropriate to await the outcome of the Civil Courts Review before taking any further action in relation to this matter.

Item 3: Update on Acts of Sederunt

3. Six Acts of Sederunt amending the Rules of the Court of Session had been made since the last meeting of the Council on 8 December 2008. The Council did not have any comments to make on the instruments that were made.

Item 4: Adoption and Children (Scotland) Act 2007

4.1 The Council was invited to consider a draft Act of Sederunt containing provision for applications made to the Court of Session under the Adoption and Children (Scotland) Act 2007. It was noted that the Sheriff Court Rules Council had established an adoption working group which had given detailed consideration to rules for equivalent applications made in the sheriff court. The draft Act of Sederunt, which seeks to substitute a new Chapter 67 into the Court of Session Rules, had been drafted with a view to aligning, so far as is appropriate, the procedures in both the Court of Session and the Sheriff Court. This included making similar provision for the imposition of a stricter procedural timetable for dealing with specified orders under the 2007 Act.

4.2 The Council noted that the implementation date for the relevant rules had now been put back from the end of June to the end of September 2009. As the draft Act of Sederunt was over 50 pages long, it was suggested that members of the Council might wish some further time to consider the details of the draft instrument. Members were invited to direct any comments on the draft instrument to the Private Office, preferably by the end of May. Mr McKay informed the Rules Council that a related issue had arisen in relation to concerns about the levels of payment and standards of training of curators *ad litem*. He had prepared a paper on that topic for consideration at the next meeting of the Sheriff Court Rules Council on 1 May.

- **Members of the Council to provide any comments on the draft Act of Sederunt to Private Office by the end of May 2009.**

Item 5: Inner House business

5. Members were advised of developments in relation to the Act of Sederunt which was intended to implement the recommendations of Lord Penrose following his review of Inner House business. A draft Act of Sederunt had been drafted, in consultation with Lord Penrose. The intention was that a short consultation process would now take place on the terms of the draft instrument and on recommendations contained in a report which had been prepared by Lord Penrose. It was reported that consultation letters would be issued later that week and that the consultation process would run until the end of June. It was also proposed that an open meeting of practitioners and other interested parties would take place in late May or early June, to allow issues to be raised in discussion. Once the consultation process was complete and the draft Act of Sederunt finalised, the instrument would be placed before the Rules Council for consideration at its next meeting.

- **The Council noted developments in relation to this matter.**

Item 6: Legislative changes with implications for the Rules

Repeal of section 726(2) of the Companies Act 1985

6.1 The Council considered the terms of a letter received by Private Office from the Office of the Solicitor to the Advocate General (OSAG) regarding the repeal of section 726(2) of the Companies Act 1985 by virtue of a provision contained in the Companies Act 2006. Section 726(2) of the 1985 Act currently provides that where, in Scotland, a limited company is a pursuer in an action or other legal proceedings, the court having jurisdiction in the matter may in certain circumstances order the company to find caution and sist the proceedings until caution is found. The repeal of the provision is due to come into force in October 2009.

6.2 The letter from OSAG suggested that the repeal of this provision may well have been inadvertent and they had queried whether the court could fill the legislative gap by inserting a rule into Chapter 33 of the Court of Session Rules which replicated the effect of the repealed provision. OSAG had also directed a similar query to the Secretary of the Sheriff Court Rules Council in respect of a proposal to make similar changes to the Sheriff Court Rules. The Council noted that the Secretary to the Sheriff Court Rules Council had written to OSAG stating that that Rules Council did not consider that what was proposed fell within its remit.

6.3 Although the Council noted that the Civil Court Rules in England and Wales were being altered to deal with this matter, some reservations were

expressed as to whether an amendment to the court rules would be the most appropriate solution to this potential difficulty, particularly as it had arisen as a result of a recent provision made in primary legislation. The Council indicated that it considered that it would be desirable to maintain the effect of the statutory provision which would shortly be repealed, but that it should fall to the Lord President and Private Office to reach a decision as to whether the Court of Session ultimately had the powers to make the rule change proposed by OSAG.

- **Private Office and the Lord President to determine the competency of the proposed rule change and to revert to OSAG.**

Crime (International Co-operation) Act 2003

6.4 The Council noted developments regarding rule changes that were required as a result of the coming into force of Schedule 4 to the 2003 Act, which was enacted as part of the implementation of the EU Council Framework Decision on the execution in the EU of orders freezing property or evidence (2003/577/JHA). The council had been advised of these legislative changes at its previous meeting on 8 December 2008.

6.5 It was noted that the Home Office had indicated that the intention was that these provisions would now be brought into force in autumn 2009. Private Office would still require to obtain further clarification from the Home Office regarding the policy intention behind the relevant provisions, but it was still anticipated that new rules would require to be inserted into Chapter 84 (applications under the Terrorism Act 2000) in respect of the form of application of domestic orders and also in Part VII of Chapter 62 in respect of overseas freezing orders.

