

Minutes of Sheriff Court Rules Council Meeting

McDiarmid Park, Perth

6 June 2008 at 10.30am

PRESENT

Sheriff Principal Sir S S T Young Bt QC
Sheriff W Holligan (arrived at approximately 11.30am)
Sheriff M J Fletcher
Sheriff C Scott
Mr S Di Rollo QC
Mrs C Flanagan
Mr A Johnston
Mr R McMillan
Mr F Simpson
Mr S Brand
Ms S O'Neill
Mr S McCourt (Secretary)
Miss M O'Neill (Assistant Secretary)

In attendance: Mrs G McKeand

Agenda

1 Apologies and Welcome

Sheriff Principal J A Taylor, Mr G Way, Mr J d'Inverno, Ms K Stewart

The Chairman welcomed Sheriff C Scott to the Council and welcomed Mrs McKeand along to today's meeting. The Chairman advised that Council vacancies still existed for a lay person and the Scottish Government representative. He requested the secretariat contact the Legal Secretary to the Lord President to ascertain what progress is being made on the appointment of a lay person.

2 Minutes of previous meeting

The minutes of the previous meeting were approved.

Matters Arising

- Item 9: The Chairman advised that, as well as his own, Practice Notes have now been issued by Sheriffs Principal Bowen, Dunlop and Taylor. (It has since been confirmed that Sheriff Principal Kerr has also issued one).
- Item 11: The secretariat confirmed that Sheriff Peebles had accepted the invitation to be co-opted onto the Court of Session and Sheriff Court Rules Council Joint IT Committee.
- Item 15: Ms O'Neill provided the meeting with an update on the Civil Courts Review

3 Adults with Incapacity (S) Act 2000 – Renewal of Guardianship Applications

The Council considered the query received from Scottish Government policy holders in relation to intimation of renewal of guardianship applications. Although no specific

intimation provisions apply, the Council agreed that Section 1 of the Act should always be considered by the sheriff in relation to all proceedings. The Council was of the view that in practice applications are being intimated and there was no widespread problem. However, it was agreed that the matter be continued until the next meeting to allow the secretariat to seek further clarification from the sheriff involved of any existing difficulties in practice. Sheriff Scott also undertook to discuss the matter with the sheriff concerned.

4 Bankruptcy & Diligence (S) Act 2007

Sheriff Holligan advised the Council that timetabling issues had been raised with the Lord President's Advisory Group ("Advisory Group") in relation to the commencement of provisions.

The Council reconsidered the time to pay provisions previously contained in the draft diligence instrument in relation to summary cause and small claims rules. The Council agreed that in principle the current time interval of 7 days between the return day and the calling date should be amended to 14 days and as a consequence the period for a pursuer to intimate an objection to a time to pay application be extended from 2 days to 9 days. It was agreed that this change be taken forward by the Advisory Group, with the amendments being contained in the next related instrument. It was also agreed that the Summary Application Rules 1999 require to be amended to reflect the changes to time to pay provisions in the other sets of rules. The secretariat undertook to advise the Scottish Court Service of these changes to ensure forms are updated prior to the commencement date. It was agreed also that the Advisory Group should consider making provision for the intimation of non-acceptance of time to pay applications.

The Council considered whether a motion for recall of arrestment or inhibition should specify reasons, in line with Court of Session procedure. It was agreed that, since the form of motion already provides for reasons, no changes to the existing rules were required to achieve this result.

The Council also considered the following specific issues raised by the Advisory Group:

- Inhibitions – the Council agreed that no specific rule for inhibition in execution is required
- Money Attachment – the Council agreed that these rules should be contained in the rules for the Debtors (S) Act 1987 with applications being by way of a prescribed form. The Council agreed that appeal provisions should be included and requested that the secretariat instruct the draftsman to consider the addition of appeal provisions replicating Rule 31.2 of the Ordinary Cause Rules, providing a 7 day time limit for seeking leave from the sheriff and 7 days following the grant of leave for lodging the appeal.
- Arrestment in execution and action of furthcoming - the Council agreed that these rules should be contained in the rules for the Debtors (S) Act 1987 with applications being by way of a prescribed form. The Council agreed that no distinction should be made in relation to procedure for any objection to Court of Session decrees. A question arose over whether there should be a rule specifying on what basis jurisdiction is to be founded and the Council requested the secretariat to arrange for this issue to be placed on the agenda for discussion by the Advisory Group at its next meeting.
- Actions of removing from heritable property – the Council expressed concern regarding the unrealistic timescales proposed for commencement of these provisions given that the policy intention behind them is unknown. The Council agreed with Sheriff Holligan's view that it is unable to commit to having rules in place for commencement in May 2009 without knowing what the policy issues were.

The Council was advised that the first draft of the provisions due to come into force in October 2008 is due be circulated to the Advisory Group in advance of its next meeting on 23 June. The Advisory Group had agreed that the draft would at the same time be made available to Council members to allow them the opportunity to provide comments to the secretariat prior to the meeting of the Advisory Group in August.

5 Adult Support & Protection (S) Act 2007 – Part 1

The Council considered the draft Act of Sederunt produced along with the drafts person's note and subject to the instruction of certain amendments agreed that a revised draft be cleared by the Chairman in due course.

