

SHERIFF COURT RULES COUNCIL

Minutes of Meeting held on Friday 19 March 2004 at Edinburgh Sheriff Court

Present: Sheriff Principal I D Macphail QC - Chairman
Sheriff Principal B A Kerr QC
Sheriff M J Fletcher
Sheriff N M P Morrison QC
Sheriff I A S Peebles QC
Mr S Di Rollo QC
Mr J d'Inverno, TD ADC WS, Solicitor-Advocate
Mrs C Flanagan, Solicitor
Mrs E Laing, Assistant Area Director SCS
Mr J Murphy, Sheriff Clerk
Mr P Cackette, SEJD

Mrs G McKeand - Secretary
Mr G Halligan - Assistant Secretary

Apologies: Mr R Conway, Solicitor
Mr A Loudon, Solicitor
Mr J McCormick, Solicitor
Mr A Adams, Lay Member

Item No 2 on the Agenda – Minutes of Previous Meeting

The minutes of the meeting on 5 December 2003 were approved.

Matters Arising

The assistant secretary advised the Council that the Miscellaneous Act of Sederunt would be signed shortly and come into force one month later. This would allow an explanatory article to be published in Greens and the SCS Circular.

A draft Act of Sederunt was available for consideration by the Consolidation Committee and the meeting should be fixed within the next few weeks.

Item No 3 on the Agenda – Protection of Children (Scotland) Act 2003

The revised draft Act of Sederunt was considered by the Council. The Council were content with revised Rule 3.25.4.

The Council considered the view of the draftsman that the general dispensing power of the Sheriff in Summary Application Rule 2.3 only applies to Part 2 of the Rules.

The Council agreed and decided to provide a general dispensing power for all other chapters in the next Miscellaneous Act of Sederunt.

Item No 4 on the Agenda – Cash Seizures under the Proceeds of Crime Act

The Council considered the reports by Sheriff Principal Kerr on cash seizures under the Proceeds of Crime Act 2002. Crown Office had suggested that there should be provision for a standard form of receipt for cash seized and detained by Police or Customs, which would notify the affected person of the time, date and place of hearing before the Sheriff and of his/her right to attend or be represented at the hearing. As the cash could only be detained initially for a period of 48 hours this meant a hearing for an extension may have to take place at the weekend or on a public holiday.

The view of Sheriff Principal Kerr was that the intention must have been that the matter would be brought before a judicial authority within 48 hours on an *ex parte* application who would, if satisfied under section 295(4), make an order extending the detention (maximum 3 months) which would then be intimated to the affected persons under section 295(8). It would then be open to the affected persons to make an application under section 297 at any time if they wished for release of the cash.

The concerns of Sheriff Principal Kerr related to Sheriffs many matters as indicated in his memorandum, including having to hear applications, which if not *ex parte*, would have to be held at the sheriff court or other location such as the police station. This had obvious implications for resources and administrative arrangements.

Mrs Laing also raised concerns of staffing the courts, especially those in remote areas. Mrs Laing suggested there was nothing in the legislation to prevent specific courts being nominated to deal with these applications and one solution would be to frame a rule which allows Sheriffs Principal to nominate courts in their Sheriffdom where applications made out of normal hours, or at weekends, are to be dealt with. This would allow Sheriffs Principal to nominate courts where it would be least inconvenient to have a shrieval resource available.

The Council agreed to invite Lorna Harris, Civil Recovery Unit into the meeting to discuss these issues.

The Chairman welcomed Lorna Harris to the meeting and explained that the Council, from initial discussions, had in principle agreed that something would need to be done to allow the person the opportunity to be heard.

Mrs Harris explained that since Lord Clarke's judgment *ad hoc* arrangements had been in place. The Civil Recovery Unit are informed as soon as there is any cash seizure, even where the cash is seized late in the day on a Friday they are trying to ensure an application is heard, during normal office hours.

Sheriff Principal Kerr asked what happens at the moment.

Mrs Harris explained that the Local Police Financial Recovery Unit telephone CRU who are available 24 hours a day 7 days a week. The CRU then contact the Procurator Fiscal's office about preparation of a summary application and to arrange

a hearing to take place within 48 hours. The Financial Recovery Unit then contact the affected persons.

The Chairman asked if these *ad hoc* arrangements were ECHR compliant.

Mrs Harris advised that they were.

