

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 28TH SEPTEMBER 2009**

Present: Lord President
Lady Dorrian
Gerry Moynihan QC
Lesley Shand QC
Eugene Creally, Advocate
Graeme Hawkes, Advocate
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor
Duncan Murray, Solicitor
Sydney Smith, Solicitor
Fred Tyler, 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: Lord Nimmo Smith
Ronnie Clancy QC
Graeme Marwick, Principal Clerk of Session

Item 1: Introduction and welcome

1. The Lord President welcomed those present and intimated the apologies for absence. It was noted that Lord Nimmo Smith would be retiring as a judge at the end of September and that he would at that time cease to be a member of the Council. The Lord President indicated that Lord Reed would be replacing Lord Nimmo Smith as a member of the Council.

Item 2: Minutes of previous meeting and matters arising

2.1 The minutes of the previous meeting were approved.

2.2 In relation to the action point after paragraph 6.7 of the minutes, relating to the Coroners and Justice Bill, it was noted that the proposed rule changes were still in hand. In relation to the action point after paragraph 6.3, relating

to the repeal of section 726(2) of the Companies Act 1985, it was noted that Private Office had contacted the Office of the Solicitor to the Advocate General to confirm that it was not considered that the Court of Session had the powers to make the rule change that was proposed. Robin Macpherson advised the Council that the provision in question had now been repealed. The repealing provision relating to section 726(2) of the 1985 Act had not been brought into force. The Council noted the position in that respect.

2.3 The Lord President advised the Council that there were a number of other items that could have been placed on the agenda for the present meeting. However, it had been necessary to omit certain items in order to make the agenda more manageable. In order to deal with these additional items without undue delay, the Lord President indicated that he would be proposing that the next meeting of the Council should take place earlier than would normally be the case.

Item 3: Update on Acts of Sederunt

3. Since the last meeting of the Council on 27 April 2009, two Acts of Sederunt had been made which amended the Rules of the Court of Session. These were the Act of Sederunt (Rules of the Court of Session Amendment No. 7) (Adoption and Children) (Scotland) Act 2007) 2009 (SSI 2009/283) and the Act of Sederunt (Devolution Issues) (Appeals and References to the Supreme Court) 2009 (SSI 2009/323). The Council did not have any comments to make on either of these instruments.

Item 4: Legislative changes with implications for the Rules

Energy Act 2008 – Interdicts against unknown persons

4.1 The Council considered a paper which had been prepared by Private Office on this matter, together with accompanying documents. The accompanying documents included a paper which had been prepared by the Office of the Solicitor to the Advocate General.

4.2 It was noted that the Energy Act 2008 included provision allowing the Secretary of State or Scottish Ministers to apply to the Court for an interdict restraining certain unlicensed offshore activities. The 2008 Act included provision enabling rules of court to provide for an injunction or interdict to be issued against a person whose identity is unknown. The question raised for the Council was whether rules should be made in relation to that matter and, if so, the form which such rules should take. It was noted that, in England and Wales, a Practice Direction within the Civil Procedure Rules had set out a procedure in relation to the matter. It was also noted that there were existing

rules within the Rules of the Court of Session which could be adapted to make provision as to how an application for interdict against an unidentified person could be served.

4.3 The Lord President indicated that he considered that it would be prudent to exercise the rule-making power in this instance, but that he would be inclined to make the relevant rules applicable only to the 2008 Act, rather than to apply any wider scope. There was general agreement to adopt that approach. The Lord President suggested that, while guidance might be drawn from the Practice Direction applicable in England and Wales, the existing provisions within the Court of Session Rules could provide a useful template in proceeding with the rule changes. It was noted that the Practice Direction in England and Wales provided for applications in that jurisdiction to be supported by witness statements. However, the Council agreed that, in cases in Scotland, it seemed more appropriate for applications to be supported by averments.

4.4 Mr Moynihan noted that the paper prepared by Private Office had suggested a procedure under the 2008 Act in relation to interdicts against unknown persons. It was suggested in the paper that a summons could be signetted or a petition presented against an unknown person, that it could then be served on those persons who seemed to be affected and that a motion could then be made for interim interdict. If the relevant tests were satisfied and interim interdict was granted, it had been suggested that the interim interdict could then be served in the same way.

4.5 Mr Moynihan indicated that he had a concern that that proposed procedure did not appear to accord with the Ministry of Justice's intention, as outlined in the paper from the Office of the Solicitor to the Advocate General. The intention of the Ministry of Justice appeared to be that there are circumstances in which it might be necessary to serve and immediately seek an injunction or interdict, even before the identity of the defender is known. Mr Moynihan considered that it would be appropriate to make provision for immediate service of the application, which may, in itself, assist in identifying interested parties. It was agreed that Mr Moynihan's concerns should be taken into account in drafting the relevant rules.