Sheriff Fletcher agreed to consider the Draft Code of Practice produced by the policy holders on behalf of the Council and provide the Chairman and secretariat with any comments.

6 Joint IT Committee

The Council considered the paper provided by Mrs McKeand. Mrs McKeand provided a short presentation to the Council introducing the concept of the "virtual court" for small claims and summary cause debt actions.

Mrs McKeand highlighted that the following provisions within the Small Claims Rules 2002 and Summary Cause Rules 2002 require to be considered:

- Rule 4.4 – could authentication by sheriff clerk be achieved electronically?
- Rule 5.1(4) – could authentication by sheriff be achieved electronically?
- Rule 25.1(2) and 35.1(2) (respectively) – could the execution of service be lodged electronically with the principal being retained for inspection purposes only?

The Council considered the jurisdiction of the "virtual court" and in particular whether the sheriff and sheriff clerk would have authority to act in a case arising in a court in sheriffdom A when they were physically situated at an office in sheriffdom B. Mrs McKeand confirmed that legal advice had been provided concerning this point and agreed to email the advice to all Council members. Subject to this being provided, the Council agreed in principle to the amendment of the Summary Cause Rules 2002 and Small Claims Rules 2002 to facilitate the operation of the "virtual court". Mrs McKeand agreed to provide the Council with a note of what changes to rules may be required for consideration at the next meeting.

7 Notice to Admit

The Council considered the email received from Mr Di Rollo QC. The Council agreed that the provisions contained in sub paragraph (4) be deleted from Rule 29.14 of the Ordinary Cause Rules 1993 as it was of the view it was wrong in principle for the two reasons highlighted in the email. It would also enable the provisions to be brought into line with the Court of Session. The secretariat to instruct the amendment for inclusion in the next miscellaneous Act of Sederunt.

8 Letter from Michael Anderson, Legal Secretary to the Lord President

The Council considered the letter received from Michael Anderson, Legal Secretary to the Lord President and in particular considered the following points:

Timing of Rules Council Meetings

The Council agreed to alter the timing of the meetings to accommodate the commencement dates of future Acts of Sederunt. It was agreed that meetings should now be held in February, May, August and November of each year with effect from 06 February 2009.

Miscellaneous Instruments

The Council agreed to the establishment of a fixed programme whereby two miscellaneous instruments are made per year. It was agreed that this system should be adopted after the next miscellaneous instrument, which is due to be made in September. The secretariat to discuss with Michael Anderson when the new arrangement should commence, bearing in mind the dates of future meetings of the Council had now been changed.

Policy Memoranda

The Council agreed that policy memoranda are useful tools to provide practitioners with the reasoning behind rule changes and agreed that an appropriate pilot would be the next Miscellaneous Act of Sederunt. The secretariat undertook to discuss commencement of a pilot with the Legal Secretary to the Lord President.

At this stage, the Council discussed the current publishing of changes to legislation and the need to identify changes to practitioners. Ms O'Neill suggested that others may also be interested in knowing of rule changes and agreed to provide the secretariat with a list of appropriate publications.

Attendance at meetings

The Council agreed that it would be useful for a draftsman to attend Council meetings on a regular basis. The secretariat undertook to contact the Legal Secretary to the Lord President to invite a draftsman to attend Council meetings from September onwards.

9 Business Update

Members noted progress on the various issues. In relation to the two European Regulations, it was agreed that the secretariat would prepare and circulate a paper to the members of the Ordinary Cause Committee by early July with a view to having a draft instrument available for the next Council meeting in September. The Council raised concerns regarding the drafting of rules on ADR. The secretariat undertook to contact the Legal Secretary to the Lord President to confirm what the up to date position on this was.

In relation to the Consumer Credit Act 2006, Ms O'Neill advised that progress was ongoing in relation to form changes as all references to time orders will require to be removed from the Summary Cause and Small Claims Rules. Ms O'Neill agreed to email the secretariat with these changes prior to the next meeting.

Ms O'Neill provided an update on time orders and unfair relationships under the Consumer Credit Act 2006. Work was ongoing on creating a prescribed form for time orders and a draft should be available for consideration at the next meeting. Ms O'Neill suggested that references to time orders would require to be deleted from the current summary cause and small claim rules and be replaced by new rules and forms. Ms O'Neill undertook to provide the secretariat with a note of what these are. Ms O'Neill advised also that she was still to draft a form for unfair relationships but hoped to do so in time for the next meeting.

10 Any other Business

UK Borders Act 2007

The Council considered the draft provisions produced and, subject to the instruction of certain amendments, agreed that a revised draft be cleared by the Chairman in due course.

Reciprocal Enforcement of Maintenance Orders/Recovery of Maintenance (United States of America) Orders

The Council considered the policy paper produced in respect of the orders. The Council agreed that no Guidance note was required as the Orders clearly state which provisions apply to US cases.

The Chairman undertook to prepare a note which he would discuss with Sheriff Fletcher before requesting the secretariat to instruct draft rules. It was agreed that they would then be cleared by the Chairman.

Date of subsequent meetings.

Friday 5 September 2008

Friday 5 December 2008

Friday 6 February 2009