

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 11th JANUARY 2010**

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

Item 1: Introduction and welcome

1. The Lord President welcomed those present and intimated the apologies for absence. The Lord President extended a particular welcome to Lord Reed on his first attendance as a member of the Rules 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 5.7 of the minutes of the previous meeting, relating to the rules arising from the review of Inner House business, it was noted that Private Office was still completing the drafting process for the rules. It was also noted that Private Office had contacted both the Scottish Legal Aid Board and the Law Society of Scotland in relation to the

implementation of the rules. The Scottish Legal Aid Board had indicated that it had no significant concerns about the proposed rules and that it did not consider that the introduction of the new procedures would require any adjustment of the fees under the existing legal aid scheme. The Law Society had made a submission to the Lord President's Advisory Committee on Solicitor's Fees (LPAC) and the view had been taken by LPAC that, while some adjustment of the fees would be appropriate in the longer term, the existing fee structure could continue in its present form for a short period after the new procedures come into force under the act of sederunt.

2.3 In relation to the action point after paragraph 9.2 of the previous minutes, relating to the proposed rule change to rule 43.11 on applications for interim payments of damages in personal injury actions, Lady Dorrian advised the Council that the Personal Injuries User Group (PIUG), at its last meeting in December, had taken a preliminary view that a rule change would be appropriate. However, the PIUG had agreed to continue the matter to its next meeting on 17th March to allow members of the PIUG who had been unable to attend the December meeting to contribute to the discussion on the topic.

Item 3: Update on Acts of Sederunt

3. Since the last meeting of the Council on 28 September 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. 8) (Motions Procedure) 2009 (SSI 2009/387) and the Act of Sederunt (Rules of the Court of Session Amendment No. 9) (Miscellaneous) 2009 (SSI 2009/450). The Council did not have any comments to make on either of these instruments.

Item 4: Legislative changes with implications for the Rules

Arbitration (Scotland) Bill

4.1 The Council considered a paper which had been prepared by Private Office on this matter, together with a letter and accompanying documents provided by the Scottish Government. It was noted that, at the time of the meeting, the Arbitration Bill was still awaiting Royal Assent. Mr. McKay indicated that the Bill reflected a general policy desire to promote arbitration and to modernise its use. Various technical matters had been raised in the correspondence from the Scottish Government and the Council considered whether it would be appropriate for applications made under the new statutory provisions to be made under existing petition procedure, subject to

any necessary adaptations, or whether a special procedure should be introduced in the Rules.

4.2 It was agreed that, in the first instance, the commercial judges should be consulted about the appropriate procedure. Lord Reed expressed the view that he would rather that the new statutory applications in this area were not dealt with under the existing petition procedure in the Rules. There were extensive rules controlling procedure in commercial actions under Chapter 47 and Lord Reed suggested that control measures similar to those employed in commercial cases should be applied in relation to cases arising from the provisions currently contained in the Arbitration Bill. Lord Reed suggested that those control measures should include the same restrictions on reclaiming and the same powers of sanction as apply in commercial cases. Support was therefore expressed for devising a *sui generis* procedure in the Rules which incorporated the same control measures which apply in relation to commercial cases.

- **Private Office to consult the commercial judges and draft appropriate rules, taking into account Lord Reed's observations.**

Financial Services Bill: collective proceedings

4.3 The Council considered a paper regarding provisions in the Financial Services Bill (currently before the Westminster Parliament) which, if enacted, would permit collective proceedings to be brought before courts in the United Kingdom in respect of financial services claims. In relation to Scotland, the provisions in the draft Bill would enable such proceedings to be brought in the Court of Session.

4.4 The Council had before it correspondence between the Treasury and its legal advisers in Scotland, Private Office and the Scottish Ministers. The Council was advised that the Treasury's legal advisers had contacted Private Office to seek the Lord President's views on the proposed provisions in the Bill. It was noted that, in light of the time constraints involved in relation to the progress of the Bill and Treasury's desire to obtain views quickly, the Lord President had considered it appropriate to communicate his views on those provisions prior to the present meeting of the Council.

