

2009 No. 63

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session Amendment)
(Miscellaneous) 2009**

Made - - - - - *23rd February 2009*

Coming into force in accordance with paragraph 1(1) and (2)

The Lords of Council and Session, under and by virtue of the powers conferred 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) (Miscellaneous) 2009 and, subject to subparagraph (2), comes into force on 25th February 2009.

(2) Paragraphs 4 to 7 come into force on 23rd March 2009.

(3) This Act of Sederunt is to be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2. The Rules of the Court of Session 1994(b) are amended in accordance with paragraphs 3 to 7.

Bank insolvency and bank administration

3.—(1) In rule 5.1A (further restriction as to caveats)(c)—

(a) the existing words of the rule shall become paragraph (1); and

(b) after paragraph (1) insert—

“(2) A caveat shall not be lodged against an order for intimation, service and advertisement of a petition for a bank insolvency order under rule 74.35 or a bank administration order under rule 74.45.”.

(2) In rule 33.9 (insolvency or death of cautioner or guarantor), in paragraph (d)(i), for “administration or winding up order” substitute “administration or bank administration order or a winding up or bank insolvency order”.

(3) In rule 74.1 (application and interpretation of Chapter 74)(d)—

(a) in paragraph (1), after subparagraph (c) insert—

(a) 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c.32, section 2(3), the Children (Scotland) Act 1995 c.36, Schedule 4, paragraph 45 and by the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 14(1).

(b) S.I. 1994/1443, last amended by S.S.I. 2008/401.

(c) Rule 5.1A was inserted by S.S.I. 2001/92 and amended by S.S.I. 2001/305.

(d) Rule 74.1 was amended by S.I. 1996/1756 and S.S.I. 2003/385, 2007/499 and 2006/83.

“; and

(d) Parts 2 or 3 of the Banking Act 2009(a).”;

(b) in paragraph (2), after the definition of “the Act of 2004” insert–

““the Act of 2009” means the Banking Act 2009(b);

“the Bank Administration Rules” means the Bank Administration (Scotland) Rules 2009(c);

“the Bank Insolvency Rules” means the Bank Insolvency (Scotland) Rules 2009(d);”; and

(c) in paragraph (3)–

(i) after “the Act of 2004,” insert “Parts 2 or 3 of the Act of 2009”; and

(ii) after “the Insolvency Rules” insert “, the Bank Insolvency Rules, the Bank Administration Rules”.

(4) In rule 74.2 (proceedings before insolvency judge)(e), for “or Chapter 3 of Part 3 of the Act of 2004,” substitute “, Chapter 3 of Part 3 of the Act of 2004 or Parts 2 or 3 of the Act of 2009,”.

(5) In rule 74.3 (notices and reports, etc., sent to the court)(f)–

(a) after “the Act of 2004,” insert “the Act of 2009,”; and

(b) after “the Insolvency Rules” insert “, the Bank Insolvency Rules, the Bank Administration Rules”.

(6) In rule 74.9 (form of other applications)(g)–

(a) after paragraph (1) insert–

“(1A) In the case of a bank, an application to which this rule applies shall be made–

(a) where the bank is not subject to a bank insolvency order and is not in bank administration, by petition; or

(b) where the bank is subject to a bank insolvency order by the court or is in bank administration, by note in the process to which it relates.”; and

(b) in paragraph (2), after subparagraph (h) insert–

“; or

(i) any provision in the Act of 1986, as applied by the Act of 2009, relating to voluntary arrangements.”.

(7) After rule 74.15 (applications during an administration or energy administration)(h), insert–

“Application for administration by a bank liquidator

74.15A. An application by a bank liquidator for an administration order under section 114 of the Act of 2009 shall be made by note in the existing process of the bank insolvency petition.”.

(8) After rule 74.32A (other applications)(i), insert–

(a) 2009 c.1.

(b) 2009 c.1.

(c) S.I. 2009/350.

(d) S.I. 2009/351.