- **Private Office to draft the necessary rule changes in consultation with the Deputy Principal Clerk of Session.**

Coroners and Justice Bill

6.6 The Council had before it a copy of Part 7 of the Coroners and Justice Bill, which seeks to make provision for the Court, on the application of the Scottish Ministers, to make exploitation proceeds orders. These are orders requiring a person to pay an amount into the Scottish Consolidated Fund in respect of proceeds obtained from the exploitation of material relating to a relevant offence.

6.7 The Council noted that it would seem necessary for a new rule to be inserted into the Court of Session Rules in relation to applications made under clause 149(3) of the latest version of the Bill. Where an exploitation proceeds

order has already been obtained, this clause provides for an application to be made to the Court for an order requiring the Scottish Ministers to repay a recovered amount to the respondent in circumstances where a relevant conviction is quashed. Rather than applying the default position, under which the application would require to be made by a fresh petition, it seems more appropriate that such an application should be made by way of a note in the existing process or by a letter to the Deputy Principal Clerk of Session.

- **Private Office to draft the necessary rule changes in consultation with the Deputy Principal Clerk of Session.**

Item 7: Judicial rate of interest

7.1 The Council considered the terms of a paper prepared by Private Office on the above matter. The Lord President had received correspondence from the Forum of Insurance Lawyers (FOIL), suggesting that the current rate of judicial interest was excessive and should be reduced, given that the base interest rate fixed by the Bank of England was currently much lower. Similar suggestions had been made by other practitioners.

7.2 The Council was advised that the current judicial rate of 8% had been in place since April 1993. An informal arrangement existed whereby any plans to change the rate would be discussed with the other jurisdictions in the UK. Private Office had made contact with officials in the Ministry of Justice who were responsible for the policy on the matter in England and Wales. Those officials had confirmed that they were still considering whether it would be appropriate to make any changes to the judicial rate of interest in that jurisdiction. The Council also noted a proposal made by the Scottish Law Commission in its 2005 Report on Interest on Debt and Damages that the judicial rate of interest could be fixed at an agreed level above the base rate set by the Bank of England.

7.3 The Lord President indicated that he saw some force in the arguments set out in the letter from FOIL. It was agreed that the judicial rate of interest is currently out of step and that, at this stage, the relevant policy officials in England and Wales should be advised that the Council takes the view that the rate should now be changed. The Council agreed that it can then reassess the position at its next meeting.

- **Private Office to contact the relevant officials in Ministry of Justice to advise them of the Council's views on this matter.**

Item 8: Form of order in procedure for recovery of documents under Chapter 64

8.1 The Council considered the terms of the Opinion of the Extra Division of the Inner House, dated 28 November 2008, in the cause *Sovereign Dimensional Survey Ltd. v. Cooper*. The Opinion raised a number of issues regarding the competency of orders made by the Court under section 1(1) of the Administration of Justice (Scotland) Act 1972, which related to the extended powers of the courts to order inspection of documents and other property. It was noted that the Opinion, in particular, raised issues about the competency of aspects of the standard forms 64-A (the form of order of court) and 64-B (the accompanying notice), as prescribed in the Court of Session Rules.

8.2 It was agreed that it fell to the Council to take a view on the competency of the forms in light of the observations made by the Extra Division in its Opinion. It was agreed that Mr Moynihan, Mr Hawkes and Mr Murray should form a working group to consider the matter further and report back to the Council at its next meeting.

- **Mr Moynihan, Mr Hawkes and Mr Murray to consider the Extra Division's Opinion on this matter and report back to the Council at its next meeting on any necessary amendments to the Rules.**

Item 9: Abuse of process

9.1 The Council considered a letter received by Private Office from the Secretary to the Sheriff Court Rules Council, querying whether the Court of Session had any intention of crystallising, in its own Rules, a set of provisions dealing with the general concept of abuse of process. This query followed on from an article which appeared on the matter in the Scots Law Times in January 2009. The Council noted that a new Chapter 21A of the Rules had been inserted into the Rules in the wake of the Inner House Opinion in the case *Tonner v. Reiach and Hall* 2008 SC 1. Those rules, which came into force on 1 December 2008, related to dismissal of a claim due to inordinate and inexcusable delay by a party or their agent, resulting in unfairness.

9.2 The Lord Justice Clerk indicated that the Report of the Civil Courts Review, which was expected to be published at the end of June or in early July, did not at present contain any specific proposals on this matter. It was expected that there would be more of a focus in the Report on the role of party litigants. The Lord President indicated that the general issue of abuse of process affected not only the Court of Session, but that it was also relevant to

sheriff court procedure. The possibility of establishing a joint working group, consisting of members of both the Court of Session Rules Council and the Sheriff Court Rules Council, was discussed. It was agreed that the question of establishing such a group, and who should participate in its work, should be revisited once the Report of the Civil Courts Review had been published.