4.5 It was noted that, in providing comments on the proposed provisions in the Bill, the Lord President had had regard to the recommendations made in Chapter 13 of the Report of the Civil Courts Review. The Report recommends that a special multi-party procedure should be introduced in Scotland for dealing with multiple claims which give rise to common or similar issues of fact or law. While conscious of the fact that the Report

recommends the introduction of a single procedure (initially in the Court of Session only), the Lord President had acknowledged the UK Government's policy responsibility in relation to the matters raised in the Bill and its entitlement to adopt and develop its own policy position. One aspect of the UK Government's policy position was that it was appropriate to introduce statutory provisions relating to representative actions on a sector-specific basis, rather than as a generic procedure.

4.6 It was noted that the Lord President had expressed the view in correspondence to the Treasury that, although ideally it would have been preferable to proceed with implementation of the Civil Courts Review recommendations in relation to multi-party actions as a single process, the principle behind the draft provisions appeared to be broadly consistent with the proposals of the Civil Courts Review. It was noted that the Lord President had therefore expressed support in principle for the provisions in the Bill. Members indicated that they were content with the position in that respect.

4.7 The Council was advised that it was currently expected that rules of court on this matter would require to be in place at some point in 2011, to coincide with the coming into force of the relevant statutory provisions. It was noted that Private Office had indicated that it would be content to liaise with those persons who are involved in drafting relevant court rules in England and Wales, both in terms of the content of the rules and the proposed timescale for developing them.

4.8 Mr. Murray suggested that care would need to be taken to ensure that actions raised north and south of the border in this area were dealt with in a broadly consistent manner, and that consideration be given as to liaison between jurisdictions to identify whether a multi-party action had already been raised in the other jurisdiction. Mr. McKay suggested that similar proposals by the UK Government for the introduction of procedures for representative actions in the current Equality Bill and in relation to a proposed UK-wide Consumer Advocate should be considered alongside the provisions in the Financial Services Bill. Lord Reed confirmed that a judicial working group established by the Lord President to consider the recommendations made in the Report of the Civil Courts Review had identified the topic of multi-party actions as one of its highest priorities. Lord Reed confirmed that these matters would be considered by the working group at its next scheduled meeting, later in January.

- **The Rules Council noted the position and indicated that it was content.**

Protection of Vulnerable Groups (Scotland) Act 2007

4.9 The 2007 Act makes provision to bar certain individuals from working with children or certain adults. It also makes provision requiring the Scottish Ministers to keep lists of those individuals and establishes a scheme under which information about individuals working or seeking to work with children or certain adults is collated and disclosed.

4.10 Legal and policy officials at the Scottish Government had drawn attention to certain provisions of the 2007 Act with a view to considering the possible introduction of court rules or guidance issued by the Court in relation to matters such as the intimation of appeals, intimation of intention to appeal and the exercise of discretionary powers to refer cases.

4.11 Members of the Council agreed that no changes required to be made to the Rules as a result of the coming into force of the relevant provisions of the 2007 Act. It was considered that the existing rules on applications and appeals would adequately deal with the statutory procedures introduced by the 2007 Act.

- **It was agreed that no further action was necessary in relation to this matter.**

Crime (International Co-operation) Act 2003

4.12 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 meetings on 8 December 2008 and 27 April 2009.

4.13 It was noted that, after undertaking a consultation exercise on the matter, the Home Office had now settled on a policy that the Court should ordinarily give effect to an overseas freezing order the next business day after receiving it, but that provision should be made in exceptional circumstances for the Court to turn the matter round within 5 business days.

4.14 A draft rule which seeks to give effect to the Home Office policy by making amendments to Chapter 62 (recognition, registration and enforcement of foreign judgments etc.) and Chapter 84 (applications under the Terrorism Act 2000) was placed before the Council. The Lord President suggested that a small amendment be made to one part of the rule, as drafted. It was agreed that that suggested change should be made. Members of the Council had no other comments on the draft rule.

- **Relevant rules to be finalised, made and brought into force to coincide with the implementation of the relevant statutory provisions.**

Building Society Insolvency Procedure

4.15 The Council considered draft rules relating to the procedure that is to apply when an application is made to the Court for a building society insolvency order under the Banking Act 2009, as applied and modified by the Building Societies (Insolvency and Special Administration) Order 2009.