(e) Rule 74.2 was substituted by S.S.I. 2006/83.

(f) Rule 74.3 was substituted by S.S.I. 2006/83.

(g) Rule 74.9 was amended by S.S.I. 2003/385.

(h) Rule 74.15 was substituted by S.S.I. 2006/83.

(i) Rule 74.32A was inserted by S.S.I. 2006/83.

“Approval of the voluntary winding up of a bank

74.32B.—(1) An application for the prior approval of a resolution for voluntary winding up of a bank under section 84 of the Act of 1986 shall be made to the Deputy Principal Clerk by letter.

(2) An application under paragraph (1) shall be marked as having been made on the date on which the letter is received by the court.

(3) The letter shall be placed before the insolvency judge forthwith for consideration.

(4) The court shall approve such a resolution by pronouncing an interlocutor to that effect.”.

(9) After Part VI of Chapter 74 (disqualification of company directors) insert—

“PART VII

BANK INSOLVENCY PROCEDURE

Petition for bank insolvency

74.35.—(1) An application for a bank insolvency order under section 95 of the Act of 2009 shall be made by petition.

(2) A petition under paragraph (1) shall include averments in relation to—

- (a) the name and address of the person to be appointed as the bank liquidator, and his qualification to act;
- (b) the current name and any other trading names of the bank;
- (c) the address of the bank’s registered office, and any previous such address within six months immediately before the presentation of the petition so far as known to the petitioner;
- (d) a home address for each director of the bank;
- (e) a statement of the amount of the bank’s capital (nominal and issued) indicating what part is called up, paid up or credited as paid up, and the amount of the assets of the bank so far as known to the petitioner;
- (f) whether, to the knowledge of the petitioner, a bank administrator has been appointed in respect of the bank or a supervisor has been appointed in respect of the bank under a voluntary arrangement under Part 1 of the Act of 1986; and
- (g) the grounds on which the petition proceeds.

Intimation, service and advertisement under this Part

74.36.—(1) Unless the court otherwise directs, the order under rule 14.5 (first order in petitions) for intimation, service and advertisement of a petition referred to in rule 74.35 shall include—

- (a) a requirement to serve two copies of the petition—
 - (i) on the bank and each director of the bank;
 - (ii) on the Bank of England, if it is not the petitioner;
 - (iii) on the Financial Services Authority, if it is not the petitioner;
 - (iv) on the Secretary of State, if he is not the petitioner;
 - (v) on the proposed bank liquidator;
 - (vi) on the Financial Services Compensation Scheme;
 - (vii) on any person who has given notice to the Financial Services Authority in respect of the bank under section 120 of the Act of 2009;

(viii) if there is in force for the bank a voluntary arrangement under Part 1 of the Act of 1986, the supervisor of that arrangement; and

(ix) where a bank administrator has been appointed in relation to the bank, on that bank administrator;

(b) a requirement to advertise the petition forthwith—

(i) once in the Edinburgh Gazette; and

(ii) once in one or more of such newspapers as the court shall direct; and

(c) the time and date fixed by the court for the hearing of the petition.

(2) In fixing the time and date for the hearing of the petition mentioned in paragraph (1)(c), the court shall ensure that the date and time is as soon as reasonably practicable, having regard to the need to give the directors of the bank a reasonable opportunity to attend.

(3) Unless the court otherwise directs, where the petition is served under paragraph (1), one copy of the petition shall be sent electronically as soon as practicable to each of the persons named in the order and the other copy shall be served on those persons in accordance with Chapter 16 of these Rules.

(4) Any answers to the petition must be lodged 24 hours before the date fixed by the court under this rule and a copy of the answers must be served on the petitioner before that date.

(5) An advertisement under paragraph (1) shall include—

(a) the identity of the petitioner;

(b) the name and address of the agent for the petitioner;

(c) the date on which the petition was presented;

(d) where a provisional bank liquidator has been appointed by the court, his name, address and the date of his appointment; and

(e) a statement that any person who intends to appear in the petition must lodge answers no later than 24 hours prior to the date set down for a hearing in terms of paragraph (1)(c).

