Scottish Civil Justice Council Consultation on Draft Court Rules in Relation to Protective Expenses Orders

Response on behalf of RSPB Scotland

Introduction

The Scottish Civil Justice Council (SCJC) is considering whether to submit a revised version of Chapter 58A concerning Protective Expenses Orders (PEOs) to the Court of Session for approval. The SCJC agreed to consult on the proposals prior to considering the draft rules further[1] and RSPB Scotland welcomes the opportunity to provide views on the proposals therein.

Summary

As has been recognised by the SCJC, the current application process for PEOs can be protracted and expensive. We therefore welcome the introduction of a simplified and accelerated procedure for the determination of PEO applications and the proposal for a £500 cap on the liability in expenses for applicants in the event that an application is unsuccessful. These changes will go some considerable way to making the procedure more accessible for members of the public.

We note measures to ensure that respondents continue to be protected by the cap set at first instance in the event of an appeal. The position with regard to appeals set out in *Edwards* means that when either the applicant or the respondent appeals, the issue of costs must be considered afresh, applying the two-stage (subjective and objective) test as to prohibitive expense. While this will necessarily increase the time and expenses incurred by the parties, it will be ameliorated by a move towards a simplified and accelerated procedure for the determination of PEO applications.

As a general point, we also remain concerned about the lack of publicly available information about PEOs (and the process of applying for them) and the apparent variable and, at times, opaque manner by which PEOs are determined. We are aware of a number of PEO applications where the decision has been published - but also others that have not been. We hope that decisions will be routinely published in the future and we support the Faculty of Advocates call for the provision of information about PEOs and that all such judgements are published[2].

Finally, we have concerns about one aspect of the draft Act of Sederunt that represents a significant backwards step in terms of the current position on access to environmental justice. Given the significance of this change, we are surprised that the SCJC has not invited views on this proposal in the Consultation Paper. We urge the SCJC to do so before making any recommendations on this issue. We raise this concern under question 7.

Questions

1. The Test

In *R (on the application of Edwards and another) v Environment Agency and others ("Edwards")*, the Supreme Court sought a preliminary ruling from the Court of Justice of the

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1 SCJC Consultation paper available at: http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-on-draft-rules-for-protective-expenses-orders/consultation-document.pdf?sfvrsn=8

2 http://www.advocates.org.uk/media/2460/final-faculty-response-13-june-2017-peos.pdf

European Union (ECJ) on how a domestic court should determine whether the cost of litigation is prohibitively expensive, and in particular whether that question should be decided on an objective basis, on a subjective basis, or on some combination of the two. The ECJ issued its preliminary ruling in April 2013[3] and the Supreme Court issued its own judgment in December 2013[4].

Chapter 58A pre-dated both decisions and the SCJC believes that the language of the Rules may be at odds with the ECJ's interpretation of the Aarhus Convention.

Rule 58A.1 (2) states: "*proceedings are prohibitively expensive for an applicant if the applicant could not reasonably proceed with them in the absence of* [a PEO]". The SCJC acknowledges that this is essentially a subjective approach, but would prefer to omit any further definition of prohibitive expense on the basis that it is a principle of statutory interpretation that, where legislation is enacted to give effect to Community Law, terms used in the legislation must be construed in accordance with that law. Given that the ECJ and the Supreme Court have ruled on the meaning of "prohibitively expensive", the SCJC believes that the inclusion of a definition in the rules is unnecessary, and potentially confusing.

Question 1: Do you agree that the rules should not define 'prohibitively expensive'?

Draft Rules 58A.2(4), 58A.3(4) and 58A.4(4) require the court to make a PEO where it is satisfied that the proceedings are prohibitively expensive for the applicant for appeals relating to: (1) requests for environmental information; (2) public participation in decisions on specific environmental activities; and (3) contravention of the law relating to the environment respectively. As highlighted above, any further reference to a further definition of prohibitive expense is omitted on the basis that the ECJ and the Supreme Court have already ruled on it and to repeat it in the Rules is unnecessary and potentially confusing.

