

2004 No. 514

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment
No. 6) (Miscellaneous) 2004**

Made - - - - - *29th November 2004*

Coming into force - - - - - *30th November 2004*

The Lords of Council and Session, under and by virtue of the powers conferred upon them by section 5 of the Court of Session Act 1988(a) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Miscellaneous) 2004 and shall come into force on 30th November 2004.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2.—(1) The Rules of the Court of Session 1994(b) shall be amended in accordance with the following sub-paragraphs.

(2) In rule 33.6 (form of bonds of caution and other securities) paragraph (2) shall be omitted.

(3) After rule 35.15 (letters of request) there shall be inserted the following:—

“Applications for requests that evidence be taken under the Council Regulation

35.16.—(1) In this rule—

‘the Council Regulation’ means the Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters(c);

‘Member State’ has the same meaning as in Article 1(3) of the Council Regulation;

‘request’ means a request to which Article 1(1)(a) of the Council Regulation applies; and

‘requested court’ has the same meaning as in Article 2(1) of the Council Regulation.

(2) This rule applies to an application under the Council Regulation for a request to a requested court in a Member State other than the United Kingdom for the purposes of a cause depending before the Court of Session.

(a) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c.32, section 2(3) and by the Children (Scotland) Act 1995 c.36, Schedule 4, paragraph 45.

(b) S.I. 1994/1443, last amended by S.S.I. 2004/331.

(c) O.J. L 174, 27.06.2001, p.1.

(3) An application to which paragraph (2) applies shall be made by minute in Form 35.16–A with a proposed request in form A (request for the taking of evidence) or form I (request for direct taking of evidence) set out in the Annex to the Council Regulation.

(4) It shall be a condition of granting an application for a request that the agent for the applicant, or a party litigant, as the case may be, shall be personally liable, in the first instance, for any reimbursement required by the requested court in respect of any fees paid to experts and interpreters and the costs occasioned by the use of any requested special procedure in executing the request for evidence, or the use of requested communications technology at the performance of the taking of evidence; and that he shall consign into court any such sum as is required by the requested court as deposit or advance towards the costs of executing the request.

(5) Unless the requested court is in a country or territory–

- (a) where English is an official language, or
- (b) in relation to which the Deputy Principal Clerk certifies that no translation is required,

then the applicant shall, before the issue of the request, lodge in process a translation of the request and any interrogatories and cross-interrogatories into the official language of that country or territory.

(6) Where an application under this rule has been granted, the request shall be forwarded by the Deputy Principal Clerk to–

- (a) the requested court; or
- (b) the central body or competent authority designated by the other Member State to be responsible for taking decisions on requests to take evidence directly.

(7) The Deputy Principal Clerk shall, as soon as reasonably practicable after receipt of any communication from the requested court, send written intimation of that communication to the parties.

(8) If a request is made to take the evidence of a witness directly in another Member State, the Deputy Principal Clerk shall intimate to the witness who is to give evidence, a notice in Form 35.16–B and the witness shall return Form 35.16–C to the Deputy Principal Clerk, within 14 days after the date of intimation of the notice.”.

(4) In rule 43.1(3)(a) (disapplication of certain rules to personal injuries actions) after “rule 22.3 (closing record)” there shall be inserted “rule 26.5(2)(c) (answers by third party to include pleas-in-law),”.

(5) In rule 72.1(1) (interpretation) after “Bankruptcy (Scotland) Act 1985(b)” there shall be inserted the following:–

“;

‘the 2004 Regulations’ means the Debt Arrangement Scheme (Scotland) Regulations 2004(c).”.

(6) After rule 72.2 (first order in petitions for sequestration) there shall be inserted the following:–

“Declaration regarding an approved debt payment programme

72.2A. The petitioner shall lodge with the petition a declaration or declarations by the petitioner and any concurring creditors in Form 72.2A confirming that the debtor has not entered into an approved debt payment programme or that the debts founded on in the petition are in respect of credit as defined in regulation 35(1)(b) of the 2004 Regulations.”.

(a) inserted by S.S.I. 2002/570 and amended by S.S.I. 2004/291.

(b) 1985 c.66.

(c) S.S.I. 2004/468 as amended by S.S.I. 2004/470.