- **Private Office to proceed with the drafting of appropriate rules in light of the Council's comments.**

Human Fertilisation and Embryology Act 2008

4.6 The Council noted that provision was currently made in section 30 of the Human Fertilisation and Embryology Act 1990 for the Court to make a

parental order, under which a child born to a surrogate mother is to be treated in law as the child of the parties of a marriage in certain circumstances. It was noted that section 30 of the 1990 Act would be repealed by the Human Fertilisation and Embryology Act 2008 and that, at the same time, sections 54 and 55 of the 2008 Act would create a new statutory regime for parental orders. The Council agreed that Chapter 81 of the Rules of the Court of Session, which currently makes provision in relation to the 1990 Act, should be revoked (with any necessary savings provision) and that a new Chapter should be inserted into the Rules to deal with the 2008 Act. It was also agreed that the procedural framework for applications under the 2008 Act should be identical to that which currently exists for the 1990 Act, subject to the need to make amendments reflecting the fact that applications for parental orders under the new provisions will no longer be confined to married couples and that account will require to be taken of applications made under section 55(1) of the 2008 Act.

- **Private Office to proceed with the drafting of appropriate rules as indicated.**

Transfer of the Asylum and Immigration Tribunal functions

4.7 The Council considered a paper that had been prepared by Private Office on the UK Government's proposal to make legislative provision abolishing the Asylum and Immigration Tribunal and transferring its jurisdiction into the unified Tribunals structure, as provided for by the Tribunals, Courts and Enforcement Act 2007. It was noted that the UK Government's intention was to lay a Transfer Order before Parliament in late 2009. It was also noted that the UK Government proposed that the First-tier Tribunal would be similar in procedure and construct to the current Asylum and Immigration Tribunal and that the review function currently undertaken by the latter would in future be carried out by the Upper Tribunal.

4.8 The Council noted that Chapter 41 of the Rules of the Court of Session contained particular rules regarding the Court's interaction with the Asylum and Immigration Tribunal. A draft Act of Sederunt was presented to members of the Council, together with a copy of a draft of the Transfer Order. The draft Act of Sederunt contained proposed amendments to the relevant rules in Chapter 41 and contained a savings provision. Members of the Council confirmed that they were content with the general approach taken in the draft Act of Sederunt and had no further comments on its terms.

- **Draft Act of Sederunt to be finalised and made in due course.**

Item 5: Review of Inner House business

5.1 Members were advised that a consultation had taken place on a draft of the Act of Sederunt which was intended to implement the recommendations of Lord Penrose following his report on Inner House business. As part of that consultation process, an open meeting had been arranged with interested parties. The Lord President noted that the open meeting, which had been chaired by Lord Reed and which Lord Penrose had also attended, appeared to have been a useful exercise.

5.2 The Council was advised that amendments had been made to the draft Act of Sederunt following the consultation process. The Council had before it a revised draft of the Act of Sederunt, covering proposed Chapters 37A to 40 of the Rules. The Council was also provided with a note prepared by Private Office, which explained why various amendments had been made to the version of the instrument that had been consulted upon.

5.3 Members were advised that a draft set of rules was not yet available in relation to Chapter 41, which deals with statutory appeals. Private Office was still proceeding with the drafting work in relation to those provisions and it was now anticipated that they could be progressed separately from the rules on proposed Chapters 37A to 40.

5.4 Two issues, in particular, arising from consultation responses were drawn to the attention of the Council. First, one respondent to the consultation had queried whether the Court had sufficient powers to include certain rules in the Act of Sederunt which sought to (a) confer power on a procedural judge to dispose of a reclaiming motion or appeal on the basis of procedural failure by a party and (b) enable a procedural judge to grant applications for leave to appeal.

5.5 It was noted in that regard that specific reference had been made to the limits of section 5(ba) of the Court of Session Act 1988, which provides that the Court has power by act of sederunt to make provision as to the quorum for a Division of the Inner House considering solely procedural matters. The Lord President confirmed that, in policy terms, it was considered very important that the relevant powers of disposal should be included in the new rules. The Lord President indicated that he was inclined to take a robust approach to arguments that the proposed rules in question were outwith the Court's powers. He was inclined to proceed with the rules as currently drafted, on the basis that if those rules were successfully challenged, the matter may have to be referred back to the Scottish Parliament. Members of the Council indicated that they were content to proceed on that basis.

