

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 18th JUNE 2007**

Present: Lord President
Lord Nimmo Smith
Ms. Lesley Shand Q.C.
Mr. Graeme Hawkes
Mr. Gordon Keyden
Mr. Duncan Murray
Mr. Sydney Smith
Mr. Fred Tyler
Mr. Steve McCourt, Scottish Executive Justice
Department (in place of Paul Cackette)
Mr. Bob Cockburn, Deputy Principal Clerk of Session

In attendance: Mr. Michael Anderson, Legal Secretary to the Lord
President
Ms. Carolyn Breeds, Deputy Legal Secretary to the Lord
President

Apologies: Lord Justice Clerk
Lady Paton
Mr John Mitchell Q.C.
Mr Ronnie Clancy Q.C.
Mr. Graeme Marwick, Principal Clerk of Session
Mr. Eugene Creally
Mr. Robin Macpherson
Mr. Paul Cackette

Item 1: Introduction and welcome

1. The Lord President welcomed those present and 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 3 Acts of Sederunt made since the last meeting of the Rules Council on 16th November 2006. The Council did not have any comments to make on the 3 instruments.

Item 4: Vulnerable Witnesses (Scotland) Act 2004

4. The paper that had been circulated to members along with the draft Act of Sederunt was presented to the Council and comments were invited. It was noted that the word “notice” was omitted from draft rule 35A.2. There were no further comments.

Item 5: Bankruptcy and Diligence (Scotland) Act 2007

5.1 It was explained that the 2007 Act contains various provisions requiring regulation by Act of Sederunt. There are 3 categories: practice and procedure (Court of Session); practice and procedure (sheriff court); and diligence.

5.2 The Advisory Group was set up by the Lord President to act as a safety net to pick up matters in the third category. The group had its preliminary meeting a few weeks ago. Sheriff Holligan raised the issue of the group’s remit and whether it was wide enough. It was explained that the Sheriff Court Rules Council has a different practice to the Court of Session Rules Council. It meets more regularly and provides more detailed instructions. In relation to the Court of Session Rules Council, the LPPO takes more initiative in relation to changes to the rules of court. It is proposed to make the Advisory Group more of an umbrella group to co-ordinate the changes that need to be made to the different sets of court rules. It would be the first port of call in relation to drafting that needs to be done and draft rules could then be submitted by the Advisory Group to the respective Rules Councils for approval. This would enable a more systematic approach to be taken to drafting. The Advisory Group was seeking the Council’s approval for this broader remit.

- **The Council approved the extension of the Advisory Group’s remit.**

Item 6: Council Regulation EC 1346/2000 on insolvency proceedings

6.1 The paper that had been circulated to members on this item of the agenda was presented to the Council. A report was prepared by Mr. David

Bennett on the instructions of the Scottish Executive, to assess the impact of the EU Regulation on Insolvency 2000 on the Insolvency (Scotland) Rules, the rules of the Court of Session and sheriff court. The Report concluded that the rules of court were not fully compliant with the Regulations and that extensive amendment to all 3 sets of rules was required.

6.2 Most insolvency proceedings take place in the sheriff courts. It was explained that, because only a handful of cases would be affected, the Sheriff Court Rules Council has now instructed a single rule to draw attention to the EU regulations. As it was likely that similar changes would be required to the Court of Session rules as would be made to the sheriff court rules, the Council was invited to agree to postpone the drafting of rules until the instructions received from the Sheriff Court Rules Council had been implemented. This would be considered further at the next meeting of the Council.

- **The Council to consider further at the next meeting**

Item 7: Joint IT Committee update

7. The report provided by Lord Macphail, Chair of the IT Committee, was discussed. The Report notes proposals for piloting the electronic transmission of documents in small claims and summary cause actions, involving the setting up of a “virtual court”. Additional aspects such as the inclusion of caveats and motions in the pilot are being considered. The Joint IT Committee is of the view that it would be inappropriate to make any further rules of court on the subject of electronic transmission of documents whilst the pilot is being developed and until the results of the exercise are known.

