

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 8TH DECEMBER 2008**

Present: Lord President
Lord Nimmo Smith
Ronnie Clancy QC
Graeme Hawkes, Advocate
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor
Duncan Murray, Solicitor
Sydney Smith, Solicitor
Fred Tyler, Solicitor

In attendance: Michael Anderson, Legal Secretary to the Lord President
Bob Cockburn, Deputy Principal Clerk of Session
David Smith, Deputy Legal Secretary to the Lord President
Roderick Macpherson, Society of Messengers-at-Arms and
Sheriff Officers (re. the matter discussed at paras. 6.1 – 6.6 below)
Stuart Hunter, Society of Messengers-at-Arms and Sheriff Officers
(re. the matter discussed at paras. 6.1 – 6.6 below)

Apologies: Lord Justice Clerk
Eugene Creally, Advocate
Graeme Marwick, Principal Clerk of Session
Gerry Moynihan QC
Colin McKay, SG Constitution, Law and Courts Directorate
Lesley Shand QC

Item 1: Introduction and welcome

1. The Lord President welcomed those present, including Roderick Macpherson and Stuart Hunter, who were attending the meeting as representatives of the Society of Messengers-at-Arms and Sheriff Officers, to speak to the issue of service of Court of Session documents furth of Scotland. The Lord President also intimated the apologies for absence.

Item 2: Minutes of previous meeting

2. The minutes of the previous meeting were approved. There were no matters arising.

Item 3: Update on Acts of Sederunt

3. There were 6 Acts of Sederunt made since the last meeting of the Rules Council on 10 March 2008. The Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2008 made a number of changes to the Court of Session Rules in relation to issues that the Council had considered at its last meeting. The Council did not have any comments to make on the instruments that were made.

Item 4: Bankruptcy and Diligence (Scotland) Act 2007

4.1 Lord Nimmo Smith, in his capacity as chairman of the Lord President's Advisory Group on Diligence Rules, spoke to a paper on progress on the implementation of the above Act. He indicated that the Group had met on four occasions since the Council last met and would be meeting again on the afternoon of 8th December 2008. An Act of Sederunt had been made containing the rules required as a result of phase 1 of the Scottish Government's implementation of the 2007 Act.

4.2 The Group was currently considering and preparing the rules of court necessary for phase 2 of the implementation programme, relating to Parts 5 (inhibition) and 10 (arrestment in execution and action of furthcoming) of the Act. The main changes resulted in the commencement of Part 5. Provisions in the Act remove the need for letters of inhibition and make provision for the form of schedule of inhibition and certificate of execution of inhibition to be prescribed by Scottish Ministers rather than by the court. Accordingly, the references to letters of inhibition and the relevant forms are to be removed from the rules. An amendment to the rules is also required to reflect amendments made to section 155 of the Titles to Land (Consolidation) (Scotland) Act 1868 in relation to the date on which inhibition takes effect.

4.3 In relation to Part 10 of the Act, amendments are required to Form 16.15-B (form of schedule of arrestment on the dependence) and a new Form 16.16 is required for service of a final copy decree in an action on the dependence of which a creditor has executed an arrestment. The Group is now considering the detail of Rules required for phase 3 of the implementation programme in relation to Parts 8 and 15 of the 2007 Act (relating respectively to money attachment and actions for removing from heritable property). It is currently proposed that those provisions will be brought into force in late June 2009.

4.4 A draft Act of Sederunt had been circulated. The Council had no comments to make on that draft Act of Sederunt.

- **The Council noted the position on the process of implementing this Act**

Item 5: Legislative changes with implications for the Rules

Adoption and Children (Scotland) Act 2007

5.1 The Council was advised of developments in relation to proposed amendments to Chapter 67 of the Court of Session Rules as a result of the 2007 Act. The current intention was to bring the Act into force at the end of June 2009. The Council was advised that amendments to the Sheriff Court Rules were currently being advanced and it was anticipated that a draft Act of Sederunt making the necessary changes to the Court of Session Rules would be made available to members in the early part of 2009. The work on the rules would involve trying to align the Court of Session and Sheriff Court adoption procedures as far as possible.

- **The Council noted the position on the process of implementing this Act**

Counter-Terrorism Act 2008 – financial restrictions proceedings

5.2 The Council was advised that an Act of Sederunt had been made on 2 December 2008 reflecting the financial restrictions proceedings in Part 6 of the Counter-Terrorism 2008 Act. Part 6 of the 2008 Act provides that, where the Treasury make any decision under one of the UN Terrorism Orders, the Anti-Terrorism, Crime and Security Act 2001 or Schedule 7 to the 2008 Act, any person affected by the decision may apply to the Court of Session to have it set aside.

