

SHERIFF COURT RULES COUNCIL

APPROVED - Minutes of Meeting held on Friday 25 June 2004

Present: Sheriff Principal I D MacPhail QC, Chairman
Sheriff Principal B A Kerr, QC
Sheriff M J Fletcher
Sheriff N M P Morrison QC
Sheriff I A S Peebles, QC
Mr S Di Rollo, QC
Mr R Conway, Solicitor
Mr J D'Inverno, TD ADC WS, Solicitor-Advocate
Mr J McCormick, Solicitor
Mr J Murphy, Sheriff Clerk
Mr P Cackette, SEJD
Mr R Young, Lay member

Mrs G McKeand, Secretary
Mr G Halligan, Assistant Secretary

Apologies: Mrs C Flanagan, Solicitor
Mr A Loudon, Solicitor
Mrs E Laing, Assistant Area Director
Mr A Adams, Lay Member

The Chairman welcomed Mr Richard Young to his first meeting.

Item No 2 on the Agenda – Minutes of Previous Meeting

Sheriff Principal Kerr suggested the insertion of “many matters as indicated in his memorandum, including” after “to” and before “sheriffs” in paragraph 3 of item 4. In the same section in the third last paragraph insert “summary application” between “usual” and “procedure”. The Council agreed with the amendments. The minutes of the meeting of the 19 March 2004 were approved as amended.

Matters Arising

The Chairman advised the Council that the Miscellaneous Act of Sederunt came into force on 21 May 2004 and an explanatory article was in the June edition of the Law Journal. The Sexual offences Act of Sederunt came into force on 21 May 2004 and the Protection of Children Act of Sederunt was due to come into force on 15 July 2004. A draft Consolidation Act of Sederunt was with the draftsman for amendment and the Consolidation Committee would meet when this was available

Item No 3 on the Agenda – IT Consultation Paper

Sheriff Peebles explained the details of the draft IT Consultation Paper to the Council.

The Council were satisfied with the purpose of the consultation paper being stated as “to seek views on the Rules Council’s proposals for the further extension of the use of information technology in civil cases in the Sheriff Court”.

The Chairman suggested that before each consultation question there should be a narrative of the background to the question and what the IT Committee see as the advantages and disadvantages and how it would work in practice. It would be helpful if we explain why we are doing this, a consultation paper similar to those issued by the Law Commission.

Sheriff Peebles suggested the narrative for each question could be set out in the background with a cross-reference to the question number. The Council agreed.

Sheriff Morrison asked how the centralised virtual court would operate. Sheriff Peebles suggested using the previous paper that was put forward to the Council at the last meeting in the consultation paper to explain these issues.

Sheriff Peebles also advised the Council that the Secretariat was searching rules and primary legislation to identify areas where changes will be required. The Chairman suggested a question on this point could go into the consultation paper.

The Council agreed to include a consultation question on whether the Sheriff Clerk should serve all summary cause and small claims actions. After discussion the Council decided not to include a question on whether service requirements should move towards first class post.

The Secretariat to revise the consultation paper in these terms and circulate the revised copy to members.

Item No 4 on the Agenda – Taking of Evidence via a video link

The Council discussed the letter from Mr T G Coutts, QC in relation to changes to civil procedure to allow evidence to be taken by way of video link in civil cases. Mr Coutts takes the view that, in default of agreement, the request to take evidence by video-link is incompetent and the procedure requires to be regulated by some form of legislation, perhaps by way of a rule of court.

The Court of Session Rules Council had considered this issue and set up a working group to consider it further.

Mr Di Rollo could see no reason for the request to be incompetent and did not think a procedural rule was required

The Chairman agreed but suggested it may be preferable to have some kind of rule. In England there is a rule and practice direction based on experience in Australia.

The Chairman agreed to prepare ea paper on the issue for the next meeting of the Council.

Item No 5 on the Agenda – Land Reform (Scotland) Act 2003

The Chairman explained some of the background to the Act. The Act enables statutory public rights of access to land for recreational and other purposes. The Act extends some of the provisions for that purpose to rights of way and other rights. Provision is made under which bodies representing rural and crafting communities may buy the land with which those communities have a connection.

Part 1 – Chapter 5

Section 14 deals with prohibition signs, obstructions and dangerous impediments etc. The owner of the land in respect of which access rights are exercisable shall not, for the purpose or for the main purpose of preventing or deterring any person entitled from doing so by putting up a sign or notice etc.