However, we believe that the inclusion of an essentially subjective approach in the draft Rules, and the omission of any reference to the objective limb of prohibitive expense, is more likely to lead to confusion than simply setting out the test as formulated by the ECJ in *Edwards*. An analysis of the ECJ's judgment in *Edwards* confirms the following:

(1) Members of the public must not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of the Aarhus Convention by reason of the financial burden that might arise as a result (*Edwards* at paragraph 35).

(2) In deciding what is "prohibitively expensive", account must be taken both of the interest of the person wishing to defend his/her rights and the public interest in the protection of the environment (*Edwards* at paragraph 35).

(3) The costs of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable (*Edwards* at paragraphs 46 and 49).

(4) There is therefore is a two-stage test. First, the level of costs must be subjectively reasonable – i.e. they must not exceed the financial resources of the person concerned. If the costs exceed the financial resources of the person concerned, then they are prohibitively expensive, regardless of whether they are objectively unreasonable. Second, if the level of costs do not exceed the financial resources of the person concerned, nevertheless, they must not be objectively unreasonable. If they are objectively unreasonable, costs protection may be granted even in cases where the level of costs is not prohibitively expensive to the claimant in question.

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3 See Case C-260/11 *Edwards and Pallikaropoulos*

4 [2013] UKSC 78

(5) This formulation was also summed up by the Advocate General's opinion in *Commission v United Kingdom,* at paragraph 55: "*...the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable.*"

(6) In assessing whether the costs are objectively unreasonable, the factors to consider are those set out by the ECJ in *Edwards* at paragraph 42. i.e. (i) the situation of the parties concerned, (ii) whether the claimant has a reasonable prospect of success, (iii) the importance of what is at stake for the claimant and for the protection of the environment (iv) the complexity of the relevant law and procedure and (v) the potentially frivolous nature of the claim at its various stages.

(7) That these are factors to be assessed at the objective stage is clear from the decision of the Supreme Court in *Edwards v Environment Agency*[5], where Lord Carnwath considered these matters having first reached a judgment on whether the level of costs were subjectively prohibitive (see paragraphs 29-30).

Three important principles emerge from this analysis: (i) the merits of the claim are only relevant at the second stage, when deciding whether the level of costs is objectively unreasonable (ii) the question of whether costs are objectively unreasonable is only posed once it has been demonstrated that the level of costs are not subjectively unreasonable, i.e. that the level of costs is within the financial means of the proposed claimant (iii) if the costs are subjectively prohibitive, then costs protection should be granted, regardless of whether the level of costs is objectively unreasonable.

The *Edwards* formulation above has been reproduced in Statutory Instruments in both England/Wales and Northern Ireland. For example, the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017[6] state:

> "*Determination of prohibitive expense*
>
> *6. Proceedings are to be considered prohibitively expensive for the purpose of these Regulations if, having regard to any court fee an applicant is liable to pay, their likely costs either—*
> *(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 a reasonable prospect of success;*
> *(iii) the importance of what is at stake for the applicant;*
> *(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.*"

The need to make specific reference in the Rules to the need to conduct subjective and objective assessment as to prohibitive expense is pertinent in light of recent cases such as the *Petition of the John Muir Trust*[7] and *Gibson v Scottish Ministers*[8].

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5 [2014] 1 W.L.R. 55

6 Please note that the reference to "*any court fee*" in the NI Regulations must be interpreted to mean all the costs arising from participation in the judicial proceedings (see *Edwards* (paragraph 27) and *Commission v UK* (paragraph 44)

7 Outer House, Court of Session [2014] CSOH 172A

8 [2016] CSIH 10

In the *Petition of The John Muir Trust*[9], counsel for the JMT argued that the court had discretion to make a PEO order even though the predicted expenses of the proceedings would not be prohibitively expensive for the applicant[10]. In rejecting the Petitioner's application for a PEO in the order of £5,000, Lord Philip also rejected that submission, holding that: "*The fundamental pre-requisite for the granting of a protective expenses order is that the court should be satisfied that the expenses to be incurred would be prohibitively expensive for the applicant*". As can be seen from the above analysis, it may be argued that Lord Philip could have failed to apply the two-stage test for prohibitive expense required by the ECJ[11]. In concluding that the costs were not prohibitively expensive for the JMT (a conclusion with which we do not agree) Lord Philip should then have turned his mind to the question of whether the sum of £160,000 was objectively unreasonable in the context of the PEO application[12].