(7) After Chapter 86 (applications under various provisions of the Competition Act 1998) there shall be inserted the following:–

“CHAPTER 87

CAUSES RELATING TO ARTICLES 81 AND 82 OF THE TREATY ESTABLISHING
THE EUROPEAN COMMUNITY

Intimation of actions to the Office of Fair Trading

87.1.—(1) In this rule–

‘the Treaty’ means the Treaty establishing the European Community;

‘the OFT’ means the Office of Fair Trading.

(2) In an action where an issue under Article 81 or 82 of the Treaty is raised:–

- (a) by the pursuer or petitioner in the summons or petition;
- (b) by the defender or respondent in the defences or answers; or
- (c) by any party in the pleadings;

intimation of the action shall be given to the OFT by the party raising the issue, by a notice of intimation in Form 87.1.

(3) Where the issue under Article 81 or 82 of the Treaty is raised in the summons or petition, a warrant for intimation shall be inserted in the summons or petition in the following terms: ‘Warrant to intimate to the Office of Fair Trading’.

(4) Where the issue under Article 81 or 82 of the Treaty is raised in defences, answers or in any other part of the pleadings, the party raising the issue shall apply by motion for an order for intimation to the OFT.

(5) A certified copy of an interlocutor granting a motion under paragraph (4) shall be sufficient authority for the party to intimate by notice in Form 87.1.

(6) The notice of intimation shall be served on the OFT within such period as the court shall specify in the interlocutor allowing intimation.

(7) There shall be attached to the notice of intimation–

- (a) a copy of the pleadings (including any adjustments and amendments);
- (b) a copy of the interlocutor allowing intimation of the notice; and
- (c) where the pleadings have not been amended in accordance with a minute of amendment, a copy of that minute.”.

(8) In the appendix–

- (a) after Form 35.15–B there shall be inserted the forms set out in Part 1 of the Schedule to this Act of Sederunt;
- (b) after Form 69.23 there shall be inserted the form set out in Part 2 of the Schedule to this Act of Sederunt;
- (c) after Form 86.3 there shall be inserted the form set out in Part 3 of the Schedule to this Act of Sederunt.

Edinburgh
29th November 2004

Lord President
I.P.D.

SCHEDULE

Paragraph 2(3)

PART 1

Rule 35.16(3)

FORM 35.16–A

Form of minute for request to take evidence

IN THE COURT OF SESSION

MINUTE

for

[A.B.] (or [C.D.]) (*designation and address*)

in the cause [or in the petition of]

[A.B.] (*designation and address*), Pursuer [or Petitioner]

against

[C.D.] (*designation and address*), Defender [or Respondent]

(Name of counsel or other person having a right of audience) for the Minuter states to the court that the evidence specified in the proposed request lodged with this Minute is required for the purpose of this cause and prays the court to issue a request in terms of the proposed request to *(specify the court or tribunal having power to obtain evidence)* to obtain the evidence so specified.

(Signed by counsel or other person having a right of audience)

FORM 35.16-B

Form of notice to person in another Member State of intention to seek to take direct evidence

Date: *(date of posting or other method of intimation)*

To: *(name and address of person to give evidence)*

You are a witness for the pursuer [*or petitioner*] [*or defender*] [*or respondent*] in the case raised by [*or to be raised by*] (*name*) against (*name*).

The pursuer [*or petitioner*] [*or defender*] [*or respondent*] has requested that evidence be taken directly from you by means of (*specify the communications technology to be used*) from the (*name of the requested court*) to the Court of Session.

This evidence can only be taken directly from you if you agree to give evidence in this way. If you do not agree to give evidence directly the pursuer [*or petitioner*] [*or defender*] [*or respondent*] may apply for a request to have evidence taken from you in (*name of requested court*) without the means of (*specify the communications technology*).

Please return the enclosed response form to the Deputy Principal Clerk of Session within 14 days after the date of this notice stated at the top of this notice.

FORM 35.16-C

Form of response form to be completed and returned to requesting court by witness

WITNESS RESPONSE FORM

To: Deputy Principal Clerk of Session, Court of Session, Parliament House, Edinburgh, EH1
1RQ

From: *(name to be printed by person serving the notice)*

Date: *(date)*

I, *(name and address of witness to be completed by person serving the notice)*, have received the notice seeking my agreement to have evidence taken directly from me as a witness for the pursuer [*or petitioner*] [*or defender*] [*or respondent*] in the Court of Session case raised by (*or to be raised by*) *(name of pursuer or petitioner)* against *(name of defender or respondent)* at *(person sending notice to specify the court)* by means of *(person serving notice to specify communications technology to be used)*.