Provisional bank liquidator

74.37.—(1) An application to appoint a provisional bank liquidator under section 135 of the Act of 1986, as that provision is applied and modified by section 103 of the Act of 2009, may be made—

(a) by the petitioner, in the prayer of the petition or, if made after the petition has been presented, by note; or

(b) by any other person entitled to make an application under section 95 of the Act of 2009, by note.

(2) The application mentioned in paragraph (1) shall include averments in relation to—

(a) the grounds for appointment of the provisional bank liquidator;

(b) the name and address of the person proposed to be appointed, and his qualification to act, as provisional bank liquidator; and

(c) confirmation that the person to be appointed has consented to act as provisional bank liquidator.

(3) Where the court decides to appoint a provisional bank liquidator—

(a) it shall pronounce an interlocutor making the appointment and specifying the functions to be carried out by him in relation to the affairs of the bank; and

(b) the applicant shall forthwith send a certified copy of such interlocutor to the person appointed and to such other persons as are specified under rule 12 of the Bank Insolvency Rules (order of appointment of provisional bank liquidator).

(4) On receiving a certified copy of an interlocutor pronounced under paragraph (3), the provisional bank liquidator shall intimate his appointment forthwith—

- (a) once in the Edinburgh Gazette; and
- (b) once in one or more such newspapers as the court has directed.

(5) An application for the discharge of a provisional bank liquidator shall be made by note.

Applications and appeals in relation to a statement of affairs

74.38.—(1) An application under section 131(5) of the Act of 1986, as applied and modified by section 103 of the Act of 2009, for—

- (a) release from an obligation imposed under section 131(1) or (2) of the Act of 1986, as so applied and modified; or
- (b) an extension of time for the submission of a statement of affairs,

shall be made by note.

(2) A note under paragraph (1) shall be served on the bank liquidator or provisional bank liquidator, as the case may be, who may lodge—

- (a) answers to the note; or
- (b) a report on any matters which he considers should be drawn to the attention of the court.

(3) Where the bank liquidator or provisional bank liquidator lodges a report under paragraph (2), he shall forthwith send a copy of it to the noter.

(4) Where the bank liquidator or provisional bank liquidator does not appear at any hearing on the note, a certified copy of the interlocutor disposing of the note shall be sent to him forthwith by the noter.

(5) Where a certified copy of the interlocutor is sent to the bank liquidator or provisional bank liquidator in accordance with paragraph (4), the noter shall forthwith provide notice of that fact to the court.

(6) An appeal under rule 4.9(6) of the Insolvency Rules (appeal against refusal by liquidator of allowance towards expenses of preparing statement of affairs), as applied by rule 19 of the Bank Insolvency Rules, shall be made by note.

Appeals against adjudication of claims

74.39.—(1) An appeal under section 49(6) of the Bankruptcy (Scotland) Act 1985(a), as applied by rule 4.16 of the Insolvency Rules (appeal by a creditor or contributory of the company against a decision of the liquidator), as that rule is in turn applied by rule 28 of the Bank Insolvency Rules, shall be made by note.

(2) A note under paragraph (1) shall be served on the bank liquidator.

(3) On such a note being served on him, the bank liquidator shall send the claim in question, and a copy of his adjudication, forthwith to the Deputy Principal Clerk who shall cause them to be lodged in process.

(4) After the note has been disposed of, the Deputy Principal Clerk shall return the claim and the adjudication to the bank liquidator with a copy of the interlocutor disposing of the note.

(a) 1985 c.66; section 49 was amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), section 31(1).

Removal of bank liquidator

74.40. An application for an order under section 108 of the Act of 2009 (removal of bank liquidator by the court) shall be made by note.

