

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

RULES REWRITE COMMITTEE

TUESDAY, 22 November 2022

Judges Conference Room, Level +2 Parliament House

MINUTES

Present: Lord President (Chair)
Mark Boni
Sheriff Kenneth Campbell QC
Joel Conn
Walter Drummond-Murray
Duncan Hamilton QC
Jaqueline Harris
Lord Richardson
Sheriff Principal Turnbull

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

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

Apologies: Ian Dickson
Summary Sheriff Roddy Flinn

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, 3.2, 3.2A and 3.2B.

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 2022/17 – approved the minutes of the previous meeting on 28 June 2022. Those minutes 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 4 (JB34) - Alternative Dispute Resolution

5. As the practical steps to promote ADR are embedded within the new rules covering case management discussions, it was considered necessary and sufficient for this rule to reinforce the overarching duty to promote ADR. Ideally the wording could focus less on this being a choice between two options (court v ADR) and more on encouraging discussion.
- 6. The Committee agreed that an overarching duty is both necessary and sufficient, with suggestions for rewording to follow.**

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

7. The sanctions that would apply when a party is in default were not specifically addressed within the Procedural Narrative, so rule 5 was added for discussion.
8. Inclusion of the phrase “timetable agreed between the parties” in rule 5 (1) (a) is likely to lead to further argument. The preference is to stick with just “timetable ordered by the court”. The alternative of “timetable authorised by the court” was considered and rejected.
- 9. The Committee agreed to delete the words “...between (or among) the parties or ...” from rule 5 (1) (a).**

Rule 6 (JB36) - Relief from failure to comply

10. Any relief that may be granted when a party is in default was not specifically addressed within the Procedural Narrative, so rule 6 was added for discussion. The terms “mistake” in rule 6 (1) (a) and “oversight” in rule 6 (1) (b) had been the subject of debate in several court opinions. The preference is to just refer to “an excusable cause”. Adopting the alternative of “on cause shown” was considered and rejected.
- 11. The Committee agreed that rule 6 (1) (a) and 6 (1) (b) should be deleted, and rule 6(1) (c) should be amended to read “any excusable cause”.**

Rule 7 (JB69) – Overview (per chapter)

12. The option of having an overview inserted for each chapter of the rules was considered in terms of whether it would improve readability of the rules, or provide a distraction that unnecessarily increases the size of the rules. On balance it was considered to be unnecessary.

13. The Committee agreed that chapter overviews would not be required, and rule 7 can be deleted.

Rule 47 (J250) - Intimation of proposed application and response:

14. The committee had previously considered this significant shift away from the existing system in April 2022 when finalising the content of the Procedural Narrative, which reflects a preference for mirroring the e-motions procedure used by the Court of Session.

15. Following intimation, rule 47 (3) would require the other party to respond no later than 5pm on the second court day with any opposition to the proposed application, and views on whether a hearing is required. The rule assumes that this timeframe for intimation and response can only really be met by email. Whilst that timing works well in the Court of Session, it may be too tight for those practitioners who work in the sheriff courts due to volume issues, variations in the size of practice, availability of counsel, and the incidence of party litigants etc. A solicitor may struggle to take instructions and to prepare and lodge their opposition within time, particularly if only some of it is opposed. It may be problematic for party litigants lacking access to email.

16. The purpose of intimation and response is principally to determine whether a hearing is required for an opposed motion, rather than to get into the detailed grounds for opposition. The short 2 day timeframe for listing opposition, and the likely grounds, does get a party to fixing the hearing earlier. The requirement for grounds could be set out within the rules or the form. Time would remain for the grounds to be worked up in more detail before the hearing. Ideally the courts would expect dialogue to have taken place between the parties, and awareness of whether it will be opposed, before a collated motion is lodged. The Council's guiding principles include providing comparability in rules. The different infrastructures for each court may suggest the need for an exception but that should be avoided if at all possible.

17. The Committee agreed to: change the timing for opposition from 2 days to 3 days, the motion party should collate the motion and indicate if it will be opposed, with the reasons for opposition to be listed in the response.

Item 3.2 – Caveats (Papers 3.2, 3.2A & 3.2B):

18. Under the temporary exemptions provided by the [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#) the SCTS is taking steps to allow for solicitors to lodge some caveat applications online; gradually extending that online capability over time. It is opportune to update the caveat rules to provide a more permanent solution for the electronic signing and transmission of those documents. In addition the terminology should be modernised:

- To amend the obligation to make applications in writing;
- To state more clearly the requirement for email addresses;
- To withdraw references to faxes; and
- To provide for any minor variation when a paper form is lodged.

19. Members raised the opportunity to future proof the rules so that a caveat application might be made for either a single sheriff court or for all sheriff courts and/or the Court of Session. There is a potential impact on court fees of adding such a national caveat option. An amendment to the court fee orders should be coordinated in parallel with offering a new option for national caveats. The Scottish Government does lodge a significant number of caveats across all courts, so their reduction in charges would help to offset the potential reduction in fee income.

20. The Committee agreed to issue Drafting Instructions, to enable the development of amended Caveat rules for consideration.

Item 4 - A.O.B.

21. No other business was raised.

Item 5 - Dates of future meetings

22. Calendar invites will follow for quarterly meetings during 2023.

23. The committee considered whether to change the start time to 4:30. The time will remain at 4:15 but ad hoc changes can be accommodated on request.