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SCOTTISH STATUTORY INSTRUMENTS

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**2018 No. 348**

**COURT OF SESSION**

**Act of Sederunt (Rules of the Court of Session 1994  
Amendment) (Protective Expenses Orders) 2018**

*Made - - - - 15th November 2018*  
*Laid before the Scottish*  
*Parliament - - - - 16th November 2018*  
*Coming into force - - 10th December 2018*

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013<sup>(1)</sup>, the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council with such modifications as it thinks appropriate.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by section 103(1) of the Courts Reform (Scotland) Act 2014<sup>(2)</sup> and all other powers enabling it to do so.

**Citation and commencement, etc.**

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018.

(2) It comes into force on 10th December 2018.

(3) A certified copy is to be inserted in the Books of Sederunt.

**Amendment of the Rules of the Court of Session 1994**

2.—(1) The Rules of the Court of Session 1994<sup>(3)</sup> are amended in accordance with this paragraph.

(2) In rule 38.16 (procedural hearing in reclaiming motion)<sup>(4)</sup>, after paragraph (2) insert—

“(3) Where this paragraph applies the procedural judge is to make an order under paragraph (2)(c) appointing the reclaiming motion to be determined in chambers without appearance unless satisfied that cause exists for making some other order.

(4) Paragraph (3) applies where—

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(1) [2013 asp 3](#). Section 4 was amended by the Courts Reform (Scotland) Act 2014, (asp 18), schedule 5, paragraph 31(3), and by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 ([asp 2](#)), schedule 1, paragraph 1(4).  
(2) [2014 asp 18](#).  
(3) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443), last amended by S.S.I. 2018/266.  
(4) Rule 38.16 was substituted by S.S.I. 2010/30.

- (a) the interlocutor reclaimed against is an interlocutor disposing of an application for a protective expenses order under Chapter 58A of these Rules; and
  - (b) the grounds of appeal do not seek to submit to the review of the Inner House any other interlocutor, other than a subsequent interlocutor dealing with expenses.”.
- (3) For Chapter 58A (protective expenses orders in environmental appeals and judicial reviews)(5), substitute—

## “CHAPTER 58A

### PROTECTIVE EXPENSES ORDERS IN ENVIRONMENTAL APPEALS AND JUDICIAL REVIEWS

#### **Application and interpretation of this Chapter**

**58A.1.**—(1) This Chapter applies to applications for protective expenses orders in—

- (a) an appeal under section 56 of the Freedom of Information (Scotland) Act 2002(6) as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004(7);
- (b) relevant proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention;
- (c) relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.

(2) In this Chapter—

“the Aarhus Convention” means the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25th June 1998;

“protective expenses order” means an order which regulates the liability for expenses in the proceedings, including as to the future, of all or any of the parties to them;

“the public” and “the public concerned” have the meanings given by Article 2 of the Aarhus Convention;

“relevant proceedings” means—

- (a) applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Act of 1988;
- (b) appeals under statute.

(3) Proceedings are to be considered prohibitively expensive for the purpose of this Chapter if the costs and expenses likely to be incurred by the applicant for a protective expenses order—

- (a) exceed the financial means of the applicant; or
- (b) are objectively unreasonable having regard to—
  - (i) the situation of the parties;
  - (ii) whether the applicant has reasonable prospects of success;
  - (iii) the importance of what is at stake for the applicant;

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(5) Chapter 58A was inserted by [S.S.I. 2013/81](#), and amended by [S.S.I. 2013/120](#), [S.S.I. 2014/152](#) and [S.S.I. 2015/408](#).

(6) [2002 asp 13](#).

(7) [S.S.I. 2004/520](#).

- (iv) the importance of what is at stake for the environment;
  - (v) the complexity of the relevant law and procedure; and
  - (vi) whether the case is frivolous.
- (4) The costs and expenses mentioned in paragraph (3) are—
- (a) the costs incurred by the applicant in conducting the proceedings; and
  - (b) the expenses for which the applicant would be liable if the applicant was found liable for the taxed expenses of process, without modification.

### **Appeals relating to requests for environmental information**

**58A.2.**—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 58A.1(1)(a).

(2) Where the person who requested the environmental information is a party to the appeal, that person may apply for a protective expenses order.

(3) The application must be made, except on cause shown—

- (a) where the applicant is the appellant, no later than is reasonably practicable after the applicant becomes aware that the appeal is defended;
- (b) where the applicant is the respondent, no later than the expiry of the period allowed for the lodging of answers.

(4) Where the court is satisfied that the proceedings are prohibitively expensive, it must make a protective expenses order.

### **Public participation in decisions on specific environmental activities**

**58A.3.**—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 58A.1(1)(b).

(2) An application for a protective expenses order may be made by the petitioner or the appellant.

(3) The application must be made, except on cause shown, no later than is reasonably practicable after the applicant becomes aware that the petition or appeal is defended.

(4) The court must make a protective expenses order where it is satisfied that—

- (a) the applicant is a member of the public concerned;
- (b) the applicant has a sufficient interest in the subject matter of the proceedings; and
- (c) the proceedings are prohibitively expensive.

### **Contravention of the law relating to the environment**

**58A.4.**—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 58A.1(1)(c).

(2) An application for a protective expenses order may be made by the petitioner or the appellant.

(3) The application must be made, except on cause shown, no later than is reasonably practicable after the applicant becomes aware that the petition or appeal is defended.