- **Council to review the position at its next meeting.**

Item 10: Business Experts and Law Reform Report

10.1 Mr McKay presented a paper regarding a Report by the Business Experts and Law Reform Group (BELF), which had been established by the Cabinet Secretary for Justice. Mr McKay indicated that the Report contained a number of recommendations that touched upon the work of the Civil Courts Review. These included a proposed review of costs recovery rules, the work of the commercial court in the Court of Session and, in particular, the recommendation that the commercial court should issue informal practice statements from time to time. Since the Report had been published in November 2008, Mr McKay indicated that the Scottish Ministers had broadly welcomed its recommendations. Ministers had also contacted the Lord President on the recommendation in the Report regarding the simplification of procedural terminology. Mr McKay invited the Council to provide any comments on the contents of the Report.

10.2 The Lord Justice Clerk confirmed that most of the topics covered by the BELF Report overlapped with topics that would be considered in the Report by the Civil Courts Review. The two exceptions to that were the last two recommendations in the BELF Report relating to the commercial court in the Court of Session and the issuing of informal practice statements and the proposal to establish a dispute resolution centre in Scotland. The Lord Justice Clerk indicated that the Civil Courts Review had not been asked to consider those matters.

10.3 Members of the Council had no further comments on the terms of the BELF Report at this stage. However, it was agreed that the Report should be considered again once the Civil Courts Review had issued its Report and that the matter should be placed on the agenda for consideration at the Council's next meeting.

- **Council to review the position at its next meeting.**

Item 11: Environmental Decisions and Judicial Review

11.1 Mr McKay advised Members of the Council of correspondence between the UK authorities and the European Commission regarding access to and affordability of remedies in environmental cases. The European Commission had served a formal notice related to the UK's alleged non-compliance with Article 3(7) of EU Council Directive 85/337/EC and Article 4 of EU Council Directive 91/61/EC, as amended by EU Council Directive 03/35/EC ("the Public Participation Directive"). In a letter to the European Commission dated 5 September 2008, the UK Permanent Representation to the European Union had suggested that the Scottish Government intended to make contact with the Lord President about the possibility of court rules being made in order to ensure compliance with this Directive, with particular emphasis on the possibility of provision being made regarding the granting of protective costs orders in such cases.

11.2 The Council noted that, although the issue had arisen in the context of environmental cases, it had a potentially wider application. Mr Moynihan drew members' attention to the Court of Appeal's decision dated 2 March 2009 in the case of *Morgan v. Hinton Organics*. The Opinion seemed to suggest that the Court of Appeal is uncomfortable about taking an approach that is too restrictive in this area. Mr Moynihan indicated that the only Scottish decision that he was aware of that considered protective cost orders was Lord Glennie's decision in the Outer House dated 9 December 2005 in the petitions for judicial review by *McArthur, Black and Kennedy*, in which it was held that such an order might be competent.

- **The Council noted the position. The Lord President to consider whether it will be appropriate to make court rules in relation to protective costs orders, in light of any further correspondence from the Scottish Government on this matter.**

Item 12: Permission to appeal against a decision of the Upper Tribunal

12.1 The Council considered the terms of correspondence between the Convener of the Justice Committee at the Scottish Parliament and the Cabinet Secretary for Justice regarding the *vires* of, and policy behind, rule 41.59 of the Court of Session Rules, which had been inserted in November 2008 by the Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2008 (SSI 2008/329). The rule in question introduced a two-leg criterion for permission to appeal to the Court of Session from a decision of the Upper Tribunal established under the Tribunal, Courts and Enforcement Act 2007. Mr McKay indicated that the Subordinate Legislation Committee had queried

the *vires* of the rule when it considered the instrument and that the Lord President's Private Office had responded to that query. This had been noted by the Convener of the Justice Committee, who also raised concerns that there may be an argument of possible erosion of the supervisory jurisdiction of the Court of Session. Mr McKay confirmed that his Division had sought the advice of the Scottish Government Legal Directorate on the *vires* of the rule.

12.2 The Lord President emphasised that the matter was not currently before the Scottish Parliament as a live issue. It was noted that the Rules Council had been advised of the rule at its previous meeting and no question had been raised on *vires* at that time. The Lord President invited views from members on the policy behind the rule. The Council had no comments on that matter. Following some further discussion about the *vires* of the rule in the context of the terms of section 13 of the Tribunals, Courts and Enforcement Act 2007, the Council agreed to note the concerns expressed by the Convener of the Justice Committee at the Scottish Parliament. The Lord President indicated that he was not minded to alter the rule, on the basis that if a person had any concerns about the *vires* of the rule, it would be open to them to challenge it when the Court was considering an appeal against a decision of the Upper Tribunal.

- **The Council noted the terms of the correspondence from the Convener of the Justice Committee and resolved to take no further action.**

Item 13: Any other competent business.

13. The next meeting of the Council is to be on 28th September 2009 at 10am. There was no other business.