5.3 The Act of Sederunt provided for a procedure to make applications to set aside Treasury decisions and claims related to such applications. Also included were a rule regarding the disclosure of material by the Treasury, a rule setting out the procedure for the Treasury to make applications not to disclose material, a rule on hearings for such applications, and rules on the appointment of special advocates and communication about proceedings by special advocates. The Council had no comment on this Act of Sederunt.

- **The Council noted the position**

Banking Bill

5.4 The Council was advised of the implications for the Court of Session Rules arising from Parts 2 and 3 of the Banking Bill. As drafted, Part 2 of the Bill would make provision for a new bank insolvency procedure, while Part 3 would make provision for a new bank administration procedure. Both Parts 2 and 3 of the Bill would apply provisions in the Insolvency Act 1986, with modification. It was anticipated that the main rule changes would relate to the form in which various applications under the Bill could be made. It was noted that any amendments to the Court of Session Rules would require to reflect any subsequent amendments made to the Bill and the terms of any rules made by the Treasury to give effect to Parts 2 and 3. It was anticipated that the relevant legislative provisions would come into force at the end of February 2009.

- **Necessary changes to the rules arising from this Bill to be taken forward by the Private Office and the Deputy Principal Clerk of Session**

Crime (International Co-operation) Act 2003

5.5 The Council was advised of rule changes 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). It was 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 into Part VII of Chapter 62 in respect of overseas freezing orders. Given the terms of paragraph 25E(2) of Schedule 4 to the 2000 Act, particular consideration would require to be given to the mechanism by which the court is to consider overseas freezing orders on its own initiative, without any application being made to it.

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

Item 6: Suggestions for rule changes

Service of documents elsewhere in the United Kingdom

(This item was, for the convenience of those attending, taken as the first item of substantive business.)

6.1 The Council considered the terms of a paper prepared by Private Office which outlined the development leading to the current requirement for citation to be witnessed. It was noted that, historically, more than one witness

was required to the service of documents. However, this requirement had been modified in statute. Section 32 of the Debtors (Scotland) Act 1838 and section 1 of the Citations (Scotland) Act 1846 imposed a statutory requirement for execution of service to be witnessed by one witness and those provisions are still in force. Since then, the requirement for one witness had been reflected in the various consolidated Acts of Sederunt which set out the Court of Session Rules. It was thought possible for the court to modify, amend or repeal the relevant statutory provisions by act of sederunt, by virtue of the court's power under section 5(m) of the Court of Session Act 1988.

6.2 The Council then heard from Mr Macpherson and Mr Hunter, both representing the Society of Messengers-at-Arms and Sheriff Officers, regarding this matter. Mr Macpherson spoke to a letter from the Society which was placed before the Council.

6.3 Mr Macpherson explained that service of Court of Session documents furth of Scotland historically took place by edictal citation. This was changed by an Act of Sederunt made in 1971, which provided for personal service of such documents in other parts of the United Kingdom. He pointed out that there were differences in practice between the requirements of service in Scotland and in England. For example, in England, documents are sometimes served on a Sunday. This does not occur in Scotland.

6.4 Mr Macpherson pointed out that Her Majesty's Court Service had suggested, as part of a consultation process on proposed changes to the Civil Procedure Rules in England and Wales, that the rules on service of documents were regulated by the jurisdiction in which service was carried out. However, the case of *Greenwoods Ltd. v. Ans Homes Ltd.* [2007] CSOH 13 had suggested otherwise. The Society was concerned that if the Court of Session can regulate modes of service outwith Scotland, then the rules in England and Wales can apply where service of documents occurs in Scotland. No one profession was responsible in England and Wales for serving documents: this was in marked contrast to the position in Scotland, where only a messenger-at-arms, as an accredited representative of the Sovereign, could serve Court of Session documents by hand. The Society had made representations that any provision allowing process servers from England and Wales to serve documents in Scotland would require to be included in primary legislation.