The two-stage test was, in our view, correctly applied in *Gibson v Scottish Ministers*[13], in which the owner of a country estate sought a Judicial Review of the grant of planning permission for a nearby windfarm in the absence of a public inquiry. The Inner House carried out an analysis of the Petitioner's finances, including income, pension provisions, net value of estate and past capacity to borrow money. They concluded that it was unreasonable to expect him to funds costs of £170,000 under the subjective limb.

In subsequently applying the objective test, the Inner House concluded that there would be no significant impact on his economic interests from the development (the other parties' suggested economic consequences of visual impact on tourism and lettings were not supported by evidence). It was also concluded that issues in the claim regarding the landscape and impact on a "dark sky park" and observatory were sufficient to show that the petitioner was acting to protect the environment. Although we do not support the imposition of an intrusive analysis of the Petitioner's financial circumstances, we believe the Inner Court correctly made the PEO sought by the Petitioner in the sum of £5,000.

2. Decoupling prohibitive expense from prospects of success

Rule 58A.2(5) currently provides for the court to refuse to make a PEO if it considers that the applicant has no real prospect of success. As such, the current Rules make an explicit link between prospects of success and the availability of costs protection. In *Edwards*, the ECJ included "*whether the claimant has a reasonable prospect of success*" in the list of factors that may be taken into account by the court when assessing whether proceedings are prohibitively expensive for the claimant on an objective basis[14].

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9 [2014] CSOH 172A

10 *Ibid*, paragraphs 12 and 22

11 See *Edwards*, paragraph 40 and Advocate General Kokott's opinion in *Commission v United Kingdom*, at paragraph 55: "*...the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable.*"

12 Lord Philip separately held that a figure of £160,000 for a three day hearing was not objectively unreasonable (paragraph 19). However, this was not in the context of the assessment as to what was prohibitively expensive for the JMT on an objective basis. In any event, one might question how such a large sum could ever be considered so. In this respect, reference is also made to the dissenting judgment of Lord Drummond Young in the Inner House [2016] CSIH 33 concerning the JMT's (unsuccessful) application to increase the reciprocal cap from £30,000 to £50,000 and *Gibson v Scottish Ministers* [2016] CSIH 10, in which the Inner House criticised the Lord Ordinary for failing to consider whether the total estimated expense of £170,000 went well beyond what is objectively reasonable for an ordinary member of the public, despite being raised by the Petitioner in submissions (see para 23 of the judgment)

13 [2016] CSIH 10

14 See paragraphs 42 and 46 of the ECJ judgment

The SCJC points out that presenting the two issues as distinct questions may be unhelpful and that the same considerations may apply to the list of circumstances to be taken into account in determining applications currently set out in rule 58A.5(1).

Question 2: Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?

We address these questions separately.

(a) Prospects of success and costs protection

As articulated above, the ECJ's judgment in *Edwards* confirms that the merits of the claim are only relevant at the second stage, when deciding whether the level of costs is objectively unreasonable. Moreover, it should be emphasised that the question of whether the proposed claim lacks merit is only one factor to be taken into account in deciding whether public interest favours no costs protection. As set out by the ECJ in *Edwards* (paragraph 42) a range of factors needs to be considered in reaching a judgment on whether the level of costs payable is reasonable. These also include "*the importance of what is at stake for the protection of the environment*". The safest way of ensuring that the merits of the claim are correctly assessed in the context of the availability of costs protection is to set the formulation out in full (i.e. as in the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland)).

