

**MINUTES OF THE MEETING OF THE COURT OF SESSION RULES
COUNCIL
PARLIAMENT HOUSE, MONDAY 9TH MAY 2011**

Members present: Lord President (Hamilton)
Lord Reed
Lady Dorrian
Gerry Moynihan QC
Lesley Shand QC
Gordon Keyden, Solicitor
Robin Macpherson, Solicitor
Duncan Murray, Solicitor
Sydney Smith, Solicitor

In attendance: Lord Justice Clerk (Gill)
Lord Carloway (for item 9 only)
Lord Hodge
Colin McKay, SG Justice Directorate
Bob Cockburn, Deputy Principal Clerk of Session

Secretariat: David Smith, Deputy Legal Secretary to the Lord President

Apologies: Ronnie Clancy QC
Eugene Creally, Advocate
Graeme Hawkes, Advocate
Fred Tyler, Solicitor
Graeme Marwick, Principal Clerk of Session

Item 1: Introduction and welcome

1. The Lord President welcomed those present and noted apologies. Lord Carloway was attending the meeting to introduce and speak to item 9 on the agenda (charges for witnesses).

Item 2: Minutes of previous meeting and matters arising

2. The minutes of the meeting on 14th February 2011 were approved. There were no matters arising.

Item 3: Update on Acts of Sederunt

3. Since the last meeting a miscellaneous amending instrument had been made. This was Act of Sederunt (Rules of the Court of Session Amendment

No. 3) (Miscellaneous) 2011 (SSI 2011/190), which made amendments to the rules relating to: (i) service of documents beyond the UK, (ii) inspection and recovery of documents and allocation of diets and timetables in personal injuries cases, (iii) enforcement of measures for the protection of children and in respect of parental responsibility, (iv) searches under the Administration of Justice (Scotland) Act 1972 and (v) the form of certificate of citation of a witness by a messenger-at-arms. All of these amendments were considered by the Council at its previous meeting. The Council had no observations to make on the instrument.

Item 4: Reports by associated groups

(i) Judicial Working Group on the Civil Courts Review

4.1 Lord Reed confirmed that the Group had not met since the last meeting of the Council. However, Lord Reed and officials from the Judicial Office and the Scottish Government had had a useful meeting in March, at which possible timetables for an implementing Bill or Bills and for the drafting of changes to the rules of court had been discussed. It was acknowledged that the task of amending the rules would be a significant one and that sufficient resources and a realistic timetable would require to be put in place. There was an opportunity to take a more aligned approach in relation to the application of the court rules to the Court of Session and to the Sheriff Court. In the meantime, Scottish Government officials would continue to liaise with the Judicial Office on the implementation arrangements.

(ii) Inner House Reforms Implementation Group

4.2 The work of this Group would be discussed as item 8 on the agenda.

(iii) Personal Injuries User Group

4.3 Lady Dorrian updated the Council on the Group's recent work. Among recent developments, following correspondence received from the Outer House Administrative Judge, a sub-group had been established to consider the possible introduction of case management in respect of clinical negligence cases. It was hoped that the first meeting of the sub-group would take place within the next few weeks.

(iv) Diligence Rules Advisory Group

4.4 Lord Reed indicated that the Group did not currently have any substantive business to discuss, although work was still in hand on the

development of instructions for rule changes in relation to heritable removings. Draft rules would be presented to both the Council and the Sheriff Court Rules Council in due course.

(v) **Administrative Judges**

4.5 Lord Reed and Lord Hodge reported on their respective portfolios. Apart from matters already before the Council at the present meeting, no business for the Council was on the immediate horizon.

Item 5: Damages (Scotland) Act 2011

5.1 The Damages (Scotland) Act 2011 sought to implement the Scottish Law Commission's Report on Damages for Wrongful Death, published in September 2008. It sought to repeal, and re-enact with certain amendments, the Damages (Scotland) Act 1976.

5.2 A draft Act of Sederunt was placed before the Council for consideration. Some minor technical amendments to the Rules had been identified in consequence of the provisions of the 2011 Act. A saving provision was also included for continuity of existing actions.

