

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

RULES REWRITE COMMITTEE

MONDAY, 13 FEBRUARY 2023

Judges Conference Room, Level +2 Parliament House

MINUTES

Present: Lord President (Chair)
Sheriff Kenneth Campbell QC
Joel Conn
Ian Dickson
Summary Sheriff Roddy Flinn
Walter Drummond-Murray
Lord Richardson
Sheriff Principal Turnbull

In attendance: Craig Anderson (Offices of the Court of Session)
Jonathan Brown (Parliamentary Counsel Office)

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

Apologies: Mark Boni
Duncan Hamilton QC
Jaqueline Harris

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, 3.1A and 3.1B.

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 2022/30 – approved the minutes of the previous meeting on 22 November 2022. Those minutes are now available online.

Item 3 - Work Programme:

Item 3.1 – The New Civil Procedure Rules (Papers 3.1, 3.1A and 3.1B):

4. The Committee agreed that the latest version of the rules (**Paper 3.1A**) moved members closer to a version that would be suitable for a future consultation.
5. The Chair used the queries in the right hand column of paper 3.1B to prompt discussion of further potential amendments.

Numbering:

6. To simplify the ongoing development of the rules, the numbering is a simple 1 to 99. Any change to the numbers that link a rule to their relevant chapter is a styling option. Those styling changes will be considered later, once the substance of each rule is finalised.

Rule 1 (J510) – Name of these rules

7. The Committee noted the difficulty that the public may have with the word “cause”, and the practical need for practitioners to refer back to the Ordinary Cause Rules for some time. The Committee agreed that the new rules will be called the Ordinary Procedure Rules (OPR).

Rule 2.1 / 2.3 / 2.6 (JB49-51) Commencing an action:

8. The Committee discussed:
 - The merits of introducing word counts within initiating documents, in preference to the alternative approach using font size and spacing; and
 - Whether an escape valve needs to be added at that same stage.
9. The aim is to ensure that actions are being framed correctly whilst recognising there is not a “one size fits all” solution, particularly when time bars apply. There is a risk that people try to avoid a word count threshold by simply lodging multiple actions. With initiating documents, the Committees preference is to use a word count accompanied by an appropriate escape valve.

Rule 13 (JB55) - Service of summons

10. A question arose as to whether a summons is capable of being personally served by someone other than a messenger-at-arms or sheriff officer (such as a solicitor).
11. Confusion can arise through the way the rules refer to “officers of court” in a general sense. At present solicitors frequently intimate that something has happened to other parties. They stop short of attempting service. It is doubtful

whether practitioners would want to be involved in effecting service. There are risks associated with enforcement and recovery which may not be covered by current insurance arrangements. Such risks may be better left to those already operating (SMASSO).

Rule 14 (JB57) Defences

12. The aim with this rule is to make sure that defences respond to the case that has been advanced, as envisaged by rule 14 (3) (d) and rule 14 (3) (e). Current practice has not been successful in achieving that.
13. Rule 14 (5) is included to recognise that failure to deny a matter contained in the summons does not, of itself, amount to an admission. The aim is to help move away from current practice, in which practitioners often use “quoad ultra denied” as their default response.

Rule 18 (JB61) Undefended cases and decree in absence

14. The current principle is that a summons or initial writ will fall after a year and a day, which means it is no longer possible to seek decree after that time. There is a danger that this is being overcomplicated by the wording used at rule 18 (5) and rule 18 (6). In practice the court needs to be able to clear the decks of cases that will not be proceeding, preferably without the need to make an intervention. That needs to be done in a manner that is compliant with the reasonable time element in Article 6 of the European Convention.
15. The Committee agreed that the wording of this rule should support inactive cases being “deemed dismissed”, avoiding the problems that accompany inaction.

Rule 19.1 (JB62) Summary Decree:

16. A clarification may be required, to reflect that summary decree should only apply in defended cases. That change would recognise that whilst a practitioner is unlikely to move for such a decree, a party litigant may do so.

Rule 20 (J63) – Judicial Continuity

17. The Committee recognised the practical difficulties with judicial deployment. This rule lays down a marker for judicial continuity where practicable. It may be more honoured in the breach. Situations can and do arise where judicial continuity can be counter-productive; if a perception of bias might arise with the same judge ruling on the same matter on several occasions.
18. The Committee agreed that the wording for this rule should support judicial continuity “where practicable and appropriate”.

Rule 22 (JB65) - Case Management Questionnaire

19. The questionnaire is the earlier step in process which has the purpose of determining whether a case management hearing is required. It is additional to the note that each party is to lodge 7 days before any hearing (under rule 27). As those two requirements can overlap, there is the potential for duplication. To minimise duplication, the following options were considered:

- *Option 1* – restrict the questionnaire to a simple question of whether the party wants a case management hearing;
- *Option 2* – lodge a combined questionnaire / note at the earlier step in process, then lodge an updated version of the same combined document 7 days before the hearing; or
- *Option 3* – Maintain the use of two separate documents.

20. The Committee agreed that it is necessary to maintain both documents.

Rule 27 (JB4) – Information supplied before a case management hearing

21. The question is whether the information required under rule 27 is unduly onerous.

22. This will depend on whether the answers are made in full and unconditionally or whether the answers are littered with items marked as 'to be confirmed'. That begs the question of what is the difference between a) the proposed list that's being provided for the case management hearing (under rule 27) and b) the actual list that is to be provided for the substantive hearing (under rule 29).

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

23. The latest version of the Attendance at Hearings rules is an agenda item for the upcoming Council meeting. If approved, finalised rules could be published during March 2023. The availability of those rules will facilitate an update being made to these rules.

Rule 46 (J518) - Caveats

24. Following the Committee's meeting of 22 November 2022, drafting instructions had been issued to have the existing caveat rules refreshed and reissued during 2023. The availability of those updated rules removes the need to have a placeholder retained within the Ordinary Procedure Rules.

Rule 72-76 (J266 to J270) - Additional Party Procedure

25. There is a danger that the term “additional party” will add confusion, rather than reduce it. The Committee reconfirmed that it would retain the traditional term of “third party” and retain the working practice of qualifying each addition made (as the 1st third party, the 2nd third party etc.).

Rule 82 (J281) - Applications for [referral] to the Inner House of the Court of Session

26. The Committee agreed to adopt the phrase “referral by way of report”.

Rule 92 (JB38) Online applications and forms

27. With the ongoing process of digitisation, online forms that can effectively utilise drop down menus are increasingly the norm. In parallel with that, a non-electronic form does need to be maintained for those who need to use it (the digitally excluded).

28. The challenge is how to maintain the flexibility of a digital version which can evolve rapidly over time, whilst maintaining reasonable equivalence in the non-electronic version. Nervousness remains regarding whether old outdated legislation could still be used to challenge the validity of forms through technical legal arguments.

29. The meeting discussed the general requirements for signing. The business need is for these rules to provide a gateway into the system. That gateway activity will support accountability for those who submitted a given document and when. That ask is achieved by completion of the task itself, rather than adding a “squiggle”.

Item 4 - Any other business

30. There was no other business raised.

Item 5 – Dates of future meetings

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

32. The Chair asked the secretariat to schedule an additional meeting in mid-April 2023. The secretariat will confirm a date and issue calendar invites.