

SCOTTISH CIVIL JUSTICE COUNCIL
COSTS AND FUNDING COMMITTEE (CAFC)

APPROVED MINUTES

PARLIAMENT HOUSE, 4.15PM, MONDAY 19 JANUARY 2015

Members present: Lord Burns (Chair)
Sheriff Charles Stoddart (Retired)
Sheriff Thomas Hughes (Dundee Sheriff Court)
James Mure QC
Ian Dickson (SLAB)
Alan Rogerson (Claims Manager, Aviva)
Iain Nicol (Solicitor)
Stella Smith (Legal Services Team Leader, Scottish Government)

Video conference: Eric Baijal (Solicitor, SCJC member)

In attendance: Gillian Prentice (Deputy Principal Clerk of Session)
Jane MacDonald (Policy and Legislation Branch, SCS)
Kenny Htet-Khin (Head of Rules Rewrite Drafting Team)
John Thomson (Deputy Legal Secretary to the Lord President)
Inez Manson (Deputy Legal Secretary to the Lord President)
Susan Brodie (Policy Officer, SCJC Secretariat)

Apologies: Lindsay Montgomery (Chief Executive, SLAB)
Julia Clarke (Principal Advocate, Which?)
Graham Crombie (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Item 1: Introduction, welcome, apologies and private papers

1. The Chair welcomed Eric Baijal who attended the meeting via video conferencing, Ian Dickson in attendance on behalf of Lindsay Montgomery of SLAB and Kenny Htet-Khin in attendance on behalf of Graham Crombie from Rules Rewrite Drafting Team. Attendance of others present and apologies were noted at this, the fourth meeting of the CAFC.
2. **The Committee agreed not to publish the following papers: 3.3, 3.4, 4.1, 5.1 and 6.1.**

Item 2: Minutes of previous meeting

Item 2.1: Minutes of previous meeting [Papers 2.1]

3. **The Committee approved the minutes of the previous meeting.**

Item 3: Forward Work Programme

Item 3.1 Update of Activity of the Scottish Government [Oral]

4. Stella Smith provided an update for Scottish Government regarding the merger of the Scottish Court Service with the Tribunal Service and Specialised Personal Injury Court. Scottish Government is set to hold a consultation exercise which takes forward primary legislation required in areas as identified in Sheriff Principal Taylor's recommendations. Ms Smith confirmed that this consultation would include the question of whether the SCJC should be given the power to make rules relating to Counsel's fees.

Item 3.2 Update on Activity of the Scottish Civil Justice Council (SCJC) and Committees [Oral]

5. Susan Brodie provided an update on the activities of the SCJC, SCJC Secretariat and an update of the activities of other SCJC Committees.

Item 3.3 CAF Report on the Implementation of Sheriff Principal Taylor's Review [Paper 3.3]

6. Iain Nicol spoke to the content of **Paper 3.3** regarding his comments in relation to the final draft report on the implementation of Sheriff Principal Taylor's recommendations with contribution from Eric Baijal reiterating his own comments made.
7. **Following discussion, the Committee agreed an insert would be included into paragraph 79 of the CAFC Report on Implementation, to ensure parties are aware they have a right to apply for Legal Aid.**
8. **Ms Smith and Mr Nicol agreed to discuss paragraphs 84, 87, 88, 89 and 92 separately and Mr Nicol to report to the CAFC at the next meeting on 16 February 2015.**
9. **The Committee agreed the CAFC Report on Implementation would remain as it is within paragraphs 87, 88, 89 and 92 for the time being.**

10. **Members agreed to include “professional negligence claims” within paragraph 84 of the CAFC Report on Implementation.**

Item 3.4 Strategy for implementation of Sheriff Principal Taylor’s recommendations [Paper 3.4]

11. John Thomson addressed **Paper 3.4** inviting the Committee to consider its strategy for the implementation of the recommendations set out in chapters 2 to 4 of the Report of Sheriff Principals Taylor’s Review.
12. **Following discussion, the Committee agreed that the SCJC secretariat and/or the Deputy Legal Secretary should embark on the preparation of a series of discussion papers on timeous topics for consideration at future CAFC meetings.**

Item 4 Personal Injury Committee Policy Instruction Paper

Item 4.1 Sanction for Counsel [Papers 4.1 4.1A and 4.1B]

13. Kenny Htet-Khin spoke to the content of **Papers 4.1A-B** and provided information to the members of the significance for CAFC to deal with timeous matters and of consultations between the Committees of the SCJC.
14. **Members agreed a joint meeting between the CAFC and PIC may be required, and agreed to consider issues that would merit such a meeting, for further discussion at the CAFC meeting 16 February 2015.**
15. **The Chair agreed to discuss with Lord Jones the Chair of the PIC any issues which his committee consider might merit a joint meeting.**
16. **The Committee noted paragraphs 108 to 117 in Paper 4.1a and paragraphs 6 to 8 in Paper 4.1b.**

Item 5 Exclusive Competence of the Sheriff Court

Item 5.1 Exclusive Competence of the Sheriff Court [Paper 5.1]

17. The Committee thanked Graham Crombie in his absence for providing an informative paper, which Mr Htet-Khin spoke to. Members discussed **Paper 5.1** which considered the relationship between the exclusive competence of the sheriff court, the principles currently used to determine the value of orders sought and issues of the operation of these principles. Members considered options for approaches to exclusive competence and how the committee might approach proxy or informal consultation. Members also discussed the approach currently adopted in

England and Wales in relation to determining the value of an order (as set out in Annex B of **Paper 5.1**).