6.5 Mr Macpherson also stated that the invariable custom in England was that service of documents took place without a witness. Messengers-at-arms were easily recognisable as they were always accompanied by a witness. Members of the Society were used to working in pairs and it was considered useful for two persons to be in attendance when service took place in order to

provide confirmation of service and in case matters got heated. Members of the Society were likely to be anxious if the requirement for witnessing were changed. Mr Macpherson also noted that the fees for service of documents by a messenger-at-arms, accompanied by a witness, were lower than the fees charged by process servers acting on their own. Removing the requirement for a witness was not considered likely to result in any reduction in costs. Mr Macpherson suggested that these were all reasons tending to suggest that no change was required in the rules.

6.6 The Council considered the matter further after Mr Macpherson and Mr Munro had left the meeting. The Council observed that any proposed changes to the Civil Procedure Rules in England and Wales were outwith its remit. It noted that the requirement for a witness to attend when service was carried out by a messenger-at-arms did not appear to result in any extra cost to the public. It was considered useful for a witness to be present in order to confirm, for example, that a person was not at home when an attempt was made to serve a document. In light of this, the Council resolved to take no further action on this matter.

- **The Council resolved to take no further action**

Motions procedure in the Outer House

6.7 The Council was updated on developments regarding the above. A draft Act of Sederunt and Practice Note were being prepared. The intention was that the scheme to be established by the new rules would apply to all cases in which the parties are represented, or where a party who is not represented has opted in to the scheme and provided their email address to the court. Mr Cockburn advised the Council that 20% of all unstarred motions were now being dealt with under the pilot scheme which had been rolled out in the Outer House. The motions were generally being dealt with in 4 days.

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

Contempt of Court

6.8 The Council was provided with an update on the above matter. It was noted that, following the death of Lord Johnston, Lord Osborne had taken over as chair of the group which had been set up to consider the issues involved and to instruct and supervise the drafting of rules of court for the criminal courts and the civil courts. The Council was advised that the group had met on three occasions and that it was currently considering issues which will be relevant to all courts. Rules had been drafted for the criminal courts. Further revision of those rules was required before the group turned to the task of adapting those rules for the civil courts. Depending on when the rules for

the civil courts are ready, a draft would either be submitted to the Council at its next meeting or members would be consulted by correspondence.

- **The Council noted the position**

Actions of proving the tenor: use of affidavit evidence

6.9 Mr Cockburn spoke to a paper regarding the above matter. He advised that this was a matter that had been raised by practitioners. Where an action of proving the tenor is undefended, under rule 52.3 of the Court of Session Rules, the pursuer is required to apply by motion for an order for proof. It has generally been the custom and practice for proof in these circumstances to be a parole proof, in which witnesses attend a diet and give evidence in person. The Keeper normally fixes a half day diet for such a proof. However, in recent months some clarity has been sought by practitioners as to whether they need to instruct counsel for a proof diet or whether they can simply move for decree on the basis of affidavits. There is a growing tendency, perhaps encouraged by the provisions in the Civil Evidence (Scotland) Act 1988, to rely on affidavit evidence. It was therefore proposed that rule 52.3 be replaced by a rule providing for evidence in such undefended actions to be given by affidavit unless the court otherwise directs. The Council supported this proposal.

- **Private Office to draft appropriate rule change**

Personal injuries actions – exclusion of admiralty actions from Chapter 43 procedure

6.10 The Council considered a paper by the Court of Session Personal Injuries User Group containing a recommended rule change. The Group had noted the Opinion of the Lord Ordinary (Lord Clarke) in the cases *John Stephen and Mark Tocher v. Simon Mokster AS* [2008] CSOH. The Opinion had highlighted the fact that there appeared to be a conflict between the rules in Chapter 43 (personal injuries actions) and Chapter 46 (admiralty actions) in circumstances where personal injuries arose in the context of an admiralty action within the meaning of rule 46.1.

6.11 It was noted that the rules in Chapter 43 currently make no exception in relation to admiralty actions. The Lord Ordinary had held that the cases in question had invoked the admiralty jurisdiction of the court and therefore fell to be dealt with under the procedure under Chapter 46. The Group proposed that a new rule be inserted into Chapter 43 which would provide explicitly that that Chapter does not apply to any claim for loss of life or personal injury which falls to be dealt with as an admiralty action within the meaning of rule 46.1. The Council supported this proposal.

- **Private Office to draft appropriate rule change**

Item 7: Alternative Dispute Resolution

7.1 The Lord President spoke to a paper updating the Council on proposed rules of court providing for parties to consider the utilisation of alternative dispute resolution (“ADR”). Following receipt of recommendations of a working group chaired by Lord Clarke, draft rules had been prepared and had been discussed by the Council at its meetings in October 2006 and June 2007. The Council had before it the most recent draft of those rules. The Lord President had previously formed the view that commercial actions in the sheriff court should be exempt from the proposed provisions, but that otherwise it would be desirable for the rules proposed for the Court of Session and the Sheriff Court to be consistent as far as possible.