Where the local authority consider that anything has been done in contravention of the above they may, by written notice served on the owner of the land, require that such remedial action as is specified in the notice be taken by the owner of the land within such reasonable time as is so specified.

An owner on whom a notice has been so served may, by summary application made to the sheriff, appeal against it.

Section 14 Subsection (5) states:

Rules of Court shall provide:

- a. for public notice of the making of the summary applications for the purposes of this section;
- b. for enabling persons interested in the exercise of access rights over the land to which a summary application relates, and persons or bodies representative of such persons, to be parties to the proceedings;
- c. for limiting the number of persons and bodies who may be such parties.

The Council decided that the public notice should be made by way of advert in the newspaper.

The Council agreed with the Chairmans draft rule for limiting the number of persons and bodies who may be such parties as follows:-

“Where more than one person or body has the same interest in the exercise of access rights over the land”

Under section 15 (measures for safety, protection, guidance and assistance) where the local authority consider that a fence, wall or other erection is so construed or adapted as to be likely to insure a person exercising access rights, they may by written notice served on the owner of the land on which it is placed, require the owner to take, within such reasonable time as is specified in the notice, such

reasonable action as is so specified, being action calculated to remove the risk of injury.

As with section 14 an owner may appeal against the notice by summary application to the Sheriff and the same rules of court are required.

The Council agreed and proposed the same rules as those approved for section 14.

Section 28 (Judicial determinations of existence and extent of access rights and rights of way) states:

- (1) It is competent, on summary application made to the sheriff, for the sheriff
 - (a) to declare that the land specified in the application is or, as the case may be, is not land in respect of which access rights are exercisable;
 - (b) to declare –
 - (i) whether a person who has exercised or purported to exercise access rights has exercised those rights responsibly for the purposes of section 2 above;
 - (ii) whether the owner of land in respect of which access rights are exercisable is using, managing or conducting the ownership of the land in a way which is, for the purposes of section 3 above, responsible.
- (2) It is competent, on a summary application made to the sheriff, for the sheriff to declare whether a path, bridleway or other means of crossing land specified in the application is, or is not, a right of way by foot, horseback, pedal cycle or any combination of those.
- (3) The proceedings for a declaration under subsection (1) or (2) above are those for an action of declarator initiated by summary application to the sheriff.
- (4) A summary application for a declaration shall be served on the local authority.
- (5) The local authority are entitled to be a party to proceedings for a declaration.
- (6) Where the person seeking a declaration is the owner of the land, it is not necessary to serve the application on any person but the local authority.
- (7) In any other case, the person seeking the declaration shall serve the application on the owner of the land.
- (8) Rules of court shall provide –
 - (a) for the circumstances in which (including any time periods within which) a summary application may be made for the purposes of this section;

- (b) for public notice of the making of summary applications for the purposes of this section;
- (c) for enabling persons interested in the exercise of access rights over specific land or, as the case may be, in the existence of a right of way over specific land and persons or bodies representative of such persons to be parties to the proceedings;
- (d) for limiting the number of persons and bodies who may be such parties.

The Council considered a rule for a period other than the normal 21 day period in the general summary application rules. Sheriff Morrison suggested disapplying the time limits. The Council agreed and instructed a rule which would disapply time-limits for applications under Section 28.

The Council discussed Part 2 (The Community Right to Buy) Chapter 6 regarding appeals. It was agreed this section would be covered by the general summary application rules.

The Council considered Section 91 which states –

- (1) The owner of the land or person entitled to the sporting interest to which an application under Section 73 (exercise of right to buy) relates and any other person within subsection (2) below may, by summary application, appeal to the sheriff against Ministers decision to consent to the application.
- (2) The persons within this subsection are –
 - (a) any person who is a member of the crofting community defined in relation to the applicant crofting community body in pursuance of section 71 above;
 - (b) any person who has any interest in the land or sporting interests giving rise to a right which is legally enforceable by that person; and
 - (c) any person who was invited, under section 73(8)(a) above, to send views to Ministers on the application.
- (3) The applicant crofting community body may, by summary application, appeal to the sheriff against Ministers' decision to refuse its application under section 73 above.
- (4) Subsection (3) above does not extend to Ministers' decision under section 76 above upon which of two or more applications to buy the same land they should consent to.
- (5) An appeal under subsection (1) or (3) above may be made only on a question of law and shall be lodged within 28 days of the date on which Ministers decided to consent to, or refuse, the application.