(b) Other factors set out in Rule 58A.5(1)

The list of circumstances to be taken into account in determining PEO applications set out in Rule 58A.5(1) include the following:

> ***"Determination of terms of a protective expenses orders***
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> ***58A.5****-(1) In deciding the terms of a protective expenses order, the court shall (subject to rule 58A.4(1) take into account all the circumstances, including-*
> *(a) the need to ensure that it is not prohibitively expensive for the applicant to continue with the proceedings;*
> *(b) the extent to which the applicant would benefit (whether financially or otherwise) if successful in the proceedings to which the order would apply;*
> *(c) the terms on which the applicant is represented;*
> *(d) whether and to what extent the applicant is acting on behalf of another person which would have been able to bring the proceedings himself, herself or itself; and*
> *(e) whether and to what extent the applicant is willing to limit the expenses which he or she would be able to recover from another party if successful in the proceedings to which the order would apply."*

In this list, factor (a) would be dealt with by the new Rules 58A.2(4), 58A.3(4) and 58A.4(4). The extent to which the applicant would benefit (whether financially or otherwise) if successful in the proceedings to which the order would apply (factor (b)) overlaps, to some extent, with factors identified by the ECJ in *Edwards* as relevant for the determination of what is prohibitively expensive for the claimant on an objective basis, including: (i) the situation of the parties concerned; and (ii) the importance of what is at stake for the claimant (and for the protection of the environment). Factors (c), (d) and (e) are not factors that were deemed relevant by the ECJ in determining prohibitive expense for the claimant.

In light of this, our preference is <u>not</u> to set out the factors listed in Rule 58A.5(1), but, as emphasised above, for the revised Rules to set out the prohibitively expensive test as formulated by the ECJ and the Supreme Court in *Edwards* (as is the case in Northern Ireland and England/Wales).

3. The procedure

Where a PEO is granted the applicant's potential liability in expenses in relation to the entirety of the proceedings will generally be capped at £5000. However, the consultation paper acknowledges that in the course of an opposed PEO application each party may incur expenses well in excess of that figure, with the unsuccessful party potentially being liable for the other party's expenses. In addition to the implications for their own costs, applicants therefore have to expose themselves to the risk of incurring a very substantial liability in expenses before it is determined whether or not they are going to have the benefit of expenses protection. The SCJC concludes that this has the potential to have a deterrent effect which may undermine the very rationale for the introduction of PEOs.

Question 3: Do you have any comments on draft rule 58A.6 for the determination of an application?

We welcome the proposal to adopt a simplified and accelerated procedure for the determination of PEO applications, including a presumption against the need for a hearing to consider the application. We support the view that applications should be determined by the court based solely on consideration of the papers, including statements setting out the grounds for seeking the order and the grounds for opposing it and concur that this should have the effect of significantly reducing the expenses incurred by the parties in connection with PEO applications (see draft rule 58A.6).

In this respect, we refer the SCJC to comments made in the *Petition of the John Muir Trust*[15], in which the Lord Ordinary said: "*The motion roll does not lend itself to a detailed examination of the way an organisation carries on its business nor should the court normally attempt to second guess the business decisions of a responsibly run charitable organisation*". Similarly, in *Gibson v Scottish Ministers*[16], Lord Menzies concluded that the Lord Ordinary had erred in undertaking an intrusive investigation into the petitioner's assets and income/expenditure and that the court should not "*... second guess the motives and actions of a law abiding responsible individual*".

These concerns were expanded upon in the final paragraph of Lord Menzies' judgment in *Gibson*[17], which are worth setting out in full:

> "[71] *By way of postscript we express our concern about the length of time that this application for a PEO has taken, and the expense incurred by the lengthy hearings before the Lord Ordinary and this court. Applications for a PEO have been few and far between in Scotland, but we consider that in the particular circumstances of this case, a more expeditious disposal should have been achieved. Looking to the future, we express the hope that such applications can be disposed of much more quickly. They are dealt with by motion, with a limited amount of documentary material being required in support of the motion. It is not an opportunity for a respondent to subject an applicant to intrusive and detailed investigation of financial circumstances. In most cases, we do not consider that it will be appropriate for the court to look behind this material, or (as happened in this case) to require parties to provide competing valuations of assets such as pension funds. In exercising its powers under Chapter 58A, the court is not engaged in an analysis of evidence, nor is it hearing a proof. In most applications for a PEO we would expect submissions for all parties to be capable of being concluded within a total of about 1½ hours (as is the case in an application for leave to appeal), with the court usually being able to give an immediate ex tempore judgment.*"