Application in relation to remuneration of bank liquidator

74.41.—(1) An application—

- (a) by a bank liquidator under rule 4.34 of the Insolvency Rules (application to increase remuneration), as that rule is applied by rule 47 of the Bank Insolvency Rules; or
- (b) by a creditor of the bank under rule 4.35 of the Insolvency Rules (application to reduce liquidator's remuneration), as that rule is applied by rule 48 of the Bank Insolvency Rules,

shall be made by note.

Applications under section 176A of the Act of 1986

74.42.—(1) An application by a bank liquidator or bank administrator under section 176A of the Act of 1986 (share of assets for unsecured creditors), as applied and modified by section 103 of the Act of 2009, shall be made by note in the existing bank liquidation or bank administration process.

(2) The Deputy Principal Clerk shall—

- (a) after the lodging of any note fix a hearing for the insolvency judge to consider an application under paragraph (1); and
- (b) give notice of the hearing fixed under paragraph (2)(a) to the noter.

(3) The noter shall not be required to give notice to any person of the hearing fixed under paragraph (2)(a), unless the insolvency judge directs otherwise.

Applications to appoint a special manager

74.43.—(1) An application under section 177 of the Act of 1986 (application for the appointment of a special manager), as applied and modified by section 103 of the Act of 2009, shall be made by note.

(2) A bond of caution certified by the noter under rule 4.70(4) of the Insolvency Rules, as that rule is applied by rule 82 of the Bank Insolvency Rules, shall be sent to the Petition Department by the noter.

(3) After the Deputy Principal Clerk has satisfied himself as to the sufficiency of caution under rule 33.7(1) of these Rules, the clerk of session shall issue to the person appointed to be special manager a certified copy of the interlocutor appointing him.

(4) A special manager may, before the expiry of the period for finding caution, apply to the insolvency judge for an extension of that period.

Other applications

74.44.—(1) An application under the Act of 1986 as applied by the Act of 2009, under the Act of 2009 or under any subordinate legislation made under those Acts, in relation to a bank insolvency not mentioned in this Part shall—

- (a) if made by a party to the petition, be made by motion; or
- (b) in any other case, be made by note.

(2) At the hearing of a motion under paragraph (1)(a), the court may order that the application be made by note; and, in such a case, shall make an order for the lodging of answers to the note in process within such period as it thinks fit.

PART VIII

BANK ADMINISTRATION PROCEDURE

Petition for bank administration

74.45.—(1) An application by the Bank of England for a bank administration order under section 142 of the Act of 2009 shall be made by petition.

(2) A petition under paragraph (1) shall include averments on the following matters—

- (a) the name and address of the person to be appointed as the bank administrator, and his qualification to act;
- (b) confirmation that the conditions for applying for a bank administration order, set out in section 143 of the Act of 2009, are met in respect of the bank;
- (c) the bank's current financial position to the best of the Bank of England's knowledge and belief, including actual, contingent and prospective assets and liabilities;
- (d) any security which the Bank of England knows or believes to be held by the creditors of the bank;
- (e) whether any security confers power to appoint an administrator under paragraph 14 of Schedule B1 to the Act of 1986 (holder of qualifying floating charge) or a receiver of the whole (or substantially the whole) of the bank's property, and whether such an administrator or receiver has been appointed;
- (f) any insolvency proceedings which have been instituted in respect of the bank, including any process notified to the Financial Services Authority under section 120 of the Act of 2009;
- (g) details of any property transfer instrument which the Bank of England has made or intends to make under section 11(2)(b) or 12(2) of the Act of 2009 in respect of the bank;
- (h) where the property transfer instrument has not yet been made, an explanation of what effect it is likely to have on the bank's financial position;
- (i) how the making of a bank administration order will achieve the objectives specified in section 137 of the Act of 2009;
- (j) how functions are to be apportioned where more than one person is to be appointed as bank administrator and, in particular, whether functions are to be exercisable jointly or individually; and
- (k) other matters which the Bank of England considers will assist the court in deciding whether to grant a bank administration order.