5.6 The second issue which was specifically drawn to the attention of the Council concerned the terms of a proposed rule in Chapter 40 (appeals from inferior courts) which would make provision for an appellant or respondent to apply by motion to a procedural judge for a sist of the process, within 14 days after the date of receipt of the appeal process by the Deputy Principal Clerk of Session. It was noted that one of the respondents to the consultation had suggested that that draft rule (which was based on the terms of existing rule 40.8) was unnecessary and too restrictive. It was also noted that no equivalent rule was contained in the revised draft Chapters 38 and 39 of the Rules. It was agreed that, in relation to the matters dealt with in this particular rule, provision should be made consistently across all the relevant Chapters.

5.7 The Lord President advised the Council that there was a need to give further notice of the proposed rule changes to those persons or bodies that will require to consider what changes require to be made in relation to the table of fees under Chapter 42 of the Rules and in relation to legal aid arrangements. For these reasons, it was now proposed that the Act of Sederunt would be brought into force in Spring 2010.

- **Private Office to proceed with finalising the drafting of these rules in light of the Council's comments.**

Item 6: New motions procedure in the Outer House

6.1 Mr Cockburn spoke to a paper on progress on the Act of Sederunt relating to the introduction, in the Rules of the Court of Session, of a new electronic motions procedure in causes in the Outer House.

6.2 The Council was provided with a draft Act of Sederunt relating to this matter, together with a related draft Practice Note and Direction. It was noted that the draft Act of Sederunt sought to restructure Chapter 23 of the Rules (relating to motions). The intention was that, subject to the exceptions mentioned in paragraph 6.3 below, the procedure introduced by the new rules would apply to all causes in which each of the parties is represented by an agent. It would also allow party litigants to opt in to the new procedure if they can nominate an email address for that purpose. It was noted that the intention was that the new rules and related Practice Note and Direction would be made in October 2009 and would be brought into force in January 2010.

6.3 Mr Cockburn advised the Council of the expansion of the pilot scheme, upon which the rule changes were based. Initially, three firms were involved in the pilot scheme. Eleven firms are now involved and at present 36% of all motions are dealt with under the pilot scheme. However, like the proposed rules in the draft Act of Sederunt, the pilot scheme does not extend to petitions, causes in the Commercial Court and causes in the Inner House. One of the main features of the scheme is that unstarred motions are dealt with in 4 days, rather than in 5 days as under the procedure set out in existing Chapter 23.

6.4 Mr Cockburn advised the Council that those firms which currently participate in the pilot scheme had been consulted about the terms of the draft Act of Sederunt and Practice Note. Some alterations had been made to both of these documents as a result of comments made by respondents to the consultation process. It was noted that one of the respondents to the consultation had suggested that specific provision should be made within the new rules for dispensing with or shortening intimation periods, in light of the fact that existing rule 23.3(3) includes such provision. As a result of these comments, provision for a dispensing power had been included in the draft Act of Sederunt in square brackets, subject to any views that the Council may have on this matter. The Council considered some competing arguments as to whether or not it would be appropriate to include such provision. However, it was ultimately agreed that it was important to retain such provision within the new rules.

6.5 Members of the Council were asked whether they had any further comments about the draft Act of Sederunt. Mr Murray expressed some concern about the principle of extending the proposed new rules to party litigants, due to the potential volume of emails that might be received if that were to be the case. Mr Cockburn advised that he understood Mr Murray's concern, but noted the principle that the Court generally seeks to treat all parties in the same way, whether or not they are represented. It was agreed that further consideration would be given to Mr Murray's concerns prior to the Act of Sederunt and accompanying documents being finalised.

- **Private Office and Deputy Principal Clerk to take into account the observations made by Members of the Council in finalising the Act of Sederunt and accompanying documents.**

Item 7: Form of order in procedure for recovery of documents under Chapter 64 of the Rules of the Court of Session

7.1 Mr Moynihan spoke to a paper that he had prepared in conjunction with Mr Hawkes and Mr Murray in relation to this matter. The issue raised was whether it would be appropriate, in light of the Opinion of the Extra Division of the Inner House in *Sovereign Dimensional Survey Ltd. v. Cooper*, to amend the wording in the standard forms (Forms 64-A and B) which is used following the grant of an order under section 1 of the Administration of Justice (Scotland) Act 1972.

7.2 Mr Moynihan noted that the Extra Division had identified two issues of concern relating to the competency of matters that can be dealt with under section 1 of the 1972 Act. However, the Court recognised that it had not been addressed on those matters of competency and so it was content to leave those matters to be considered, if appropriate, in another case.