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15 Outer House, Court of Session [2014] CSOH 172A, paragraph 25

16 [2016] CSIH 10

17 *Ibid*

Similarly, in *Carroll*[18], Lord Drummond Young held:

> "*[25] I was invited to comment on the conduct of future applications for protective expenses orders. It was emphasized that the expenses of the application may add significantly to the total cost of challenging planning decision. In my opinion it is plainly desirable that proceedings for protective expenses orders should be kept short and simple, to minimize expense as far as possible...*"

In the interests of clarity and certainty, we support the Faculty of Advocates call for the provision of information on the issue. This could take the form of standard application forms (prescribing the type and amount of information to be provided to the Court), a Practice Note setting out the process for bringing applications (including the information (and the amount of information) required, timetable and any pre-action protocol to be followed) and clear guidance for applicants intending to bring an application. We also support the appointment of a designated judge to determine PEOs, in order to develop expertise and consistency in the manner in which applications are disposed of and the publication of judicial decisions in relation to the grant or refusal of PEOs.

4. Expenses

The second measure involves restricting an applicant's liability in expenses in the event that the application is unsuccessful.

Question 4: Do you have any comments on draft rule 58A.9 for the expenses of the application?

We welcome the proposal that, in unsuccessful applications, the applicant's liability in expenses (in so far as relating to the PEO application) should generally be capped at £500 unless the court is satisfied that there are grounds for removing that cap (see draft rule 58A.9). We believe this will make the system far more accessible for members of the public in securing access to environmental justice.

However, we are concerned that the provision "except on cause shown" in draft rule 58A.9.(2) may encourage objections from those opposed to the granting of a PEO with a £500 cap. The present wording exposes PEO applicants to significant liability for their opponents' costs at the PEO application stage - and it is unlikely that draft rule 58A.9 would have its intended effect on reducing the prohibitively expensive nature of the PEO application process. We therefore recommend that "except on cause shown" be removed from draft rule 58A.9.(2) – or at least replaced with "in exceptional circumstances".

5. Appeals

The consultation paper confirms that there are two respects in which the draft rules would bring about changes in relation to appeals from the Outer House to the Inner House. The first concerns expenses protection for the purpose of appeals when a PEO has been granted in the first instance proceedings. Where, in that situation, there is an appeal at the instance of the applicant's opponent, the SCJC propose that the PEO previously granted should have continued effect for the purpose of the appeal. The effect would be that the applicant would not have to apply for a fresh PEO for the appeal, and the limits on the parties' liability in expenses set by the original PEO would apply in relation to the totality of the first instance and appeal proceedings - see draft rule 58A.8, below:

> ***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*

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18 [2014] CSOH 30

(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) Paragraph (4) applies 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.

However, where a PEO is granted in first instance proceedings and it is the applicant who appeals, the original PEO would not have continuing effect for the purposes of the appeal. If the original applicant wants expenses protection for the purpose of the appeal as well, they would have to apply for a further PEO, in which event the outcome of the first instance proceedings would be one of the factors taken into account in the application of the "prohibitively expensive" test.

Question 5: Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?

The issue of appeals was dealt with by the ECJ in *Edwards* at paragraphs 44-45:

"*44. Lastly, as regards the question whether the assessment as to whether or not the costs are prohibitively expensive ought to differ according to whether the national court is deciding on costs at the conclusion of first-instance proceedings, an appeal or a second appeal, an issue which was also raised by the referring court, no such distinction is envisaged in Directives 85/337 and 96/61, nor, moreover, would such an interpretation be likely to comply fully with the objective of the European Union legislature, which is to ensure wide access to justice and to contribute to the improvement of environmental protection.*

45. The requirement that judicial proceedings should not be prohibitively expensive cannot, therefore, be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal."