4.16 It was noted that the court rules on this matter could not be made until the Treasury had made its own Building Society Insolvency Rules on the matter, as the two sets of rules would be complementary. The Treasury had consulted upon a draft set of its Rules in late summer/early autumn 2009 and Private Office had been advised by Treasury's legal representatives in Scotland that the intention was to make those rules early in 2010.

4.17 The Council noted that the approach taken in the draft rules was to insert a new Part X into Chapter 74 of the Rules. The intended effect would be to extend, with appropriate modification, the existing rules relating to bank insolvency procedure under Part VII of Chapter 74. It was noted that a similar approach had been taken in the court rules relating to building society special administration procedure. Members of the Council had no further comments on the draft rules relating to this matter.

- **Rules to be finalised, made and brought into force to coincide with the implementation of the Building Society Insolvency Rules.**

Coroners and Justice Act 2009

4.18 Part 7 of the 2009 Act makes 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, such as the writing of criminal memoirs. The Ministry of Justice had indicated to Private Office that it did not envisage that Part 7 of the 2009 Act would be brought into force before Spring 2010.

4.19 The Council had before it a short draft rule which sought to provide that, where a conviction is quashed and an application is subsequently made by a respondent or his or her personal representative under Part 7 of the 2009 Act for (a) an order for repayment of a recovered amount, (b) a determination that the exploitation proceeds order is to cease to have effect or (c) the

reduction of the recoverable amount, is to be made by motion (rather than by a fresh petition). The Council had no comments to make on the draft rule.

- **Rule to be finalised, made and brought into force to coincide with the implementation of Part 7 of the 2009 Act.**

Item 5: Judicial rate of interest

5.1 The Council had considered this matter at each of its last three meetings, following receipt of representations from the Forum of Insurance Lawyers (FOIL) and others to lower the current judicial rate of interest which is set out at rule 7.7 of the Court of Session Rules.

5.2 It had been agreed at the last meeting of the Council on 28 September that further time should be allowed for a decision to be taken in England and Wales in relation to this matter, particularly as there was an informal arrangement in place, under which any plans to change the rate in one of the UK jurisdictions would be discussed with the other jurisdictions.

5.3 An update paper was provided to the Council on this matter. The Council noted that Private Office had been advised by Ministry of Justice officials at the end of December that the Ministry of Justice's economics and court statistics division was still in the process of examining the evidentiary base which will inform a decision on a possible rate change in England and Wales. Ministry of Justice officials had indicated that they hoped to provide their Minister with advice on the matter by the end of January.

5.4 The Council again noted the recommendation made by the Scottish Law Commission in its 2005 Report on Interest on Debt and Damages (Com. No. 203) that (a) there should be a prescribed fluctuating rate of interest which is a specified percentage above the official dealing rate of the Bank of England, and (b) the percentage above the Bank of England rate could be amended from time to time by statutory instrument. The Lord President referred to possible practical difficulties if a calculation were to be carried out on that basis and indicated that it did not appear that such provision could be made directly in rules of court in any case.

5.5 It was agreed that the Court did not readily have the expertise available to proceed with an exercise similar to the one currently being undertaken by the Ministry of Justice. On that basis, it was agreed that Private Office should continue to monitor the situation in England and Wales and that a report on any further developments should be provided to the Council at its next meeting.

- **Private Office to continue to monitor developments in England and Wales. Rules Council to review the position again at its next meeting.**

Item 6: Diligence in Admiralty Actions

6.1 Lord Reed spoke to a paper regarding proposed rule changes arising from provisions in Schedule 4 to the Bankruptcy and Diligence etc. (Scotland) Act 2007 in relation to diligence in admiralty actions. It was noted that the Office of the Accountant in Bankruptcy had commissioned an analysis of the rule changes which might be required. Lord Reed explained that the proposed rule changes were fairly technical in nature. The Lord President's Advisory Group on Diligence Rules, now chaired by Lord Reed, had considered the draft at its most recent meeting, indicated that it was content with its terms and had recommended to the Council that an Act of Sederunt be made in those terms.

6.2 The Council indicated that, subject to such alterations as may be necessary to accommodate transitional or savings issues, it was content for the Act of Sederunt to be made as drafted.