Mr Di Rollo asked if there needed to be a universal procedure.

Mrs Harris advised that the CRU had asked for a longer period than the 48 hours to be put in primary legislation but had been advised there would be no change for at least two years and that in any event affected persons should not be at more of a disadvantage in Scotland than they would be in England.

Mrs Laing suggested the requirements were not practical for Scotland.

The Chairman agreed that if we formalise the procedure it could make it more difficult, and asked what was wrong with keeping the present arrangements in place.

Mrs Harris was concerned about the right of the affected person to attend.

Sheriff Peebles stated that was a matter which should have been covered by primary legislation.

Sheriff Principal Kerr asked what exactly CRU were looking for the Council to do.

Mrs Harris explained they were looking for a form that specifies a hearing will take place at a time and place to be arranged.

Sheriff Peebles was of the view that it would be better to leave the informal procedures in place.

Sheriff Morrison asked if the *ad hoc* arrangements could be slightly formalised.

The Chairman suggested it could be left to the Sheriffs Principal to issue a Practice Note.

Mr d'Inverno stated that two hours notice before the hearing would not constitute a fair hearing.

The Chairman asked the Council if a rule was required. He was of the view that any application by the Procurator Fiscal to the court would need flexibility and any rule would need to be minimalist.

Mrs Flanagan asked why CRU could not prescribe their own form.

Sheriff Peebles suggested leaving the *ad hoc* arrangements in place.

Mrs Laing agreed with Sheriff Peebles.

Mr d'Inverno suggested CRU can adopt their own formal procedure.

Sheriff Peebles expressed the view that it was a matter for the Court of Session to decide if the Act was ECHR complaint.

Mrs McKeand asked if the court would need to be aware of the content and intimation details of the form. She considered something should be included in the rules to exclude the usual summary application procedure.

Sheriff Principal Kerr agreed and thereafter a Practice Note could be agreed by Sheriffs Principal for each Sheriffdom.

The Council agreed this was the way forward and would consider a draft rule at the next meeting.

Item No 5 on the Agenda – Land Reform Act 2003

On the basis that policy advice had still not been received from OSSE on the Land Reform Act it was agreed to continue this item until the next meeting in June 2004.

Item No 6 on the Agenda – IT Proposals

Sheriff Peebles explained the details of the report by the Sub-Committee on Information Technology to the Council members.

Sheriff Peebles stated that the Committee believed the sheriff court would have to move forward with technology in order to retain civil business, it could not fall behind the Court of Session in this area.

One of the Committee's main concerns was in relation to security but they had accepted the advice that it should not be a huge problem.

The Committee had agreed that a website, rather than an e-mail system, would be the best way for documents to be lodged. The advantages were that the Scottish Court Service could decide the style and that it was technically more efficient. The e-mail system could have server problems and create issues of time-limits on documents lodged.

The Committee had decided that initially a paper system would have to be kept in tandem with the electronic one. Although this would be expensive it would need to be there initially to alleviate any problems.

The Committee would look in detail at electronic signatures.

In relation to summary cause and small claims actions the Committee were looking at the possibility of a back-office system keeping these details centrally.

Sheriff Peebles recommended that the Council go out to consultation on the proposals and await responses.

The Council agreed and instructed the secretariat to draft a Consultation Paper and list of consultees, for consideration at the next meeting. The Secretariat should also write formally to the Electronic Services Delivery Unit of the Scottish Court Service advising them of the Council and Committees initiatives and proposals to consult.

Item No 7 on the Agenda – Debt Arrangement and Attachment (Scotland) Act 2002 – Miscellaneous Amendments

Rule 8

The Council considered the advice from Kay McCorquodale, OSSE which suggested Rule 8 could be amended to provide that the Sheriff Officer may exhibit to the debtor a certified copy of the decree or document of debt.

The request for change had been made by SMASO as their members are having to serve the original summary warrant.

The Council agreed that Rule 8 should be amended to allow a certified copy of the summary warrant to be served.

Rule 36

Kay McCorquodale, OSSE, had also suggested consideration be given by the Council to amending Rule 36 of the Act of Sederunt (Debt Arrangement and Attachment) (Scotland) Act 2002) 2002 to provide that an application for leave to appeal against the decision of the Sheriff under section 57 should be made within 7 days of the making of the decision. In addition, she suggested the debtor should be required to intimate the application to the creditor and Form 25 should include a reference to a debtor's right of appeal.

