

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL**

**MONDAY 26 APRIL 2021 AT 10.30AM**

**VIA WEBEX**

**MINUTES**

**Members Present:** Lord President (Chair)

Kay McCorquodale (SCTS)

Colin Lancaster (SLAB)

Denise Swanson (Scottish Ministers' representative)

Lady Carmichael

Sheriff Principal Murray

Sheriff Hughes

Sheriff Way

Lynda Brabender QC

Catherine Smith

Joel Conn

Brandon Malone

Jaqueline Harris

Elena Fry

Thomas Docherty

Employment Judge D'Inverno

**In attendance:** Cameron Stewart (SCTS Legislation Implementation Team)

Diane Machin (Offices of Court of Session)

**Support:** Craig McCorkindale (Director of Strategy, SCJC)

Ashleigh Pitcairn (LPPO)

Katy Kelman (LPPO)

Karen Stewart (SCJC)

Jessica Flynn (SCJC)

Jennifer Kelly (SCJC)

**Apologies:** Eric McQueen (SCTS)

Lord Boyd of Duncansby

### **Item 1: Welcome, apologies and agreement of private papers**

1. The Chair welcomed those present and noted apologies from Eric McQueen and Lord Boyd. The Chair advised that since the Council's last meeting in March, Sheriff Hughes has been reappointed to the Council for a further period of three years. Following today's meeting, Elena Fry will be stepping down from her position on the Council. The Chair and members expressed their thanks for her valuable contributions during her tenure.

2. Members agreed to publish the following papers: Agenda, 2.1, 3.1B, 3.2, Annex A and B, 3.2C.

### **Item 2: Previous meeting**

#### *Item 2.1 – Items by Correspondence (Paper 2.1)*

3. The Chair introduced Paper 2.1 which provided information on the outcome of matters that had been considered by correspondence since the last meeting on 01 March 2021.

4. **Members noted the paper.**

### **Item 3: Proposals for rules**

#### *Item 3.1 – Qualified One-Way Costs Shifting (Papers 3.1 and 3.1A-D)*

5. The Chair introduced **Paper 3.1** which set out the background to the rules proposal and the development of the draft rules instrument at **Paper 3.1A**. The papers discussed the policy approach adopted in determining the QOCS rules regime which was provided for in draft rules.

6. The Secretariat and the LPPO had worked closely with the Costs and Funding Committee (CAFC) to clarify a number of policy matters. These were subsequently given effect to in the revised draft instrument. Prior to issuing it to Council for consideration, the draft instrument was shared with the Personal Injury Committee (PIC) whose members provided feedback on the draft.

7. Council members were invited to consider and approve a number of policy matters which were set out in Paper 3.1 and are described in the following paragraphs.

#### *Capping Provisions*

8. Members discussed the policy approach to the application of the capping provisions relating to tenders. Members noted that the CAFC proposed that the capping provision should apply with equal effect where there is failure to beat a tender as well as where there is unreasonable delay in accepting a tender. Members noted there was a lack of consensus amongst PIC members on this policy point.

9. Some PIC members raised concerns about the proposed operation of the capping provision in cases where in which there is unreasonable delay on the part of the pursuer in accepting a tender. It was suggested that the court ought to retain the power to dis-apply QOCS where circumstances justify that approach. Council members were invited to discuss the issues and advise on their preferred policy approach.

**10. Having considered and discussed the issues arising, the matter was put to a vote. By majority, the Council approved the policy position outlined by the CAFC that the rules should provide for a capping provision which applies with equal effect where there is failure to beat a tender as well as where there is unreasonable delay in accepting a tender. Drafting amendments were instructed to give effect to this policy position.**

#### *Flat rate or a variable rate cap*

11. Members considered the operation of the capping provision; whether the rules should provide a flat rate 75% cap or variable rate of up to 75%. A flat rate would see the court order a 75% cap in every tender case at the point at which it awards expenses. - A variable rate would require further procedural regulation in each chapter. The Council noted that the majority of CAFC/PIC members favoured a standard flat cap rate being applied without modification and the draft instrument makes provision to this effect.

**12. Having considered the issues arising, the Council approved the flat rate cap of 75% to operate as provided for in the draft rules instrument.**

### *Abandonment*

13. Members noted that the underlying policy position for the prescribed exception on the grounds of abandonment, which is proposed by CAFC and supported by the PIC, is that the court should have a discretion to order a decree of dismissal if it considers that appropriate (whether or not dependent on payment of expenses). The draft rules provide the court with a discretion based on the individual circumstances of the case.

**14. Having considered the issue, the Council approved the policy approach and the related rules provision set out in the draft instrument.**

### *Summary Dismissal*

15. The Council noted that the CAFC/PIC agreed that rules should provide for an exception to costs protection in the event of summary dismissal under OCR 17.2, but in a way that does not remove the court's discretion in relation to expenses.

16. Members considered correspondence from the MDDUS which invited the Council to consider providing a 'summary dismissal' provision in RCS prior to the commencement of the QOCS rules. Members noted that the CAFC/PIC have considered the wider question of whether summary dismissal provisions (against a pursuer) would be appropriate for personal injury proceedings in the Court of Session or Sheriff Appeal Court in the context of the QOCS exception provisions.