(4) The court must make a protective expenses order where it is satisfied that—

- (a) the applicant is a member of the public; and
- (b) the proceedings are prohibitively expensive.

### **Applications for protective expenses orders**

**58A.5.**—(1) A protective expenses order is applied for by motion.

(2) Intimation of the motion and of the documents mentioned in paragraph (3) must be given to every other party not less than 14 days before the date of enrolment.

(3) The applicant must lodge with the motion—

(a) a statement setting out—

- (i) the grounds for seeking the order;
- (ii) the terms on which the applicant is represented;
- (iii) an estimate of the expenses that the applicant will incur in relation to the proceedings;
- (iv) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and
- (v) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and

(b) any documents or other materials on which the applicant seeks to rely.

(4) A party opposing an application for a protective expenses order must lodge with the notice of opposition—

(a) a statement setting out the grounds for opposing the application; and

(b) any documents or other materials on which the party seeks to rely.

### **Determination of applications**

**58A.6.**—(1) Unless the Lord Ordinary or, as the case may be, the procedural judge otherwise directs—

(a) an application for a protective expenses order is to be determined in chambers without appearance;

(b) the motion is not to be starred; and

(c) rule 23.4(6) (opposition to motions) is disapplied.

(2) Unless granting an unopposed application, the Lord Ordinary or, as the case may be, the procedural judge must give brief reasons in writing.

### **Terms of protective expenses orders**

**58A.7.**—(1) A protective expenses order must—

(a) limit the applicant's liability in expenses to the respondent to the sum of £5,000, or such other sum as may be justified on cause shown; and

(b) limit the respondent's liability in expenses to the applicant to the sum of £30,000, or such other sum as may be justified on cause shown.

(2) Where the applicant is the respondent in proceedings mentioned in rule 58A.1(1)(a)—

(a) paragraph (1)(a) applies as if the reference to the applicant's liability in expenses to the respondent was a reference to the applicant's liability in expenses to the appellant; and

(b) paragraph (1)(b) applies as if the reference to the respondent's liability in expenses to the applicant was a reference to the appellant's liability in expenses to the applicant.

- (3) In paragraph (1), “the respondent” means—
- (a) all parties that lodge answers in an application to the supervisory jurisdiction of the court; and
  - (b) all respondents in an appeal under statute.

#### **Expenses protection in reclaiming motions**

**58A.8.**—(1) Paragraph (2) applies where—

- (a) the court has made a protective expenses order in relation to proceedings in the Outer House; and
- (b) a decision of the Lord Ordinary is reclaimed at the instance of a party whose liability in expenses is limited in accordance with rule 58A.7(1)(b).

(2) Subject to any review of the protective expenses order by the Inner House, the limits on the parties’ liability in expenses set by the order include liability for expenses occasioned by the reclaiming motion.

(3) Paragraphs (4) and (5) apply for the purposes of any other reclaiming motion from a decision of the Lord Ordinary in proceedings mentioned in rule 58A.1(1)(b) or (c).

(4) A party who would have been entitled to apply for a protective expenses order in the Outer House proceedings (whether or not the party did so apply) may apply for a protective expenses order in relation to the reclaiming motion in which event rule 58A.3(4) or, as the case may be, rule 58A.4(4) applies to the application.

(5) The application must be made, except on cause shown, no later than is reasonably practicable after the reclaiming motion has been marked.

#### **Expenses of application**

**58A.9.**—(1) Paragraph (2) applies where, in proceedings in which an application for a protective expenses order has been refused—

- (a) the applicant is found liable for payment of expenses; and
- (b) the expenses for which the applicant has been found liable comprise or include the expenses occasioned by the application.

(2) On the motion of the applicant the court must, other than on exceptional cause shown, limit the applicant’s total liability in expenses, in so far as occasioned by the application, to the sum of £500.”.

#### **Saving**

3. Paragraph 2 does not apply in respect of proceedings commenced before 10th December 2018.

Edinburgh  
15th November 2018

*CJM SUTHERLAND*  
Lord President  
I.P.D.

**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

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## EXPLANATORY NOTE

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

This Act of Sederunt substitutes a new Chapter 58A of the Rules of the Court of Session 1994 and makes a related amendment to rule 38.16 thereof. The rules in Chapter 58A make provision for the granting of protective expenses orders in certain proceedings relating to the environment.

New rule 58A.1 contains a new definition of when proceedings in respect of which a protective expenses order is sought are to be considered as “prohibitively expensive” to the applicant seeking protection.

New rules 58A.2 to 58A.4 make provision for who and by when applications must be made in different types of proceeding and the situations when the court must make a protective expenses order.

New rule 58A.5 provides that an application must be made by motion and prescribes what must accompany it. Where a party wishes to oppose the application they must do so by lodging a notice of opposition accompanied by a statement setting out the grounds for opposition and any documents or other material on which they seek to rely.

New rule 58A.6 creates a new process for determination of applications. Unless the judge otherwise directs, the application will be determined by the judge in chambers without the need for parties to appear.

New rule 58A.7 provides for the limits on liability for expenses and for them to be lifted or lowered on cause shown.

New rule 58A.8 makes provision in respect of protective expenses orders in appeals.

New rule 58A.9 makes provision so that, other than where exceptional cause is shown, the liability for expenses of an applicant who is both unsuccessful and found liable for the expenses of the application is limited to £500.

Paragraph 3 is a saving provision, the effect of which is that the amendments made by this Act of Sederunt do not apply to proceedings commenced before 10th December 2018.