The Council agreed that Rule 36 and Form 25 should be amended in the terms suggested.

The Council also considered a letter from Derek Auchie, Lecturer in Law and Solicitor, Robert Gordon University.

Mr Auchie suggested that Form 4a of the Summary Cause Rules 2002 dealing with sequestrations for rent had been superseded by the Debt Arrangement and Attachment (Scotland) Act 2002 and the accompanying Regulations, namely the Act of Sederunt (Debt Arrangement and Attachment) (Scotland) Act 2002) 2002.

The Council agreed that section 58 of the 2002 Act repealed section 16 of the Debtors (Scotland) Act 1987 upon which Form 4a is based. However, the form may still be required for warrants granted prior to 30 December 2002.

The Council decided that there should be additional forms for Form 4a and Form H1 of the Ordinary Cause Rules to cover the new legislation.

Item No 8 on the Agenda – Sexual Offences Act 2003

The Council considered sections of the Sexual Offences Act 2003, due to come into force on 1 May 2004, which may have implications for civil court rules.

The Council agreed that a summary application under section 89 of the Act for a parental direction would be covered by the general summary application rules.

It was agreed that applications for variation, renewal or discharge of a parental order would also be covered by the general summary application rules.

The Council discussed section 97, notification orders and agreed applications under this section would also be covered by the general summary application rules.

The secretariat advised the Council that policy advice was still awaited for section 99(3) which states “in an application for a notification order a relevant offence may mean an act which would have constituted an offence listed in Schedule 3 if it had been done in any part of the UK unless not later than “rules of court” may provide, the defender serves on the applicant a notice:

- a. stating that, the condition is in his opinion not met
- b. showing grounds for that opinion
- c. requiring the applicant to prove the condition is met.

It was agreed any decision or the requirement of rules for this section could be taken forward with the Chairman due to the proximity of the commencement date of the Act.

The Council agreed that applications under section 100 for making, varying, renewing and discharge of an interim notification order would be covered by the general summary application rules.

The Council discussed appeals under section 102 (notification and interim notification orders), section 111 (SOPOs and interim SOPOs) and section 120 – foreign travel orders.

The Council agreed these appeals will be covered by section 27 and 28 of the 1907 Act and accordingly follow the procedure in Chapter 31 of the Ordinary Cause Rules 1993. This would mean the appeals could be made to the Sheriff Principal or the Court of Session. Although the Council commented that it is preferable for legislation to specify where the appeal should be made.

The Council discussed section 103 subsection (2) which provides that “a record of evidence shall be kept on any summary application”.

Policy Division advice suggested they meant the “record” to mean the “written pleadings and the process”. The Council did not agree.

The Council decided the secretariat should find out what “record of evidence” is being kept in England.

The Council agreed that an application under section 104 for a sexual prevention order or interim order would be covered by the general summary application rules.

The Council also agreed an application under section 105 of the Act will be covered by the general summary application rules.

The Council agreed applications under section 108, SOPOs, variations, renewals and discharges would be covered by the general summary application rules. The Council decided there is a need to make provision for the request for one court to remit the original process to the other where the application for variation is made in a different court.

The Council agreed applications under sections 109 and 114 would be covered by the general summary application rules.

The Council decided it did not wish to specify how an application under section 118 (Foreign Travel Orders – variations, renewals, discharge) is made to the court. The Council agreed provision should be made to require one court to remit the original process to the other.

Section 121(3) instructs the Clerk of Court to serve a copy of the Order, variation, renewal or discharge on the person named in the Order. The secretariat was of the view this should have included the “Chief Constable” where he is not the person named in the Order. The Council agreed with the secretariat but decided it was not within the Council's power to do this.

The Council agreed any rules could be taken forward with the Chairman.

Item No 9 on the Agenda – Any Other Business

Sheriff Principal Kerr advised the Council of the progress made by the Mediation Committee. The Committee had agreed that its aims and methods of encouraging the use of mediation should be decided at its next meeting on 6 May 2004 after consideration of relevant questions and further materials to be obtained in relation to foreign jurisdictions.

Item No 10 on the Agenda – Date of Next Meeting

The next meeting was fixed for Friday 25 June 2004 at 10.30 am within Edinburgh Sheriff Court.