- **The Council noted the terms of the report.**

Item 8: Tenders in relation to Judicial Expenses (paper by Gordon Keyden)

8.1 The Council considered the paper that had been prepared on this agenda item. It was suggested that it was not logical that, in Scotland, the paying party can protect itself in relation to the principal sum but not in relation to awards of expenses. It was suggested that a specific rule of court would be useful. In the case of *McFarlane v Scottish Borders Council*, a copy of which had been circulated to members, it was suggested that this issue might be dealt with by the Auditor, on being advised of the existence of an offer in relation to expenses, issuing a draft report of his taxation of the account, and then being informed of the offer and adjusting the draft accordingly. However, the practical position is that the Auditor will not issue a draft

report. He considers that he is bound by existing practice and therefore a practice note or rules of court may be required.

8.2 It was suggested that the issue raised affected the substantive law in a sense, although it also covered matters of practice. A solution could be to develop practice by decisions of the courts. The court could come to a considered view, having heard argument on the question.

8.3 It was suggested that this could be done by note of objection. The objection could be that the Auditor failed to consider the matter. However, it was thought that a note of objection was too late in the procedure to be a solution as by that time the Auditor had issued his report. The only way to challenge it would be with the issuing of a draft report before the final report was issued, which the Auditor has declined to do. If there was a way of obliging the Auditor to do this, then this might be a way forward.

8.4 It was noted that the Auditor is bound by the court's interlocutor. If the proposal is passed in its current form it would give the Auditor power he does not currently have, namely to make an award of expenses. At the moment, the court makes the award of expenses and the auditor decides what level the expenses should be. It was suggested that an important legal principle would be adversely affected by this proposal.

8.5 The Council considered whether this could be raised with the Civil Courts Review. However, informal indications are that it may take 2 years to report. If primary legislation was required that would take longer. The Scottish Executive had advised that the Justice Department may take this forward, rather than the Civil Courts Review. The Justice Department has been doing a general sweep of potential civil justice legislation, including matters such as pursuers' offers, and this issue could be considered as part of that exercise.

8.6 The principle behind tenders is that the judge does not know what the offer is. By the time the report of taxation is lodged in process it is too late to consider a judicial offer. The Lord Ordinary was not able to make an award of expenses in *McFarlane* in relation to the taxation because a final decerniture for expenses had been made.

8.7 It was suggested that a comprehensive rule would be better than dealing with this by way of note of objection. There could also be provision regarding interest as a *quid pro quo* for the party waiting for expenses.

8.9 The Council agreed that the Auditor should be asked for his view. It was also agreed that a report would be provided from the Justice Department at the next meeting of the Council.

- **Mr. McCourt will provide a report from the Justice Department at the next meeting of the Council.**
- **In the meantime, LPPO will discuss matters with the Auditor.**

Item 9: ADR rules – update

9.1 The paper on ADR was presented to the Council. It was explained that the Council had considered a draft Act of Sederunt with proposed rules changes introducing ADR at the previous meeting.

9.2 The Sheriff Court Rules Council has also been looking at this and has consulted on the use of ADR in the sheriff courts. The LPPO has received instructions from the Sheriff Court Rules Council. Those instructions proposed the introduction of a non-mandatory ADR order into all actions except personal injury (PI) actions and commercial actions proceeding under Chapter 40 of the Ordinary Cause Rules. Those instructions did not propose any requirement for parties to make averments about ADR, and they did not propose any power for the court to take a failure to utilise ADR into account in making awards of expenses.

9.3 The Council was advised that the Sheriff Court Rules Council had decided to exclude PI claims because of the weight of responses from the consultation last year. Effectively, the responses to the consultation were to the effect that there was no need for ADR. There is already a rule in the Ordinary Cause Rules about mediation in commercial causes and, as no Sheriff in Glasgow has ever referred a case to mediation under that rule, it was thought that further rules were not necessary.

9.4 The Council was advised that the Personal Injuries User Group (PIUG) did not think that ADR provisions were necessary for PI. The Coulsfield rules were operating successfully to settle cases. There were regular negotiations between agents. PIUG had recently approved a draft Practice Note which reminded practitioners that ADR could be useful. The Practice Note has not yet been approved and signed by the Lord President. The Council was advised that this view was representative of PI practitioners on both sides of the bar.

9.5 The Lord President thanked members for their views and would take these into consideration in making his decision.

- **The Lord President to consider further.**

Item 10: Any other competent business.

10. The next meeting of the Council is to be on 17th March 2008 at 10am.
There was no other business.