- **Rule changes to be made accordingly**

Item 6: Forced Marriage etc. (Protection & Jurisdiction) (Scotland) Act 2011

6.1 The Council considered a paper on the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, prepared by the Scottish Government. The Act made provision for the Court to make a forced marriage protection order for the purposes of protecting a person from being forced into marriage without their free and full consent, or protecting a person who has been forced into a marriage. It was expected that only a small number of applications would be brought under the legislation.

6.2 The Scottish Government paper referred to the fact that the Act made provision for certain persons or bodies to obtain leave from the court to make an application for a forced marriage protection order or to seek variation, recall or extension of such an order. The paper invited the Council to consider whether the Rules required to be amended to specify how such applications were to be made and the mechanism by which leave was to be obtained.

6.3 A draft Act of Sederunt had been prepared and was placed before the Council for consideration. The draft rules provided for the initial application

for an order to be made by petition, with subsequent applications being made by note. Provision was also made for any leave to be sought by motion, either at the same time as the petition was presented to the Petition Department, or at the same time as any subsequent note was lodged. The Council had no observations to make on the draft rules.

- **Rule changes to be made accordingly**

Item 7: Treaty of Lisbon (Changes in Terminology) Order 2011

7.1 The Council was advised of proposed technical changes to the Rules as a result of the terms of the Treaty of Lisbon (Changes in Terminology) Order 2011. The Order included amendments of general application, covering changes in relevant terminology arising out of the Treaty of Lisbon. Insofar as the Court of Session Rules contained references to relevant terminology, the general amendments within the Order extended to those Rules. However, as a result of various exceptions within the Order, it was considered necessary to make some additional amendments to the Rules.

7.2 A draft Act of Sederunt was placed before the Council. The draft amendments would have the effect of replacing existing references in various rules to “Community judgment” with references to “EU judgment”. The Council had no observations to make on the draft rules.

- **Rule changes to be made accordingly**

Item 8: Inner House causes

8.1 Lord Reed presented a draft Act of Sederunt and Practice Note which had emerged from the work of the Inner House Reforms Implementation Group. The Group had met three times since the last meeting of the Council. The draft Act of Sederunt represented the second phase in the process of implementing the reforms recommended by Lord Penrose in his Review of Inner House Business. The rules representing the first stage of those reforms had come into force in April 2010.

8.2 The draft Act of Sederunt included a new Chapter 41 in relation to appeals under statute. Large parts of the existing Chapter 41 procedures were being left unchanged, but the draft rules sought to introduce a role for the procedural judge in such appeals. The draft rules also sought to introduce new procedures for urgent disposals, challenges to competency, and timetables for the taking of procedural steps in such appeals. In addition, they

sought to include mechanisms to avoid delays occurring in Inner House causes.

8.3 The draft Act of Sederunt also included a small number of technical amendments to the rules in Chapters 37A to 40 which came into force in April 2010. Most of these proposed amendments arose as a result of comments received from practitioners. These amendments were intended to clarify issues such as the timing of the issue of timetables and the requirement for lodging answers to reclaiming motions and appeals.

8.4 Lord Reed also outlined the content of the draft Practice Note. The new draft Practice Note covered all the procedures under Chapters 37A to 41. It was therefore broader in scope than the existing Practice Note, which had taken effect in April 2010. The Council's attention was drawn to paragraphs in the new draft Practice Note relating to motions to sist Inner House causes for legal aid purposes (including the introduction of a new practice of intimating such motions to the Scottish Legal Aid Board). The draft Practice Note also referred to other issues such as continuity of appearance at procedural hearings and other Inner House hearings, methods to avoid unnecessary hearings, clearer guidance on the form and content of appendices, notes of argument and bundles of authorities, and the use of core bundles.

8.5 The Council did not have any observations to make about the draft Rules or the draft Practice Note.

- **Rule changes and Practice Note to be made accordingly**

Item 9: Charges for Witnesses

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

9.1 Lord Carloway spoke to a paper on this item, in his capacity as Chairman of the Lord President's Advisory Committee on Solicitors' Fees (LPAC). Draft rules changes were also placed before the Council. The matter related to the terms of rule 42.13 and the Lord Ordinary's Opinion in the case of *JA McClelland & Sons (Auctioneers) Ltd v. IR Robertson & Partners Ltd and Vexamus Water (Scotland) Ltd*. It was held in that case that the Court was unable to certify a person as skilled because rule 42.13(3) envisaged that such a person required to be called as a skilled witness and could only be certified as such.