This does not mean that the appeal court is obliged to make the same costs order as was made at first instance, or that the cap applying at first instance should automatically cover any later appeals. Rather, the ECJ's approach is that, in deciding whether costs are prohibitively expensive, the same criteria are to be applied on appeal as at first instance. Additionally, there is also a need to take into account the costs already incurred in the proceedings as part of that assessment, with a recognition that the objective elements of the assessment (i.e. such as the public interest in, and complexity of, the proceedings) may be different on appeal to at first instance).

The corollary of this is that a requirement that the limits on the parties' liability in expenses set by the original PEO would automatically apply in relation to the totality of the first instance and appeal proceedings does not accord with the ECJ judgment in *Edwards* – not least because if the applicant is successful on appeal they will not be able to recover expenses incurred, especially in complex environmental cases.

The correct position when either the applicant or the respondent appeals is, therefore, for the issue of costs to be considered afresh, applying the two-stage test discussed above. With respect to the assessment as to whether the costs are objectively unreasonable, the court must take into account the costs already incurred in the proceedings and recognise that the objective elements

of the assessment (i.e. such as the public interest in, and complexity of, the proceedings) may be different on appeal. There is, for example, an argument that a cap of £5,000 on the applicant (whose financial position has not changed) with a cross-cap of £60,000 may be appropriate in appeals in complex environmental cases, especially where the appeal is brought by an unsuccessful defendant, but we recognise that each case will turn on its own facts.

While we recognise that the requirement to consider the position afresh will necessarily increase the time and expenses incurred, this will be ameliorated by a move towards a simplified and accelerated procedure for the determination of PEO applications. We therefore support the view that applications should be determined by the court based solely on consideration of the papers, including the grounds for appeal and answers.

Finally, for the avoidance of doubt, we believe the proposal that the limits on the parties' liability in expenses set by the original PEO would apply in relation to the totality of the first instance and appeal proceedings but that the original PEO would not have continuing effect for the purposes of the appeal where the applicant appeals proposal is inherently unfair. Article 9(4) of the Aarhus Convention requires legal review mechanisms covered by Articles 9(1), (2) and (3) of the Convention to be "*fair, equitable, timely and not prohibitively expensive*". In this context, the Aarhus Convention Compliance Committee has confirmed that the requirement for fairness in legal proceedings relates to the position of the claimant, not the defendant public body[19].

6. Expenses protection in reclaiming motions

The second change is in relation to appeals against the determination of PEO applications. The concerns about the expenses involved in PEO applications apply equally, or to an even greater extent, where the Inner House is asked to review a decision to grant or refuse a PEO application. In order both to reduce those expenses, and to accelerate the procedure, the SCJC proposes that, when the only issue in the appeal is the determination of a PEO application, there should be a presumption that there will be no hearing and that the appeal will be determined in chambers based on consideration of the papers, including the grounds of appeal and answers. This change would be achieved by amending rule of court 38.16, as shown in paragraph 2(2) of the draft Act of Sederunt (see below):

> **Amendment of the Rules of the Court of Session 1994**
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> *2.—(1) The Rules of the Court of Session 1994(3) are amended in accordance with this paragraph.*
> *(2) In rule 38.16 (procedural hearing in reclaiming motion)(4), insert after paragraph (2)–*
> *"(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 the appearance of counsel unless satisfied that cause exists for making some other order.*
> *(4) Paragraph (3) applies where–*
> *(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".*

Question 6: Do you have any comments on the draft amendment to rule 38.16?

We welcome the proposal to introduce a simplified and accelerated procedure for the determination of appeals concerning PEO applications, including a presumption against a hearing to consider the application. We support the view that applications should be

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19 As confirmed in Communications C33 (paragraph 135) and C77 (paragraph 72)

determined by the court based solely on consideration of the papers, including the grounds for appeal and answers and agree that this should help to reduce expenses incurred by the parties in pursuing PEOs.

7. Other issues

Question 7: Do you have any other comments on the proposals contained in this paper?

(1) Terms of Representation – Rule 58A.5(3)(ii) requires applicants to set out the terms on which the applicant is represented when applying for a PEO (see below):

> ***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;***

We can see no reason why the terms on which the applicant is represented (which would require applicants to disclose that their lawyers are acting on a *pro bono* basis, for example) is relevant to that evaluation. We would therefore prefer that Rule 58.5(3)(ii) be removed.