7.3 Mr Moynihan advised Members that he and Mr Hawkes and Mr Murray had concluded that a robust view should be taken on the concerns expressed by the Extra Division. Having carefully considered the competency issues raised and the content of the relevant forms, Mr Moynihan, Mr Hawkes and Mr Murray took the view that it was not self evident that a fundamental problem exists. Therefore, they were not in favour of any substantial amendments being made to the forms. In any case, if there was any concern, they considered that that would be a matter that would require to be dealt with in legislation rather than the Rules.

7.4 Nevertheless, Mr Moynihan indicated that he had identified, with Mr Hawkes and Mr Murray, two examples of apparent deficiencies in the wording used in Form A. In paragraph (2) of the section of the form which begins "ORDERS the haver...", it was suggested that it might sometimes be inappropriate to seek access to a computer, in which case this part of the order could be an unjustified infringement of the rights of the haver under Article 8 of the ECHR. It was therefore suggested that an italicised reminder such as "*(if appropriate)*" should be inserted in this part of the form.

7.5 In relation to paragraph (5) of the same section of the form, Mr Moynihan advised that he had agreed with Mr Hawkes and Mr Murray that it would be appropriate to maintain the standard requirement for the haver to provide the Commissioner with the list of names and addresses of everyone to whom he has given any of the listed items. However, he advised that they could see no proper basis in section 1 of the 1972 Act for the haver to be compelled to provide the names and addresses of everyone who has supplied him with any of the listed items. Accordingly, they suggested that the default inclusion of the latter wording in paragraph (5) of the form is inappropriate and should be deleted.

7.6 More generally, Mr Moynihan advised that he, Mr Hawkes and Mr Murray agreed that the terms of rule 64.6 might usefully be varied to clarify that the Form 64-A is a style and not the prescriptive content of the order that the Court may pronounce. The Council confirmed that it was content with Mr Moynihan, Mr Hawkes and Mr Murray's recommendations for rule changes in relation to this matter.

- **Private Office to proceed to draft appropriate rule changes in light of Mr Moynihan, Mr Hawkes and Mr Murray's recommendations.**

Item 8: Judicial rate of interest

8.1 The Council considered the terms of a paper prepared by Private Office regarding representations that had been made to lower the existing judicial rate of interest. The current rate of 8% was fixed in 1993 and is set out at rule 7.7 of the Rules of the Court of Session. The same rate has also been applied in other jurisdictions within the UK since 1993. At its previous meeting on 27 April, the Council had considered correspondence received from the Forum of Insurance Lawyers (FOIL) in which it had been suggested that the judicial rate of interest should be reduced to a figure of around 1.5% above the base rate set by the Bank of England, in light of the fact that the base rate was currently fixed at a much lower level (0.5% at the time of the meeting).

8.2 The Council had previously been advised that there was an agreement in place between the respective UK jurisdictions to consult with each other before altering the judicial rate of interest. At its meeting on 27 April, the Council had agreed that Private Office should contact officials in the Ministry of Justice and advise them that the Council was inclined to take the view that the judicial rate of interest should now be changed.

8.3 The Council was advised that Private Office had since informed Ministry of Justice policy officials of the Council's views. Enquiries had been made as to the Ministry of Justice's latest position on the matter. Private Office had been informed that the Ministry of Justice had carried out a comparative analysis of High Street and other interest rates, in order to inform the decision that will ultimately be reached in relation to England and Wales. However, policy officials at the Ministry of Justice had informed Private Office that their submission to the relevant Minister was still being finalised and had not yet been sent. A decision was therefore still awaited as to whether the judicial rate of interest should be changed in England and Wales.

8.4 The Council was also advised that Ministry of Justice policy officials had expressed some reservations about the extent to which they could share, with Private Office and the Council, the information which will be used to inform Ministers' decision on this matter in England and Wales.

8.5 In light of these developments, the Council considered whether it would be appropriate for a separate investigatory exercise to be carried out in Scotland, which could then be used to inform the formulation or refinement of a distinct policy position on this matter in Scotland. Alternatively, further time might be allowed to enable the Ministry of Justice to complete its processes for obtaining a decision on a possible rate change in England and Wales. It was agreed that further time should be allowed for a decision to be taken in England and Wales on this matter. It was also agreed that, in the meantime, Private Office should contact FOIL to advise them of the latest position.