I confirm that I agree to voluntarily attend at *(person sending notice to specify the court)* to have evidence taken directly from me in this case.*

I confirm that I do not agree to voluntarily attend at *(person sending notice to specify the court)* to have evidence taken directly from me in this case.*

*(*Please delete as appropriate)*

(Signature of witness)

PART 2

Paragraph 2(6)

Rule 72.2A

FORM 72.2A

Form of declaration regarding debt payment programme

IN THE COURT OF SESSION

in the PETITION of

[A.B.] (*designation and address*)

for

the sequestration of the estate of (*name and address of debtor*)

At _____ on the _____ day of _____

I, (*name of person making the declaration*) am the petitioner and debtor [*or* petitioner and creditor] [*or* a concurring creditor] in the petition for the sequestration of (*name of debtor*) and I hereby state—

that the debt[s] founded upon in the petition for sequestration of the estates of (*name of debtor*) is [*or* are] not debt[s] subject to an approved debt payment programme under section 2 of the Debt Arrangement and Attachments (Scotland) Act 2002.

[*or*]

that although the debtor (*name of debtor*) is subject to an approved debt payment programme under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002 the debt[s] founded on in the petition for sequestration is [*or* are] in relation to credit given to the debtor in terms of Regulation 35(1)(b) of the Debt Arrangement Scheme (Scotland) Regulations 2004.

(*Signed by person making the declaration*)

(*Designation*)

(*Address*)

PART 3

Paragraph 2(7)

Rule 87.1(2)

FORM 87.1

Form of notice of intimation to the Office of Fair Trading

Date: *(date of posting or other method of intimation)*

To: The Office of Fair Trading

TAKE NOTICE

(Name and address of pursuer or defender) has brought an action against [*or has defended an action brought by*] *(name and address of defender or pursuer)* [*or (name and address of petitioner or respondent) has raised a petition [or responded to a petition raised by] (name and address of respondent or petitioner)*]. The action raises issues under Article 81 or 82 of the Treaty establishing the European Community. A copy of the summons [*or petition*] is [*or pleadings and interlocutor allowing intimation are*] attached.

You may apply to the court by motion for leave to be sisted as a party in the action. You must do so at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh, EH1 1RQ within [21] days after the date of intimation to you of this notice [*or if the warrant for intimation is executed before the calling of the summons, within [7] days after the summons calls in court. The summons will not call in court earlier than [21] days after the date of intimation to you of the summons*]. The date of intimation is the date stated at the top of this notice unless intimation has been made by post in which case the date of intimation is the day after that date.

(Signed)

Messenger-at-arms

[*or Solicitor [or Agent] for Pursuer [or Petitioner or Defender or Respondent]*]

(Address)

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt makes miscellaneous amendments to the Rules of the Court of Session 1994 (S.I. 1994/1443) (“the Rules”).

Paragraph 2(2) makes a minor amendment to the rules relating to bonds of caution to remove any reference to the bond of caution or security being given by an insurance company authorised under the Insurance Companies Act 1982.

Paragraph 2(3) introduces procedure for letters of request for evidence to be taken under European Council Regulation 1206/2001 on the taking of evidence in civil and commercial matters. A form for an application by minute is prescribed and rules are made in relation to the applicant’s liability for expenses and the documents to accompany any letter of request. New rules are introduced to provide for intimation between the parties, the court that has been sent the request and the witness.

Paragraph 2(4) amends rule 43.1(3) to clarify that pleas-in-law are not required in answers by third parties in personal injury cases.

Paragraph 2(5) and (6) introduces a new rule requiring a declaration to be lodged with a petition for sequestration stating that the sequestration is not prohibited under the Debt Arrangement Scheme (Scotland) Regulations 2004 due to the existence of a debt payment programme.

Paragraph 2(7) introduces a new chapter to provide a mechanism for the OFT to be advised of actions that are raised involving issues under Article 81 or 82 of the Treaty establishing the European Community.

Paragraph 2(8) inserts new forms in relation to the request to take evidence in a court in a European Community Member State, the form of declaration in a petition for sequestration, and the form of notice of intimation to Office of Fair Trading.

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