Hearing of petition

74.46.—(1) Where a petition is lodged under rule 74.45, the court shall fix a time and date for the hearing of the petition and in doing so shall ensure that the date and time is as soon as is reasonably practicable, having regard to the need to give the directors of the bank a reasonable opportunity to attend.

(2) At the hearing of a petition, each of the following may appear or be represented—

- (a) the Bank of England;
- (b) the Financial Services Authority;
- (c) the bank;
- (d) any director of the bank;
- (e) any person nominated for appointment as bank administrator of the bank;

- (f) any person who holds a qualifying floating charge for the purposes of paragraph 14 of Schedule B1 to the Act of 1986; and
- (g) with the permission of the court, any other person who appears to have an interest.

Provisional bank administrator

74.47.—(1) An application to appoint a provisional bank administrator under section 135 of the Act of 1986, as that provision is applied and modified by section 145 of the Act of 2009, may be made by the Bank of England in the prayer of the petition or, if made after the petition has been presented, by note.

(2) The application mentioned in paragraph (1) shall include averments on the following matters—

- (a) the grounds for appointment of the provisional bank administrator;
- (b) the name and address of the person proposed to be appointed, and his qualification to act, as provisional bank administrator;
- (c) confirmation that the person to be appointed has consented to act as provisional bank administrator; and
- (d) the Bank of England’s estimate of the value of the assets in respect of which the provisional bank administrator is entitled to be appointed.

(3) An order appointing any provisional bank administrator shall specify the functions to be carried out in relation to the bank’s affairs and how those functions are to be apportioned where more than one person is to be appointed as provisional bank administrator and, in particular, shall specify whether functions are to be exercisable jointly or individually.

(4) Where the court decides to appoint a provisional bank administrator—

- (a) it shall pronounce an interlocutor making the appointment and specifying the functions to be carried out by him in relation to the affairs of the bank; and
- (b) it shall forthwith send a certified copy of the interlocutor to the person appointed and to such other persons as are specified in rule 32 of the Bank Administration Rules (appointment of provisional bank administrator).

(5) On receiving a certified copy of an interlocutor pronounced under paragraph (4)(a), the provisional bank administrator shall intimate his appointment forthwith—

- (a) once in the Edinburgh Gazette; and
- (b) once in one or more such newspapers as the court has directed.

(6) An application for the discharge of a provisional bank administrator shall be made by note.

Report of bank administrator’s proposals: Schedule B1 to the Act of 1986

74.48.—(1) Paragraph (2) shall apply where a report under paragraphs 53(2) or 54(6) of Schedule B1 to the Act of 1986 (report at conclusion of creditors’ meeting), as those provisions are applied and modified by section 145 of the Act of 2009, discloses a failure to approve, or to approve a revision of, a bank administrator’s proposals.

(2) The Deputy Principal Clerk shall fix a hearing for determination by the insolvency judge of any order that may be made under paragraph 55(2) of Schedule B1 to the Act of 1986, as that provision is applied and modified by section 145 of the Act of 2009.

Time and date of lodging in a bank administration

74.49.—(1) The time and date of lodging of a notice or document relating to a bank administration under—

- (a) the Act of 2009;
- (b) the Act of 1986, as applied by the Act of 2009;

- (c) the Bank Administration Rules; or
- (d) the Insolvency Rules, as applied by the Bank Administration Rules,

shall be noted by the Deputy Principal Clerk upon the notice or document.

(2) Subject to any provision of the Bank Administration Rules, or the Insolvency Rules as applied by the Bank Administration Rules—

- (a) where the time of lodging of a notice or document cannot be ascertained by the Deputy Principal Clerk, the notice or document shall be deemed to have been lodged at 10 a.m. on the date of lodging; and
- (b) where a notice or document under paragraph (1) is delivered on any day other than a business day, the date of lodging shall be the first business day after such delivery.

Applications during a bank administration

74.50. An application or appeal under any provision of the Act of 1986 as applied by the Act of 2009, the Insolvency Rules as applied by the Bank Administration Rules, the Act of 2009 or the Bank Administration Rules, during a bank administration shall be—

- (a) where no previous application or appeal has been made, by petition; or
- (b) where a petition for an order in respect of a bank administration has been lodged, by note in the process of that petition.”.

