

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

RULES REWRITE COMMITTEE

TUESDAY, 28 JUNE 2022

Judicial Institute, Level - 2 Parliament House

MINUTES

Present: Lord President (Chair)
Mark Boni
Sheriff Kenneth Campbell QC
Joel Conn
Ian Dickson
Walter Drummond-Murray
Summary Sheriff Roddy Flinn
Jaqueline Harris
Lord Richardson

In attendance: Craig Anderson (Offices of the Court of Session)
Jonathan Brown (Parliamentary Counsel Office)
Ysabeau Middleton (Law Clerk to the Lord President)

Support: Craig McCorkindale (Scottish Civil Justice Council)
Jessica Flynn (Scottish Civil Justice Council)

Apologies: Nicola Anderson (Legislation Implementation Team, SCTS)
Duncan Hamilton QC
Sheriff Principal Turnbull

Item 1 - Welcome, apologies and agreement of private papers

1. The Chair welcomed the members present, and noted the apologies received.
2. The Committee agreed not to publish papers 3.1 and 3.1A.

Item 2 - Updates since the last meeting

Item 2.1 - Items by Correspondence (Paper 2.1):

3. The Committee noted the one item considered by correspondence:

Paper 2022/14 – approved the minutes of the previous meeting on 31 May 2022, which are now available online.

Item 3 - Work programme

Item 3.1 – Ordinary Civil Procedure (Papers 3.1 and 3.1A):

4. The Committee considered the policy questions posed within **paper 3.1**:

Rule 92 (JB38) – Online applications and forms:

5. There are significant challenges when trying to narrate in rules the content to be captured through online forms. Ensuring there is no dubiety in what is legally required can create a tension when trying to optimise the ability to develop digitised services that are simple and easy to use.
6. Forms could be promulgated by way of an LPs direction so that they can be more readily updated. The alternative is to continue to put them in a formal schedule to the rules thereby reducing the Councils flexibility to make timely changes. The method used should include a stage for approval of the rules by the Council before any Direction is made. It will be important to ensure that the legal status of Forms does not change.
- 7. The Committee will revisit the proposal to promulgate Forms via an LPs direction once a methodology has been explored in more detail.**

Rules 72-76 (J266-J270) – Additional Party Procedure:

8. The term ‘additional party’ was suggested as an alternative to the existing terminology of ‘third party’. The Committee did not see any significant benefit from making that change, which would result in the loss of the existing jurisprudence that underpins the term ‘third party’.
- 9. The Committee agreed to retain ‘third party’ as the preferred terminology.**

Rule 1 (J510) – The rules:

10. As each paragraph is referred to as a rule, the word rules should be included when determining the name for these rules. Whilst that abbreviates to OCR, the addition of the year may provide sufficient differentiation from the existing Ordinary Cause Rules (OCR).
- 11. The Committee agreed to use the term Ordinary Cause Rules.**

Rule 18 (JB 61) - Undefended cases and decree in absence:

12. Rule 18 (3) requires the court to dismiss all undefended cases if no application for decree has been made within 6 months from the last day allowed for service. That permits the court to clear any cases that are no longer live, but which have not yet been formally abandoned.
13. The 6 month period runs from the last day on which service could have been made. When the 4 month period to effect service is taken into account, the timeline is effectively 10 months from when proceedings were first initiated. Some discretion is appropriate. If a pursuer fails to seek decree within the 6 month period, the case should be dismissed unless cause can be shown.
- 14. The Committee agreed that rule 18 (3) should read 'may' rather than 'must'.**

Rules 29 (JB6) – Fixing a substantive hearing:

15. Rule 29 (2) implies that the need to limit oral testimony is something that can be predicted in advance. In practice the need to do so is only likely to become evident during the hearing itself.
- 16. The Committee agreed that rule 29 (2) should not specify a requirement for limiting oral testimony.**

Rule 30 (J500) – General:

17. The Committee's agreed policy objective is to depersonalise the rules so that, where an obligation to do something is placed on the court, it should sit with the court itself, rather than be specified as a delegated task to a particular official. The question posed was whether the administration of oaths should be an exception.
- 18. The Committee agreed that when depersonalising rules an exception will be made for administering oaths. That task should be expressed as one for the judge.**

Fax Machines:

19. In the context of modernising the rules it is appropriate to exclude references to the use of fax machines. They have been a redundant technology for some time. The rules on electronic transmission should provide sufficient flexibility in the unlikely event that a fax was still used.
- 20. The Committee agreed that references to faxes are not required.**

Rule 50 (J252) - Hearings on applications: general:

21. Ultimately it is the court that will decide whether or not a hearing is required on an application. Having that explicitly stated provides a minor benefit by assisting party litigants with their understanding of the steps in process. The detail added in rule 50 (2) may create an unnecessary burden, as it could involve the issuing of a high volume of interlocutors.

22. The committee agreed that rule 50(2) should be deleted.

Rule 54 (JB23) – Lay representation – applications process:

23. The Court of Session requires an application for a lay representative to be made in advance. Having advance notice may be a desirable aim across all court fora but equally there may be a need for pragmatism. Situations could arise where an experienced lay representative appears at the last minute for valid reasons. If they meet the substantive requirements as stated within a rule, it could be in the court's best interest to be able to affirm their appointment and move on.

24. The Committee is content with the current wording of rule 54 (3).

Rule 82 (J261) - Applications for [referral] to the Inner House of the Court of Session:

25. The use of the word report can be construed as the need to provide a full written report. The question posed was whether adopting the term 'referral' would help to avoid that. As each judge is a member of the Court of Session they would in theory be referring the matter to themselves.

26. The Committee agreed to retain "report" as the preferred terminology.

Other queries arising:

27. During discussions members flagged the following matters:

- Rule 10 (JB 51) – Commencing a case:
 - *Where a party chooses not to comply with the pre-action steps under rule 8, they should state their reasons. They should not be blocked from proceeding, particularly in complex cases where prescription might apply.*
- Rule 13 (JB55) – Service of a summons:
 - *This rule would benefit from greater internal consistency in the way that it lists who can do what.*
- Rule 47 (J250) - Intimation of proposed application and response:
 - *The Committee previously decided to mirror e-motion procedure. That could imply unnecessarily quick turnaround times which may not be*

sufficient for parties to provide reasons for opposition. Extending the timings to 7 days would provide extra time.

- Linkages to the other rules:
 - *It may be useful to restate the core thinking behind how these rules will fit with the more specialist rules that are to follow later within the rules rewrite project.*

Item 4 - A.O.B.

28. No other business was raised.

Item 5 - Dates of future meetings

29. The next meetings will be scheduled for:

- Tuesday, 27 September 2022; and
- Tuesday, 22 November 2022.