

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
ACCESS TO JUSTICE COMMITTEE
TUESDAY 03 DECEMBER 2019 AT 3.00 PM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE

MINUTES

- Present:** Lady Carmichael (Chair)
Joel Conn
Ruth Crawford QC
Anne Dickson
Judge d’Inverno
Thomas Docherty
Sheriff Martin-Brown
Dean Purdie
Sheriff Principal Turnbull
- In attendance:** Mark Kubezcka (SCTS Legislation Implementation Team)
- Support:** Karen Stewart (Policy Manager, Scottish Civil Justice Council)
Andrew Campbell (Secretary)
- Apologies:** Christina Bardsley
Rachel Smith
Denise Swanson (Scottish Government)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted apologies from Rachel Smith, Denise Swanson and Christina Bardsley. The Chair introduced the Council's new consumer member Thomas Docherty to his first Access to Justice Committee meeting. Ms Smith provided written comments in relation to agenda items 4 and 5.
2. Members agreed not to publish the following papers: 4.1; 4.1A-B; 5.1; 5.1A

Item 2: Previous meeting

Item 2.1 – Items considered by correspondence (Paper 2.1)

3. **Members noted Paper 2.1** which provided a summary of one matter considered by correspondence since the last meeting:

Access to Justice Admin Matters

- **Paper 2019/10** was issued on 17 May 2019 and invited members to approve draft minutes of the previous meeting held on 29 April 2019.
- Responses were invited by close of business on 31 May 2019 with a nil response indicating consent. Two responses were received approving the draft minutes. The approved minutes have subsequently been published on the SCJC website.

Item 3: Work Programme

Item 3.1 – Update from the Scottish Government on legislative developments

4. The Chair intimated an update on legislative developments in the Scottish Government provided in absence by Denise Swanson.

Item 4: Justice System Reform

Item 4.1 – Simple Procedure Review: Rules Amendments (Papers 4.1 and 4.1A-B)

5. **Paper 4.1** sought drafting advice on a number of issues which have arisen during the drafting of the revised simple procedure rules and related schedules in **Papers 4.1A-B**.

6. Members considered and discussed the matters arising and agreed:

List of evidence, documents and witnesses

- Members noted that the terms of rule 7.7(2)(c) provide that one of the purposes of a case management discussion is to give the parties in person guidance and orders about the witnesses, documents and other evidence which they need to bring to a hearing. On this basis, the Committee had previously agreed that the requirement to list the evidence, documents and witnesses the claimant may bring to a hearing when initiating the claim should be omitted. **The Committee noted that the draft instrument makes provision to this effect and no further amendment is required.**

Time Limits for appeal

- The Committee previously gave instruction that the Decision Form (Form 13A) and rules 15.2(1) and 16.2(1) should be amended to provide that the time limits linked to appealing or enforcing a decision are to start from the date of the decision rather than the date that the Decision Form is sent. Members noted that since the Committee proposed these amendments, the Sheriff Appeal Court has issued its opinion in *DBN-SG219-18 Ian Sweetland v Jet2 Holidays* which discusses the application of the time limit for lodging an appeal in a simple procedure case. Members noted that Section 82 of the Court Reform (Scotland) Act 2014 makes provision that an appeal may be taken to the Sheriff Appeal Court under Section 110 of the 2014 Act on a point of law only against a decision of the sheriff constituting final judgment in a simple procedure case and that any other decision of the sheriff in such a case is not subject to review. The 2014 Act provides a definition of 'final judgement' at Section 136—"a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of proceedings, even though judgment may not have been pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for."
- Members noted that the simple procedure rules provide that an appeal is only competent once a Decision Form is issued and that read in conjunction with Section 82 of the 2014 Act, the rules currently provide clarity on what may be appealed and when. Having reconsidered the issues, members were of the view that if the amendments proposed by the Committee were given effect to, there was potential that the position in relation to what is the final judgment for the purposes of a simple procedure appeal would again be cast into doubt.
- **Members therefore withdrew the previous drafting instruction. Of new, the Committee proposed that a new rule be drafted to provide that the**

Decision Form in a defended case must be issued by the court to all parties.

Email Service

- The Committee previously gave instruction for rules amendments relating to service of documents: to permit email service, with the agreement of the person on whom the document is to be formally served and on the basis that the confirmation of service required would be acknowledgement of the receipt of the email. SCTS noted concerns about how the court could be satisfied that the agreement of a respondent to email service would be obtained prior to a claim form being submitted noting that it may be difficult for a claimant to prove receipt. **Members invited the drafter to consider how proof of prior consent could be evidenced and prescribed in the draft rules.**

Process Flow Diagrams

- The Committee withdrew the instruction to include diagrams within the court forms on the basis that diagrams are likely to be extremely unwieldy given the number of possible outcomes at any given point in a case and may have the potential to confuse rather than assist parties. It was noted that process diagrams may also fetter the discretion of a sheriff exercising their powers under rule 1.8.

Unless orders

- The Committee reconsidered their previous instructions to amend Rule 8.4 and discussed a number of practical operational issues which would arise if the proposed changes were implemented. **The Committee agreed that the rule should remain as originally prescribed and withdrew the previous drafting instruction.**

Application Forms

- **The Committee agreed that, whilst it has proposed that application forms should be significantly streamlined by consolidation into an 'Orders Application' the following bespoke forms should be retained for the benefit of court users: Application to Recall, Alternative Decision Application, Application to Change a Damages Management Order, Application for Instructions about a Damages Management Order and Application for a Children's Property Administration.**

Written Orders

- The Committee reconsidered proposed amendments to rule 14.4 in relation to the issuing of written orders. Having considered a number of operational issues arising, the **Committee agreed that the wording of rule 14.4(4) should be amended to provide that the order arranging an expenses hearing must contain a requirement for an account of expenses to be sent to the court and to the other party before the expenses hearing.**
 - **The Committee proposed an amendment to rule 13.3(4) to provide that where the sheriff corrects an error in a Decision Form, the original decision form must be returned to the court.**
 - **The Committee invited the drafter to consider the wording of ‘next day service’ provided for in the rules and a number of additional drafting matters raised by SCTS.**
7. **The Committee requested the drafter to prepare a copy of the rules showing all proposed rule changes to date.**
8. **Members agree that no policy note will be required to accompany the draft rules and that a revised draft rules instrument should be circulated to members for consideration by correspondence.**

Item 5: Proposals for Rules

Item 5.1 – SCTS rule change request – Civil Online (Papers 5.1 and 5.1A)

9. The Chair welcomed Kay McCorquodale, Scottish Courts and Tribunals Service (“SCTS”) who attended the meeting for this item and spoke to **Paper 5.1A**.
10. **Paper 5.1A** is a rules request from SCTS seeking to make the use of Civil Online mandatory for all simple procedure actions but with an exception to its use in “justifiable circumstances”.
11. Members considered and discussed the rules request in **Paper 5.1A** and raised a number of questions on the proposal. Mrs McCorquodale undertook to provide the Committee with further information on:
- whether an Equality Impact Assessment has been done and if so what statistics were obtained;
 - financial information on anticipated potential costs savings of the proposal (both from party litigants and solicitors) and the basis of the figures;

- potential solutions to the technical aspects of the system which are proving to be a barrier to uptake amongst solicitors - in particular an explanation of the technical issues relating to machine to machine transfer.

12. Members agreed that SCTS' response to these questions will be considered at a later date.

Item 6: Date of next meeting

13. To be circulated.

Scottish Civil Justice Council Secretariat

December 2019