

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
RULES REWRITE COMMITTEE**

TUESDAY, 26 APRIL 2020 (by Webex)

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: Nicola Anderson (Legislation Implementation Team, SCTS)
Craig Anderson (Offices of the Court of Session)
Johnathon Brown (Parliamentary Counsel Office)
Ian Vickerstaff (Lord Presidents Private Office)
Katy Kelman (Lord Presidents Private Office)

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

Item 1 - Welcome, apologies and agreement of private papers

1. The Chair welcomed the members present, particularly the new members.
2. The Committee agreed not to publish papers 3.1 and 3.1A.

Item 2 - Update since last meeting

Item 2.1 - Items by Correspondence (Paper 2.1):

3. The Committee noted the three items considered by correspondence since the last meeting held on 3 July 2018:

Paper 2018/18 – approved the minutes of the previous meeting on 3 July 2018 for publication (on 29 November 2018);

Paper 2019/01 – approved the draft rules for the Criminal Finances Act 2017, for onwards submission to the March 2019 Council meeting; and

Paper 2020/03 - noted the current status of the Rules Rewrite Project which would remain paused indefinitely until resources could be made available.

Item 3 - Work programme

*Item 3.1 - Rules Rewrite Project: Procedural Narrative (**Papers 3.1 and 3.1A**):*

4. Feedback on the content of the Procedural Narrative (Paper 3.1A) was considered, along with the points raised within the covering paper (Paper 3.1).

The depersonalisation of tasks:

5. Where rules place an obligation on the court to do something then those obligations should normally be stated as being on the court itself, rather than a task for a specific judicial office holder or court official.
6. The goal is to simplify the rules overall. As everything is done under the delegated authority of the court the rules should only ever need to make a distinction if such personalisation within the rules is absolutely needed.
7. **The Committee agreed to set the depersonalisation of tasks as a policy objective, with any delegation of tasks only specified by exception.**

Commencing an action:

8. For a pre-action protocol to be meaningful it does require substance, with sufficient information on the basis of the claim and the likely lines of defence. That raised questions about any sanctions that might then need to be applied for non-compliance.
9. The Council's guiding principles include ensuring a consistency of rules across the Court of Session and the sheriff courts. Given the higher proportion of undefended actions going through the sheriff courts, the Committee may need to consider making some distinction between each court fora as the draft rules start to emerge. The wording worked for both court fora at the moment. The actions which a party takes in response need only to be consistent with the general parameters set. That would not drive a fundamental change in current working practices.

10. It was helpful to retain the detailed references to font size 12 and double spacing when setting page limits.
11. From an equalities perspective, the ability of users to adjust font sizes is already addressed as an expected feature within software for document readers.
12. **The Committee agreed that the Procedural Narrative should retain the current wording on commencing an action.**

Summary Decree:

13. The ability of the court to issue a summary decree at its own hand was a recommendation carried forward from the Scottish Civil Courts Review. That then became the Councils agreed policy when the New Civil Procedures Rules First Report was published in May 2017.
14. Issuing summary decree ex proprio moto is seen as the natural outcome of adopting a case management philosophy within the new rules. The wording in the Procedural Narrative (paragraph 2.50) includes two important qualifications. Notice to parties is required, along with the opportunity to be heard. Ex proprio moto decision making is consistent with the policy objective of having unmeritorious cases dealt with expeditiously.
15. **The Committee agreed that the Procedural Narrative should retain the current wording on Summary Decree.**

The procedure for making applications:

16. Some practitioners find e-motions procedure counter intuitive, whereas others find it a more modern approach that better supports the shift to digital. It does represent a shift away from the current practice for lodging applications but the consensus reached was that the approach set out within the procedural narrative was to be preferred.
17. **The Committee agreed that the Procedural Narrative should retain the current wording on making applications.**

Avoiding lengthy written pleadings:

18. The Procedural Narrative indicates that there is no longer a need to respond to every averment made; just those that are essential to resolution of the dispute. Experience from England and Wales indicated that leaving the parties unconstrained could result in lengthy written pleadings. This was in conflict with the aim of assisting parties to meet somewhere in the middle.

19. The courts do place an expectation of candour on the parties. This allows some of this concern to be addressed through active case management. The approach taken in the Commercial Courts Practice Note is instructive. The consensus was that paragraph 2.28 should be reworded to emphasise this positive obligation on the defender to address the case being made against them, by providing abbreviated responses to those averments which set out the essential facts of the dispute.

20. The Committee agreed that the wording on written pleadings should be amended slightly, to reflect the concern raised.

Digitisation:

21. The wording used within the Procedural Narrative reflects the views of the working groups who completed their work prior to the rapid digitisation that took place as part of the pandemic response. The secretariat may wish to review that wording to ensure it reflects the technologies now in use.

22. The Committee:

- **Agreed the content of the Procedural Narrative subject to the proposed edits; and**
- **Agreed to propose (by correspondence) that the Council approves the Procedural Narrative for online publication.**

Item 4 - A.O.B.

23. No other business was raised.

Item 5 - Dates of future meetings

24. The Chair confirmed that the Rules Rewrite project has now been fully reactivated. To enable rapid progress on the further development of new rules, the next two meetings have been scheduled for:

- Tuesday, 31 May 2022; and
- Tuesday, 28 June 2022.