

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

RULES REWRITE COMMITTEE

MONDAY, 27 MARCH 2023

Judges Conference Room, 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
Duncan Hamilton QC
Jaqueline Harris
Lord Richardson
Sheriff Principal Turnbull

In attendance: Jonathan Brown (Parliamentary Counsel Office)
Ysabeau Middleton (Lord President's Law Clerk)

Support: Jessica Flynn (SCJC)
Craig McCorkindale (SCJC)

Apologies: Nil

Item 1 - Welcome, apologies and agreement of private papers

1. The Chair welcomed the members present, with no 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 2023/6 – approved the minutes of the previous meeting on 13 February 2023. Those minutes are available online.

Item 3 - Work Programme:

Item 3.1 – The Ordinary Procedure Rules (Papers 3.1 and 3.1A):

4. The Committee considered version 2 of the proposed new rules.

Rule 34 (JB8) – Presumption in favour of electronic format

5. These new rules are to be aligned with the Attendance at Hearings Rules. Respondents to the consultation on those rules had rejected the use of a general presumption, whilst accepting that ongoing benefits do arise with the electronic transmission of documents.

6. The Committee agreed to:

- **Use a heading of “Electronically transmitted documents” or similar;**
- **Amend rule 34 (1) to replace “must” with “should”; and**
- **Delete rule 34 (4).**

Rule 62 (JB 14) - Presumption in favour of giving oral evidence electronically

7. The respondents to the consultation on the Attendance at Hearings rules had:

- Rejected the use of general presumptions as too blunt an instrument; and
- Indicated a strong preference for continuing the use of in-person hearings for all hearings where evidence is likely to be led.

8. The Procedural Narrative also made additional comments regarding the need to distinguish between information and evidence. The drafting lawyers will consider whether those elements remain sufficiently covered elsewhere in the rules.

9. The Committee agreed to withdraw rule 62.

Rule 4 (JB34) - Alternative Dispute Resolution

10. The revised wording is focused on encouraging discussion, addressing the previous concerns raised around conveying a choice between two options.

11. The Committee agreed the revised wording of rule 4.

Rule 5 (JB35) – Sanctions where a party is in default

12. A duplication arises if using both ‘authorised’ and ‘ordered’.

13. The Committee agreed to delete “...authorised or...” from rule 5 (1) (a).

Rule 10 (JB51) – Commencing a case

14. Rule 10 (3) was revised to ensure reasons are given where a party chooses not to comply with rule 8 which requires the intimation of a potential case. Accepting that the option to not comply exists will help to reinforce that there is no policy intention to block such parties from proceeding with their case.

15. The Committee accepted the revised wording at rule 10 (3).

Rule 13 (JB55) Service of a summons

16. It is accepted that there are some options for service derived from the common law which can be undertaken without first being specified by the court. The policy intention is for this rule to act as a catch-all so an amendment is required.

17. The Committee agreed to insert the words “...as may be competent in law” into rule 13 (1) (d).

Rule 14 (JB57) Defences

18. Current practice has not been successful in ensuring that defences fully respond to the case advanced. Whilst the responding party is already required to set out “the factual and legal basis of the defence” the suggestion made is to require in addition that the defences include “...a response to the essential facts of the dispute”. The Committee’s policy intent is to reinforce that specific need for pleadings to address fully the points made within the case raised.

19. The Committee agreed to insert “a response to the essential facts of the dispute” as a new line 14 (3) (e).

Rule 18A (J507) - Application for recall of a decree in absence

20. The Committee discussed the practical effect of a recall in an undefended case and any appeal that may arise following summary decree. The drafting lawyers will review the wording of the rule and seek further instruction if required.

Item 4 - Any other business

Withdrawal of agents

21. The existing RCS rule on withdrawal of agents was updated to require any withdrawing agent to confirm their client’s a) latest address and b) awareness of the need to be present or represented at any hearing within the next 14 days.

22. Those changes arose in response to a high incidence of late cancellation of hearings following agent withdrawal in Judicial Review cases. Members did not

take a view on whether the rule change had resolved that issue. The potential for a Rules Review on this subject remains as an item on the Council's list of outstanding rules requests.

Item 5 – Dates of future meetings

23. The next scheduled meeting is set down for 29 May 2023.