- (6) The sheriff in whose sheriffdom the land or any part of it is situated or the sporting interests or any part of them are exercisable has jurisdiction to hear an appeal under this section.
- (7) The sheriff shall dispose of an appeal under this section by ordering that Ministers' decision be adhered to or reversed and such an order shall have the same effect as if it were a decision taken by Ministers on the application.
- (8) Where the effect of such an order is the same as granting the application, the order may be made subject to any condition to which Ministers could have made their decision subject under section 80 above.
- (9) An order having the effect mentioned in subsection (9) above shall be consistent with any decision or findings of the Land Court under sections 77 or 81 above.

The Council agreed that this section would be covered by the general summary application rules.

A draft Act of Sederunt would be considered by the Council at the next meeting.

Item No 6 on the Agenda – Cash Seizures under the Proceeds of Crime Act 2002

The Secretary explained that draft rules had been instructed at the meeting on 19 March 2004 and these were now available for consideration. The Council had formed the view that a form of “certificate of information given to the affected person” should be drawn up requiring the applicant to certify to the court that he/she has informed the affected person of the date, time and place of the hearing of the application, advised him/her of the right to appear and/or be represented at such hearing, and that he or she has been supplied with a copy of the summary application or a summary of the application and advising the court of the method of delivery of such information. If the applicant did not personally give the affected person the necessary information, the person who did should also sign the certificate.

The Secretary also advised the Council that the Secretariat had met with representatives from the Crown Office Civil Recovery Unit to discuss the proposed draft Act of Sederunt. The Crown's main difficulty with what is proposed is that the Summary Application required by the process will not be prepared in sufficient time to have this sent to or served upon the affected person. They made the point that the person from whom cash is seized may give false details, in which case they would never be able to supply the person with a copy application. The Secretariat had explained to them there was still an issue of fair notice.

The Crown proposed that the police or customs officer who makes the seizure should issue to the affected person a notice in the following terms:-

“We acknowledge receipt of the sum of £ seized from you (name) at (place) on (date and time). This has been seized under the provisions of the Proceeds of Crime Act 2002 under Section 295. There will be a hearing to seek further detention of this money. Either you or your legal representative or both will be entitled to attend this hearing. The hearing will take place at (place) on (time), which is within 48 hours of the seizure. (Date and time of hearing to be determined by local protocols).

The Council agreed and also approved the following to be included in the notice –

2. A copy of the Summary Application which will be presented to the court applying for the extended detention of the cash for a summary of it) will be available at (place) not less than 30 minutes before the hearing.
3. Should we decide not to seek the extended detention of the cash, you will be informed before the hearing.
4. You may have given your contact details as (address) (phone no) and any additional information about the hearing before the sheriff will be supplied to that address/phone no.

The Council agreed with the Secretary that the rules should be amended to provide that a copy of the receipt would be sufficient proof of the required standard of intimation.

The Council agreed with Sheriff Morrison’s suggestion that the definition of “affected person” should be covered in draft rule 3.19.2.

The Secretariat was instructed to write to Sheriff Principal Bowen to advise him of the draft rules and the need for local protocols.

Item No 7 on the Agenda – The Debt Arrangement Scheme (Scotland) Regulations 2004

The Secretary advised the Council that the Regulations had been laid and approved by Parliament. The planned commencement date is for November 2004.

The Council decided there should be provision restricting the right of audience granted by Regulations.

The Council agreed there should be a form for use in applications under draft regulation 27.

The Council decided that hearings should be fixed to determine whether a debt payment programme should be granted. The Council agreed there should be a form for this application.

It was agreed that the sheriff clerk should intimate the application to parties

The Council were satisfied that the form was sufficient provision for the DAS administer to sign rather than specifying in rules.

The Council decided hearings should also take place for applications under Regulation 39. It was agreed a form should be specified. The Sheriff Clerk should intimate the hearing and the DAS administer could sign the form.

Item No 8 on the Agenda – Any Other Business

The assistant secretary advised the Council that the Competition Appeals Tribunal rules, which were previously approved by the Council, were being drafted into an Act of Sederunt. It was agreed these could be taken forward with the Chairman. The Secretary advised the Council that the Anti-Social Behaviour Bill had now passed Stage 3 and will become an Act after receiving Royal Assent. There were 11 applications in the Act capable of being made to the court and 6 new forms of appeal to the Sheriff Principal. The Council approved the use of a form for closure orders.

The Secretary also advised the Council the Gender Recognition Act may require rules.

The date of the next meeting was fixed for Friday 10 September 2004 at 10.30 am with Edinburgh Sheriff Court.