18. **Members considered and agreed with the analysis in Paper 5.1 of (i) the principles currently applied in determining the value of orders; and (ii) how such principles should be adapted.**
19. **In relation to the specific recommendations set out in paragraphs 80 to 84 of Paper 5.1, the Committee members agreed as follows:**

Paragraph 80 (exclusive competence and remits from the Court of Session):

- (a) **The Committee noted the analysis in Paper 5.1 of the relationship between section 39 (exclusive competence) and 93 (remit from the Court of Session), as summarised in paragraph 12 of Paper 5.1.**

Paragraph 81 (present principles applicable to determining value of orders):

- (a) **The Committee considered the summary of the principles presently used to determine the value of orders sought (as set out in paragraph 28 of Paper 5.1).**
- (b) **The Committee agreed that this is an accurate statement of the present position.**
- (c) **The Committee agreed that the general principles set out in Annex A of Paper 5.1 should be the starting point for the new rules, but that scope should be left for these to be clarified and for additional principles to be inserted in future.**

Paragraph 82 (detailed issues relating to determining the value of orders):

- (a) **The Committee agreed with the conclusion in paragraph 34 of Paper 5.1 that section 39 of the Courts Reform (Scotland) Act 2014 (“the 2014 Act”) precludes abolishing the community of interest rule.**
- (b) **The Committee agreed with the analysis set out in paragraphs 40 to 47 of the paper, which considers how the value of an order determining rights in relation to property is to be ascertained. In particular, it was agreed that:**
 - **Where the pursuer seeks an order of value, it is for the pursuer to explain to the court what the value of the order is.**

- Declarator and reduction are both orders which determine rights in property, but that interdict is not.
- (c) The Committee agreed with the analysis in paragraphs 48 to 54 of Paper 5.1 of how the value of an order *ad factum praestandum* is to be ascertained. In particular,
- The Committee agreed that where a pursuer claims that the value of an order is greater than its extrinsic value, it is for the pursuer to aver why this is the case.
 - The Committee approved the approach proposed in paragraphs 50 to 54 of Paper 5.1 in relation to conclusions for indefinite sums.
- (d) The Committee agreed that the value of an action for count, reckoning and payment should take account of the context (i.e. the size of the disputed fund or estate). In complex cases, it should be open to the pursuer to aver (i) why the sum sued for is truly unascertainable until there has been an accounting; and (ii) the basis for expecting to achieve more than £100,000.
- (e) In relation to whether a bespoke procedure to test questions of competency is required, the Committee agreed that:
- The current mechanisms for challenging competency are adequate.
 - Appeal against the Lord Ordinary's decision ought not to be excluded, as it will constitute a final judgment.
- (f) In relation to the consequences should the pursuer ultimately be granted orders worth less than £100,000, the Committee agreed that there should not be a blanket ban on penalising the pursuer in expenses. A discretion should be retained as a means of ensuring proportionality. The Committee considered that the new rules should not preclude the pursuer from having to face the consequences of obtaining decree of under £100,000 in value.

Paragraph 83 (options for approaches to exclusive competence):

- (a) The Committee discussed the three approaches set out in paragraph 66 of Paper 5.1. It was considered that to 'do nothing' (Option A) would be inappropriate as it was understood that Parliament's intention was to provide clear guidance. Committee members agreed that Option B was the best approach, and agreed to proceed to make rules that restate and adapt

the existing law and principles which apply when determining the value of an order. It was agreed that the Rules Rewrite Drafting Team would prepare draft rules for consideration by the Committee at its meeting in March. It was noted that the 'comprehensive review' approach (Option C) could still be done at a later date if considered necessary, but that Option B should be pursued for the time being.

Paragraph 84 (proxy consultation):

- (a) Committee members agreed they would seek views of representative bodies (for example, the Civil Justice Committee of the Law Society and the Costs and Funding Committee of the Faculty of Advocates) on the draft rules, once prepared, and liaise with the SCJC secretariat to arrange consultation meetings with such bodies timeously. Due to the time constraints (notably, the need for the draft rules to be put to the SCJC meeting in May), views would likely have to be provided by those bodies within 3-4 weeks.

Item 6 AOCB

Item 6.1 Consultative Committee on Commercial Actions [Paper 6.1]

20. Committee members noted this paper in its draft form and will refer back to this paper once approved by the Consultative Committee on Commercial Actions at the next meeting 16 February 2015.
21. The Chair raised the issue of the Auditor of the Court of Session becoming a member of the CAFC with reference to the Committee's possible future remit.
22. Sheriff Stoddart suggested that there also may be a need for an independent Auditor of the sheriff court to become a CAFC member.
23. The Committee agreed Mr Baijal to take this suggestion forward to the forthcoming SCJC meeting on 26 January 2015.

Item 7 Future Business

24. The Chair informed the Committee that it had been agreed through appropriate channels, that in his absence for any CAFC meetings during 2015 that Sheriff Stoddart or Sheriff Hughes may chair these meetings.

25. Future dates are:

Monday 16 February 2015

Monday 30 March 2015 – Sheriff Stoddart to Chair

Monday 27 April 2015

Monday 25 May 2015

All meetings set down for 4.15pm start.

Scottish Civil Justice Council Secretariat

January 2015