(2) Compensation for costs incurred when status of claim is challenged - the RSPB also believes that consideration should be given to indemnifying an applicant's expenses in circumstances where the application is opposed solely on the basis of not coming within the "Aarhus regime", but where the Court determines that it does.

(3) Court fee – the cost of court fees (which have been subject to increases) should play a part in determining the level of the limitation of liability[20]. Consideration should be given to exempting a PEO applicant from having to meet the liability of court fees.

(4) It should be clear from the Rules (and accompanying Practice Note and Guidance) that all financial information should be contained in productions, which are confidential to the court and the parties' legal advisers.

(5) Caps can be increased as well as decreased - Chapter 58A.4(1) currently caps the applicant's liability in expenses to the respondent to the sum of £5,000. Chapter 58A.2 makes provision for that sum to be reduced - but not increased (see below):

> **Chapter 58A**
>
> ***Terms of protective expenses orders***
> *58A.4- (1) Subject to paragraph (2), a protective expenses order must contain provision limiting the applicant's liability in expenses to the respondent to the sum of £5,000.*
> *(2) The court may, on cause shown by the applicant, lower the sum mentioned in paragraph (1).*

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[20] Prohibitive expense relates to all the costs arising from participation in the judicial proceedings (see *Edwards* (paragraph 27) and *Commission v UK* (paragraph 44)

(3) Subject to paragraph (4), a protective expenses order must also contain provision limiting the respondent's liability in expenses to the applicant to the sum of £30,000.
(4) The court may, on cause shown by the applicant, raise the sum mentioned in paragraph (3).

As such, PEO applicants currently have absolute clarity and certainty as to the potential extent of their financial liability in prescribed cases before commencing a claim if a PEO is granted.

By way of contrast, while Rule 58A.7(1) of the draft Act of Sederunt appears to limit the applicant's liability in expenses to the respondent to the sum of £5,000, Rule 58A.7(2) gives the Court the power to vary that sum (see below):

Draft Act of Sederunt

Terms of protective expenses orders
58A.7.—(1) Subject to paragraph (2), a protective expenses order must–
(a) limit the applicant's liability in expenses to the respondent to the sum of £5,000; and
(b) limit the respondent's liability in expenses to the applicant to the sum of £30,000.
(2) The court may, on cause shown, vary either or both of the sums mentioned in paragraph (1).

If the reference to "*vary either or both of the sums mentioned in paragraph (1)*" in Rule 58A.7(2) of the draft Act of Sederunt means that the £5,000 cap can be increased as well as decreased, this is a significant change from the current position. Rule 58A.7(2) removes the prior confidence enjoyed by petitioners in environmental cases that their adverse liability will be capped at a maximum of £5,000. It is our view (and experience) that this will deter legitimate claims from proceedings and, as such, conflict with Article 9(4) of the Aarhus Convention and the requirements of EU law and the Aarhus Convention to encourage wide access to justice and the protection of the environment.

There are two problems arising from this proposal. Firstly, it creates considerable uncertainty in respect of cost protection. In numerous cases, the ECJ has confirmed that claimants must have prior certainty in relation to costs protection. In case C-530/11, *Commission v UK*, the ECJ held (at paragraph 34):

"*In particular, where the relevant provision is designed to create rights for individuals, the legal situation must be sufficiently precise and clear, and the persons concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts (see, to this effect, inter alia, Case C-233/00 Commission v France [2003] ECR I-6625, paragraph 76)*"

In the same case, at paragraph 58, the ECJ emphasised the need for predictability:

"*It is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers' fees.*"

The effect of this change will be to create a considerable amount of uncertainty and to dissuade potential claimants from bringing claims, even where the grounds are strong.