9.2 Rule 42.13 had been amended on a number of occasions in the past. LPAC took the view that the effect of the most recent amendment in 2006 was

more limited in scope than had been intended. LPAC took the view that the rule required to be recast in order to make it clear that a skilled person (and not necessarily a skilled witness) could be certified as such. LPAC had also approved other minor suggested rule changes in Chapter 42 in consequence of observations made by the Lord Ordinary in the McClelland case. The Council confirmed that it was content with both the principle behind, and the content of, the proposed rule changes.

- **Rule changes to be made accordingly**

Item 10: Protective Expenses Orders in Environmental Cases

10.1 Colin McKay provided an update on this matter. The Council had considered a draft set of Rules at its last meeting. Those Rules had not been made, due to further developments in England and Wales and further action taken by the European Commission.

10.2 The Civil Procedure Rules Committee for England and Wales had declined to make the Rules which had been drafted for that jurisdiction. The Committee raised concerns about the scope of the draft Rules for England and Wales, in particular whether the relevant Directives required a wholly objective test to be applied and what the appropriate figure to set limits might be. The Ministry of Justice was currently reviewing the terms of the draft Rules for England and Wales in light of the Committee's comments.

10.3 In the meantime, the European Commission had decided to refer the matter on to the European Court of Justice, while at the same time asking to be kept involved in further discussions regarding proposed remedial action within the UK. Colin McKay indicated that it was intended that a UK-wide consultation on the policy in relation to environmental cases would be carried out in the summer. The Scottish Government should therefore be in position to revert back to the Council on the issue in the autumn. In the meantime, the Scottish Government had contacted COSLA to inform it of developments in relation to this matter.

- **Scottish Government to provide update on developments at the next meeting**

Item 11: Election Petitions

11.1 Lady Dorrian presented a paper on the operation of Chapter 69 (on election petitions) in respect of an application under section 167 of the Representation of the People Act 1983. The section related to a power of

courts to except an innocent act from being an illegal practice, payment, employment or hiring. Section 167(1) provided that an application under that provision was to be made to an election court.

11.2 Chapter 69 set out rules in relation to a number of different types of petitions relating to Westminster and Scottish Parliamentary elections. However, the definition of “election petition” in rule 69.1 did not include a petition brought under section 167 of the 1983 Act. In practice, it appeared that such petitions could be brought before the Court of Session under the petition procedure set out in Chapter 14. In order to make Chapter 69 consistent with the terms of section 167 of the 1983 Act, it was agreed that consideration should be given to amending rule 69.2(1) and perhaps providing for a separate form for applications made under section 167 of the 1983 Act.

- **Private Office to work on appropriate rule changes**

Item 12: Disposals under petition procedure

12.1 The Lord Justice Clerk presented a paper which invited the Council to consider what interlocutors should be competent in the disposal of a petition process. The issue turned on the First Division’s decision in *Luxmoore v. Red Deer Commission* (1979 SLT (Notes) 53). That decision supported the principle that the only competent interlocutors in a petition process are an interlocutor to grant the petition or an interlocutor to refuse it. This appeared to be a relic of practice in the Bill Chamber. However, contemporary practice had not always been to adhere to the principle.

12.2 It was agreed that the range of competent interlocutors in a modern petition process should be widened beyond the restrictions that existed under Bill Chamber practice. Where appropriate, the Court should be able to grant decree of absolvitor or dismissal, as well as other disposals. The Council discussed the extent to which this was a matter which could be dealt with by way of court rules, rather than by judicial decision. It was agreed that the Private Office should give the matter further consideration.

- **Private Office to consider the extent to which the principle agreed to by the Council can be reflected in rule changes**

Item 13: Any other business

13. There was no other business. The next meeting takes place on 26th September 2011 at 10.30am.