Lodging of appeal in court

4. In rule 41.20 (lodging of appeal in court)(a), in paragraph (4)(c), for “rule 41.2(6)(c) and (d)” substitute “rule 41.2(5)(c) and (d)”.

Personal injuries actions

5. In rule 43.1 (application and interpretation of Chapter 43)(b)—

- (a) in paragraph (1), after “Subject to” insert “paragraph (4) and”; and
- (b) after paragraph (3) insert—

“(4) This Chapter does not apply to any claim for loss of life or personal injury which falls to be dealt with as an Admiralty action within the meaning of rule 46.1 (interpretation of Chapter 46).”.

Actions of proving the tenor

6.—(1) For rule 52.3 (proof in undefended actions of proving the tenor), substitute—

“**52.3.**—(1) In an action of proving the tenor in which no defences have been lodged, evidence shall be given by affidavit unless the court otherwise directs.

(2) In an action to which paragraph (1) applies, if counsel or other person having a right of audience, on consideration of the available affidavits and supporting documents, is satisfied that a motion for decree may properly be made, he or she may move the court by minute in Form 52.3 to grant decree in terms of the summons.

(3) The court may, on consideration of the minute, affidavits and any other supporting documents, without requiring appearance—

- (a) grant decree in terms of the minute; or

(a) Rule 41.20 was amended by S.I. 1996/1756 and S.S.I. 2004/331, 2005/198 and 2008/349.

(b) Rule 43.1 was substituted by S.S.I. 2002/570 and amended by S.S.I. 2004/291 and 2007/282.

(b) put the action out by order for further procedure, if any, including proof by parole evidence, as the court thinks fit.”.

(2) After Form 51.5 (form of advertisement for objections and claims in action of multiplepinding), insert the Form 52.3 set out in the Schedule to this Act of Sederunt.

Counter-Terrorism Act 2008

7. In rule 96.9 (appointment of special advocates in financial restrictions proceedings), in paragraph (2), for “70” substitute “68”.

A. C. HAMILTON
Lord President
I.P.D.

Edinburgh
23rd February 2009

SCHEDULE

Rule 52.3

Form 52.3

Form of minute for decree in undefended action of proving the tenor

(Name of counsel) for the pursuer having considered the evidence contained in the affidavits and the other documents as specified in the attached schedule and being satisfied that on this evidence a motion for decree in terms of the conclusions of the summons [*or in such restricted terms as may be appropriate*] may properly be made, moves the court accordingly.

IN RESPECT WHEREOF

(Signature of counsel or other person having a right of audience)

SCHEDULE

(list of numbered documents)

EXPLANATORY NOTE

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

This Act of Sederunt makes amendments to the Rules of the Court of Session 1994.

Paragraph 3 makes provision in relation to bank insolvency and bank administration procedure under Parts 2 and 3 of the Banking Act 2009. A new Part VII is inserted into Chapter 74 of the Rules, in relation to procedure in the case of an application to the court for a bank insolvency order. A new Part VIII is inserted into Chapter 74, in relation to procedure in the case of an application to the court for a bank administration order. Other consequential amendments are also made to the Rules.

Paragraph 4 amends a reference in rule 41.20, in relation to the requirements for lodging documents with a statutory appeal.

Paragraph 5 amends rule 43.1, so as to make clear that Chapter 43 (personal injuries actions), does not apply to any claim for loss of life which falls to be dealt with as an Admiralty action under Chapter 46.

Paragraph 6 substitutes a new rule 52.3, setting out a new procedure in relation to undefended actions of proving the tenor, under which evidence is to be given by affidavit unless the court directs otherwise.

Paragraph 7 amends a reference in rule 96.9(2), in relation to the appointment of special advocates in financial restrictions proceedings under the Counter-Terrorism Act 2008.

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£5.00