**17. The Council agreed that it would not be prudent at this time to provide for summary dismissal in PI actions under the umbrella the of current work to implement Section 8 of the 2018 Act. Members agreed that wider consultation would be necessary should the Council consider enacting summary dismissal provisions across the civil court rules. The interaction of any such provisions with the QOCS regime could be considered at that time.**

### *Counterclaims*

18. The Council considered the drafting of the instrument, which utilises the word 'pursuer' throughout and a question arising about whether this wording could be read as extending to someone making a counterclaim. Members confirmed that they are content with the drafting which makes no reference to counterclaims.

**19. Council approved the drafting provisions and agreed to return to the matter of counterclaims should evidence arise to suggest adjustment of the rules is merited.**

### *Award of expenses*

20. The Scottish Government sought clarification about the policy intention on making awards of expenses. The Council agreed that the rules should cover all decisions on the questions of expenses including where the court makes an award of no expenses due to or by either party. The draft provisions are set out on this basis.

21. **The Council agreed the drafting approach provided in the draft instrument.**

22. **The Council approved:**

- **the draft rules instrument at Paper 3.1A for submission to the Court of Session for consideration and approval subject to any typographical or stylistic amendments; and**
- **agreed that a policy note be prepared by the Secretariat to accompany the draft instrument when it is laid in parliament.**

### *Item 3.2 Regulation of fees: SMASO fee increase (Papers 3.2, 3.2A-C)*

23. Karen Stewart introduced the papers and set out the background to the request from the Society of Messengers-at Arms and Sheriff Officers for a fee increase and the work undertaken by the CAFC in arriving at the proposals.

24. Members noted that the current tables of fees are set out in the Act of Sederunt (Fees of Sheriff Officers) (No. 2) 2002 and the Act of Sederunt (Fees of Messengers-at-Arms) (No. 2) 2002. The draft instrument (**Paper 3.2A**) proposed by CAFC makes provision for a 6% increase to the fee tables. This increase is based on a blend of the Consumer Price Index and the Consumer Price Index Housing over the period 2009-2020. The proposed 6% increase takes account of the last fee uplift approved by Council in 2018 and incorporates an element of inflationary uplift.

25. Sheriff Hughes explained that the CAFC had faced considerable difficulty in finding an alternative to an inflationary increase. This problem was acknowledged by Council members who noted that a Scottish Government expert panel has been considering these complex issues for some time now. Members noted that an ongoing Civil Justice Council consultation on solicitors' guideline hourly rates has encountered difficulty in finding a suitable alternative evidence base even in a jurisdiction where sample sizes are considerably larger.

26. The Council noted that, having considered and discounted activity based costing as a potential methodology, the CAFC had concluded that utilising external sources such as the CPI would be a more realistic marker.

27. Members considered an inflation indices report instructed by the CAFC (**Paper 3.2C**) in this regard and noted relevant information extracted from the Office of National Statistics for three potential inflation indices (Retail Price Index, CPI and CPIH) alongside results based upon a blended approach. Members noted that the CAFC had agreed that the RPI should not be utilised and that an index blend of CPI/CPIH was preferred.

28. Council members noted concern at the 6% increase proposed since it which is considerably higher than annual public pay increases agreed in the Scottish budget. Members noted Annex A and B to Paper 3.2 which showed the pattern of percentage increases for every amendment order made since 2002. The indexation indicates that the proposed figure of 6% is a reasonable uplift to bring fees up to a fully inflation adjusted position since the last approved fee increase in 2018.

29. Some Council members expressed reservations about the proposal but it was recognised that, in adopting the proposed approach, the CAFC had come full circle in terms of policy. Council members acknowledged that this decision was now based on a clearer understanding of the internal and external issues and that it would inappropriate to do nothing in the circumstances.

30. The Council was of the view that there remains scope for improving the methodology for calculating proposed fee uplifts. **Members agreed that consideration of alternative methodologies would be necessary under any future fees review to ensure a robust underpinning of any proposed increase.**

31. **The proposals were put to a vote. By majority, the Council:**

- **approved an increase of 6% to the tables of fees for messengers-at-arms and sheriff officers provided for in the draft rules instrument in Paper 3.2A and agreed that the draft instrument should be submitted to the Court of Session for consideration and approval subject to any typographical or stylistic amendments;**
- **agreed that no policy note is required for this instrument; and**
- **approved April 2021 as the base month for future inflationary adjustments, where that does form part of an evidence base for change.**

32. **Sheriff Principal Murray requested that his opposition to the proposed fee increase be noted in the minutes.**

#### **Item 4: AOB**

33. Brandon Malone advised that he has been researching the topic of blockchain and smart contracts in the context of dispute resolution and would like to provide

members with some information in this regard. The Lord President invited Mr Malone to send the documents to the Secretariat for dissemination.

**Item 5: Dates of future meetings**

- Monday 24 May 2021
- Monday 19 July 2021
- Monday 18 October 2021

**Scottish Civil Justice Council Secretariat**

**April 2021**