- **Private Office to continue to obtain updates on progress from Ministry of Justice and to contact FOIL with an update on the latest position on this matter. Council to review the position at its next meeting.**

Item 9: Applications for interim payments of damages in personal injury actions

9.1 The Council considered a letter received from Gildeas solicitors, which requested that the Council give consideration to a proposed amendment to rule 43.11(5). The request for the rule change arose from comments made by Lord Malcolm in an Opinion on 11 June 2009 in the case *Cameron v. Gellatly & AXA Corporate Assurance SA*. Rule 43.11 permits a pursuer, at any time after defences have been lodged in a personal injuries action, to apply by motion for an order for interim payment of damages to him by the defender. Lord Malcolm had suggested that it might be appropriate for a clarifying amendment to be made to paragraph (5) of rule 43.11. The aim of the clarifying amendment would be to state in clear terms that an order under this rule could be made against a defender where that defender is a person in respect of whose liability an insurer under section 151 of the Road Traffic Act 1988 will be liable to make payment.

9.2 It was agreed that it would be appropriate for the proposed rule changes to be considered in the first instance by the Personal Injuries User Group. The Personal Injuries User Group could then report to the Council at its next meeting with any recommended rule change.

- **Personal Injuries User Group to be invited to consider whether or not an amendment should be made to rule 43.11(5) and to report to the Council with recommendations at the Council's next meeting.**

Item 10: Derivative Proceedings

10.1 Mr Hawkes spoke to a short paper that he had prepared in relation to derivative proceedings under Chapter 2 of Part 11 of the Companies Act 2006. It was noted that, in a postscript to his Opinion in the petition of *Alexander Marshall Wishart*, issued on 12 February 2009, Lord Glennie had encouraged the Council to address the problems which he perceived in the requirement for separate proceedings to be raised seeking leave to initiate derivative proceedings under the 2006 Act. Lord Glennie had raised the possibility of the Rules of Court enabling a prospective litigant to seek leave by means of a Note or some other proceeding ancillary to the proposed derivative action itself, rather than having to proceed by a petition. Lord Glennie had also identified certain disadvantages in the current procedure, such as the risk that the derivative action may prescribe if leave proceedings are protracted and the difficulties in regulating the position on expenses prospectively.

10.2 It was noted that Lord Glennie's decision had been reclaimed and that a decision had been issued by an Extra Division of the Inner House in July 2009. Mr Hawkes indicated that the Inner House decision included a comprehensive analysis of the statutory scheme and clear guidance as to the correct approach to be taken in applications for leave to raise derivative proceedings. The Inner House had determined that proceedings for leave must be raised in a separate process from the action itself, by means of a petition. In addition, it had interpreted the meaning of the statutory provisions relating to the substantive requirements of an application for leave and had dealt with the issue of the competency and practicalities of a prospective indemnity for expenses.

10.3 On that basis, Mr Hawkes invited the Council to note the position and to take the view that, the Inner House having addressed fully all the concerns raised by Lord Glennie, no further action need be taken. The Council agreed that no further action was required.

- **The Council noted the position in light of the Inner House decision on this matter and resolved to take no further action.**

Item 11: Environmental Decisions and Judicial Reviews

11.1 The Council was advised of recent developments in relation to the issue of compliance with the requirements of the Public Participation Directive regarding access to, and affordability of, remedies in environmental cases.

11.2 The Lord President informed the Council that amendments had been brought forward by an MSP during the passage of the Climate Change (Scotland) Bill which had included specific provision for the court to make protective cost orders in judicial review proceedings relating to or arising out of the provisions of the Bill (It was noted that the Bill was now an Act of the Scottish Parliament, as it received Royal Assent on 4 August 2009).

11.3 The Lord President advised the Council that he had spoken to Mr Stevenson, the Minister for Transport, Infrastructure and Climate Change, prior to the Scottish Parliament's Stage 3 debate on the Bill. The Lord President had indicated to Mr Stevenson that he was considering the issue of whether court rules should be made in relation to protective cost orders, but that he wished to take into account any recommendations that might be made on the matter in the Report of the Civil Courts Review. The Council noted that Mr Stevenson had advised the Parliament of the Lord President's position at the Stage 3 debate and had indicated at that time that the Scottish Government did not see a need for the proposed provisions and would, in any case, prefer not to legislate in a piecemeal fashion on the matter. The Council noted that the proposed amendments to the Bill were withdrawn in light of Mr Stevenson's comments.

11.4 The Lord Justice Clerk confirmed that the matter arises in a more general context in the report of the Civil Courts Review, which would be issued on 30 September.

- **The Lord President to consider these matters further in light of any relevant recommendations made in the Report of the Civil Courts Review.**

Item 12: Any other competent business.

12. The next meeting of the Council is to be on 11th January 2010 at 10.30am. There was no other business.