7.2 It was noted that there remained considerable interest in the matter. Lord Rodger of Earlsferry had made comments against the encouragement of ADR in an address to a civil justice conference in June 2008. The Civil Courts Review was considering ADR and a number of points had been raised on the matter in its consultation paper. A recent report by the Business Experts and Law Forum recommended that the courts should formally acknowledge the role that mediation can play in the civil justice system in Scotland and should routinely recommend ADR to litigants.

7.3 In addition, the Lord President had received two letters on the matter from the Director of Professional Practice at the Law Society of Scotland and from the Chairman of the Sheriff Court Rules Council. Similar points had been made in both letters. In essence, it had been suggested that (a) any form of compulsion rather than encouragement to consider ADR was to be resisted, (b) without the framework of an equivalent to the English pre-action protocol it would be difficult for parties to know how to proceed and what steps they should take to initiate ADR, (c) the sanction of taking attitudes to ADR into account in relation to expenses should consider the English experience of satellite litigation in connection with costs and ADR, and (d) even if the proposed rules were thought appropriate for the Court of Session, they were not necessarily appropriate in the sheriff court, especially in relation to debt recovery cases.

7.4 The Lord President advised the Council that he could see the force in those arguments. He was inclined to wait until the Civil Courts Review had reported before proceeding to make any rules on this matter. The Lord President suggested that the matter should be considered by the Council at its next meeting. The Council agreed to this proposal.

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

Item 8: Liquidation procedure – early dissolution

8.1 Mr Cockburn spoke to a paper on this matter. He advised the Council that correspondence had been received from a practitioner drawing an unfavourable comparison between Court of Session and sheriff court practice in dealing with applications made under section 204 of the Insolvency Act 1986 for the early dissolution of a company following a winding-up order.

8.2 The main difference between the respective procedures was the role of the Auditor of Court in the Court of Session. In terms of Court of Session Practice Note No. 4 of 1992, an application for early dissolution required to be transmitted to the Auditor, who was then required to prepare a report to be placed before the Lord Ordinary. In the sheriff court, the application went directly to the sheriff, without any prior scrutiny by the Auditor. It had been suggested that this made the sheriff court procedure quicker and less expensive, as no fee was incurred to the Auditor. Mr Cockburn also noted that, in practice, the involvement of the Auditor in the Court of Session procedure appeared to be not much more than a formality.

8.3 Mr Cockburn advised the Council that the Insolvency Judges and the Auditor of Court had indicated that they were in favour of revising the practice in the Court of Session to bring it more into line with current practice in the sheriff court. However, they considered that it should be left open to the Court to refer a particular case to the Auditor of Court should the Lord Ordinary consider that to be necessary. It was therefore proposed that Practice Note No. 4 of 1992 be replaced along these lines. A replacement practice note had been drafted and the Insolvency Judges and the Auditor had all indicated that they were content with its terms. Thereafter, it was proposed that the new Practice Note would be shared with practitioners for any comments they might have. The practice note would then be finalised and made. The Council was invited to note these developments.

- **The Council noted the position**

Item 9: Business Experts and Law Reform Report

9.1 The Council had before it a copy of a report dated November 2008 by the above Forum, together with a copy of an accompanying paper by Colin McKay. As Mr McKay was unable to attend the meeting and speak to this

paper, the Council resolved to continue its consideration of the report to its next meeting.

- **Council to consider the terms of the Report at its next meeting**

Item 10: Any other competent business.

10.1 The Lord President indicated that he was minded to change the way in which the Council operated to some extent. He considered that it might be appropriate to establish committees or sub-groups comprising members of the Council to which particular matters could be remitted, such as any proposed changes to the procedural terminology used in the Court of Session. This could allow members of the Council to be more pro-active rather than reactive. He also noted that a lot of subordinate legislation had been made since the last meeting of the Council and that more and more instructions were now being received on proposed rule changes. In light of that, he suggested that it would be desirable for the Council to have more frequent meetings. Accordingly, it was proposed that the next meeting of the Council should take place in around 5 to 6 months time. There appeared to be general support for these suggested changes to the operation of the Council.

10.2 The next meeting of the Council was fixed for 27th April 2009 at 10am.