We believe the position has been correctly articulated in Northern Ireland in the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017[21], which provides for a maximum cap on adverse liability of £5,000 and makes provision for the cap to be reduced where necessary to ensure the costs will not be prohibitively expensive for the applicant. The 2017 Regulations state:

> *"(3) For regulation 3(2) to (9), substitute—*
> *(2) Subject to paragraphs (3) and (7), in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.*
> *(3) The court may decrease the amount specified in paragraph (2) if it is satisfied that not doing so would make the costs of the proceedings prohibitively expensive for the applicant."*

In terms of the practical significance of this change in position, we refer the SCJC to experience in England and Wales in which similar provisions in respect of "hybrid caps" came into effect on 28th February 2017.

Rule 8(5) of the Civil Procedure (Amendment) Rules 2017/95[22] inserts new provisions into Section VII of Part 45 of the Civil Procedure Rules ("CPR") relating to costs limits in Aarhus Convention claims. Rule 45.44 CPR gives the court the power to vary the default caps of £5,000 (individuals) and £10,000 (all other cases) in Rule 45.43 (and indeed to remove altogether the limits on the maximum costs liability of any party in an Aarhus Convention claim) on the basis of financial information provided to the court when applying for Judicial Review.

The new Rules are themselves currently the subject of a Judicial Review brought by the RSPB, Friends of the Earth Ltd and ClientEarth for which permission on both Grounds was granted by the Hon. Mr Justice Dove on 12th April 2017[23] and the case expedited in recognition of the strategic importance of the case for other environmental claims. The Liverpool Green Party (LGP) sought to intervene in the JR on the basis of its recent experience of the new rules.

LGP is an unincorporated association, which means it has no separate legal personality and can only bring a claim through an individual who acts on behalf of its members. It was advised by counsel that it had a strong claim for JR against a recent decision of Liverpool City Council to grant planning permission for a 333 car car-park in an Air Quality Management Area without undertaking an air quality assessment. LGP sent a letter in accordance with the Judicial Review Pre-Action Protocol outlining their grounds of claim. The Council's response did not properly engage with the substance of those grounds. In relation to costs, however, it stated: "*Please note that any claim for a cost protection order will be carefully examined. In particular it is noted that the court now has discretion under CPR 45.44 to vary the limits on maximum costs liability for Aarhus Claims and the Council will therefore require confirmation of the financial resources of your client in the event that it seeks a protective costs order.*"

In light of this correspondence, LGP was unable to find an individual prepared to act as claimant in that claim for a JR of the Council's decision. The requirement to submit their personal financial resources for scrutiny and the risk of a potentially large order for costs against them (as an individual) has deterred anyone from bringing a claim on behalf of the unincorporated association. The approach quoted above highlights the uncertainty now created for Claimants, in that the real possibility of their costs cap being varied makes the eventual financial burden that could arise unclear.

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21 See http://www.legislation.gov.uk/nisr/2017/27/regulation/3/made
22 See http://www.legislation.gov.uk/uksi/2017/95/contents/made
23 *The RSPB & others v Lord Chancellor & others* (CO/1011/2017)

LGP's application to intervene was unfortunately unsuccessful (although the Hon Mr Justice Holdgate held that the claimants could rely on a Witness Statement provided in support of the application to intervene in the proceedings). However, the application also raised an issue relevant to question 3 of the SCJC consultation Paper, i.e. the more intrusive the investigation into the means of those who seek costs protection and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need such protection) to challenge the lawfulness of environmental decisions[24]. In considering this proposal, it occurred to us that the rationale behind it may be to allow for an analagous approach to that in Northern Ireland and England/Wales, in that there are two caps relating to different types of applicant - £5,000 for individuals and £10,000 in "all other cases". If the intention behind this proposal is to similarly differentiate between applicants, with no subsequent possibility of increasing the caps, we would support that approach, but only on the basis that it was clear on the face of the Rules (as is the case in NI and E/W) that this was the intention.

Finally, we are concerned that the possibility of increasing the applicants' cap, and thus removing advance certainty and clarity with regard to costs exposure, was not highlighted in the Consultation Paper and that, because of this oversight, views will not be canvassed on it. We urge the SCJC to invite views on this proposed change from practitioners, environmental NGOs and civil society before making any recommendations on the issue of PEOs.

RSPB Scotland
June 2017.

24 See *Sullivan LJ in Garner v Elmbridge LBC* [2010] EWCA Civ 1006 at [52])