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

Item 7: Offer of Amends Procedure in Defamation Actions

7.1 The Council considered a short paper, published article and proposed draft rule submitted by Graeme Henderson, Advocate, in relation to offer of amends procedure in defamation actions in the Court of Session. Mr. Henderson's article made reference to an Outer House decision by Lady Paton in the case of *Moore v. Scottish Daily Record and Sunday Mail Ltd.* 2007 SLT 217, in which a pursuer accepted an offer of amends 18 months after it had been made, and 2 days before the case was set down for debate.

7.2 Lady Paton had held in the above case that, under the terms of sections 2 to 4 of the Defamation Act 1996, the pursuer was still entitled to accept the offer of amends as the offer remained open for acceptance at any time before the judge or jury had made a decision. A reclaiming motion had been marked against Lady Paton's decision but an out of court settlement was reached before the Inner House was able to consider the merits of the reclaiming motion.

7.3 Mr. Henderson's article and suggested draft rule proposed that provision be made allowing a defender to apply to the Court to set a time

limit for accepting an offer of amends. Mr. Henderson had referred to comments made in cases in England and Wales in support of that proposal.

7.4 The Council considered Mr. Henderson's article and the terms of the draft rule but were not disposed to approve the making of a rule which would be inconsistent with the Outer House authority in relation to this matter. The Council agreed that if any time limit were to be introduced along the lines suggested by Mr. Henderson, the appropriate vehicle for doing so would be primary legislation rather than rules of court.

Item 8: Foreign Decrees in Family & Civil Partnership Actions

8.1 The Council considered a paper regarding rule changes proposed by Sheriff Jamieson at Dumfries Sheriff Court. Sheriff Jamieson had written to Private Office to suggest that actions brought in the Court of Session for declarator of recognition or non-recognition of relevant foreign decrees and orders within the meaning of section 7(9) of the Domicile and Matrimonial Proceedings Act 1973 and regulation 6(2) of the Civil Partnership (Jurisdiction and Recognition of Judgments) (Scotland) Regulations 2005 should be dealt with as family actions for the purpose of Chapter 49 of the Rules.

8.2 It was noted that Private Office had written to Sheriff Jamieson and raised a number of queries about the purpose and intended effect of his proposals. In his most recent correspondence to Private Office, Sheriff Jamieson had expanded upon his reasoning for bringing the stated types of action within the scope of the definition of "family action". It was noted that Sheriff Jamieson had referred to equivalent procedural rules in England and Wales and had suggested that those rules could be adapted to apply to Scotland.

8.3 It was agreed that further consideration would require to be given to the practical implications of Sheriff Jamieson's proposals and that Private Office should therefore seek to arrange a meeting with Sheriff Jamieson to discuss the proposals in more detail.

- **Private Office to arrange a meeting with Sheriff Jamieson and report back to the Rules Council on the outcome of that meeting.**

Item 9: Matters arising from the Civil Courts Review

9.1 It was noted that, since the publication of the Report of the Civil Courts Review on 30th September, the Lord President had established a Working

Group of judges of the Court of Session, chaired by Lord Reed, to consider the recommendations made in the Report.

9.2 Lord Reed confirmed that the first two issues which the Working Group had identified for consideration were McKenzie Friends, followed by multi-party actions. Lord Reed also confirmed that the Working Group was liaising with officials from the Scottish Government, as well as representatives of the sheriffs, sheriffs principal and the Scottish Court Service. An exercise had been carried out to identify which recommendations in the Report were matters for primary legislation, which matters could be dealt with in court rules and which matters could be dealt with by the Scottish Court Service.

9.3 Mr. McKay confirmed that Scottish Government officials were currently undertaking a parallel exercise in response to the Civil Courts Review Report. Mr. McKay advised the Council that there were some governance issues that required to be resolved in discussion with the judiciary and the Scottish Court Service. Mr. McKay also confirmed that there was currently no room in the legislative programme for a Bill to take forward the various recommendations made in the Report. At this stage, it was not expected that a Bill on the matter would be prepared before 2012.

- **The Rules Council noted the position.**

Item 10: Any other competent business

10. The next meeting of the Council was fixed for 10th May 2010 at 10.30am. There was no other business.