

SCOTTISH STATUTORY INSTRUMENTS

2025 No.

COURT OF SESSION

SHERIFF APPEAL COURT

SHERIFF COURT

Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules 2021 and Summary Applications, Statutory Applications and Appeals etc. Rules 1999) (Protective Expenses Orders) 2025

Made - - - -

Laid before the Scottish Parliament

Coming into force

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(a), 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 sections 103(1) and 104(1) of the Courts Reform (Scotland) Act 2014(b) 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, Sheriff Appeal Court Rules 2021 and Summary Applications, Statutory Applications and Appeals etc. Rules 1999) (Protective Expenses Orders) 2025.

(2) It comes into force on [DATE].

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

(a) 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).
(b) 2014 asp 18.

Amendment of the Rules of the Court of Session 1994

2.—(1) Chapter 58A (protective expenses orders in environmental appeals and judicial reviews)(a) of the Rules of the Court of Session 1994(b) is amended in accordance with this paragraph.

(2) The title of Chapter 58A becomes “protective expenses orders in environmental appeals, judicial reviews and group proceedings”.

(3) In rule 58A.1, in paragraph 2, in the definition of “relevant proceedings”, after “appeals under statute.”, insert—

“(c) group proceedings under section 20(1) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.”.

(4) After rule 58A.8 (expenses protection in reclaiming motions), insert—

“Expenses protection in appeals

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

(a) a sheriff (or the Sheriff Appeal Court, as the case may be) has made a protective expenses order in relation to proceedings before them; and

(b) a decision in those proceedings is appealed.

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

(3) A party who would have been entitled to apply for a protective expenses order in proceedings in the lower courts which are appealed to the Court (whether or not the party did so apply) may apply for a protective expenses order in relation to the appeal.

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

Amendment of the Sheriff Appeal Court Rules 2021

3.—(1) The Act of Sederunt (Sheriff Appeal Court Rules) 2021(c) is amended in accordance with this paragraph.

(2) In Part 6 (incidental procedure: special procedures) after Chapter 28 (Reporting restrictions)(d), insert—

“CHAPTER 28A

APPLICATIONS FOR PROTECTIVE EXPENSES ORDERS

Application and interpretation of this Chapter

28A.1.—(1) This Chapter applies to applications for protective expenses orders in proceedings under sections 46(7), 47(7), 59(2), 78L(1), 80(3), 82(1), 91(1), 92(4), 94(7) and 94(8) of the Environmental Protection Act 1990.

(a) Chapter 58A was inserted by S.S.I. 2013/81 and substituted by 2018/348.

(b) 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).

(c) S.S.I. 2021/468, last amended by S.S.I. 2024/353.

(d) Chapter 28 was amended by S.S.I. 2023/196.

(2) In this Chapter, “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.

(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;
 - (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.

Expenses protection in appeals from the sheriff court

28A.2.—(1) Paragraph 2 applies where—

- (a) a sheriff has made a protective expenses order in proceedings in the sheriff court; and
- (b) a decision within those proceedings is appealed.

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

(3) A party who would have been entitled to apply for a protective expenses order in sheriff court proceedings which are appealed to the Court (whether or not the party did so apply) may apply for a protective expenses order in relation to the appeal.

(4) The application must be made, except on cause shown, no later than is reasonably practicable after the note of appeal has been lodged.

Applications for protective expenses orders

28A.3.—(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 28A.5(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.

(5) The motion may request that the court grant an order treating any of the information listed in paragraph (3) as confidential and open only to the court and the parties to the proceedings.

Determination of applications

28A.4.—(1) Applications under this Chapter shall be disposed of by the procedural Appeal Sheriff.

(2) Unless the procedural Appeal Sheriff otherwise directs, an application for a protective expenses order is to be determined in chambers without appearance.

(3) Unless granting an unopposed application, the procedural Appeal Sheriff must give brief reasons in writing.

(4) Where a motion includes a request for the court to grant an order under rule 28A.3(5), the hearing must take place in chambers.

Terms of protective expenses orders

28A.5.—(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) In paragraph (1), "the respondent" means all parties that lodge answers in the proceedings.

Expenses of application

28A.6.—(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.

Expenses of interveners

28A.7.—(1) Expenses are not to be awarded in favour of or against a relevant party, except on cause shown.

(2) If the court decides expenses are to be awarded under paragraph (1), it may impose conditions on the payment of expenses.

(3) In paragraph (1), "a relevant party" means a party who has—

(a) been granted leave to intervene under rule 24.3(1); or

- (b) been refused or granted leave after a hearing fixed under rule 24.2(5) or (6).”

Amendment of the Summary Application Rules 1999

4.—(1) The Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999(a) is amended in accordance with this paragraph.

(2) In Chapter 3 (rules on applications under specific statutes) after Part LIV (Sexual Harm Prevention Orders and Sexual Risk Orders)(b) insert—

“PART LV

PROTECTIVE EXPENSES ORDERS

Application and interpretation of this Chapter

3.55.1.—(1) This Chapter applies to applications for protective expenses orders in relevant proceedings.

(2) “relevant proceedings” means proceedings under sections 46(7), 47(7), 59(2), 78L(1), 80(3), 82(1), 91(1), 92(4), 94(7) and 94(8) of the Environmental Protection Act 1990.

(3) In this Chapter, “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.

(4) Proceedings are to be considered prohibitively expensive for the purpose of this Part 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;
 - (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.
- (5) 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.

Eligibility for protective expenses orders

3.55.2.—(1) Any party may apply for a protective expenses order.

(2) The court must make a protective expenses order where it is satisfied that the proceedings are prohibitively expensive.

Applications for protective expenses orders

3.55.3.—(1) A protective expenses order is applied for by motion.

(a) S.I. 1999/929, last amended by S.S.I. 2023/223.

(b) Part LIV was inserted by S.S.I. 2023/62 and was amended by S.S.I. 2023/196.

(2) The application must be made, except on cause shown, no later than is reasonably practicable after the applicant becomes aware that the proceedings are defended.

(3) 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.

(4) 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 3.55.5(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.

(5) 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.

(6) The motion may request that the court grant an order treating any of the information listed in paragraph (3) as confidential and open only to the court and the parties to the proceedings.

Determination of applications

3.55.4.—(1) Unless the sheriff otherwise directs, an application for a protective expenses order is to be determined in chambers without appearance.

(2) Unless granting an unopposed application, the sheriff must give brief reasons in writing.

(3) Where a motion includes a request for the court to grant an order under rule 55.3(5), the hearing must take place in chambers.

Terms of protective expenses orders

3.55.5.—(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) In paragraph (1), “the respondent” means all parties that lodge answers in the proceedings.

Expenses of application

3.55.6.—(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, so far as occasioned by the application, to the sum of [£500].

Expenses of interveners

3.55.7.—(1) Expenses are not to be awarded in favour of or against a relevant party, except on cause shown.

(2) If the court decides expenses are to be awarded under paragraph (1), it may impose conditions on the payment of expenses.

(3) In paragraph (1), a “relevant party” means a party who has been granted or refused leave to intervene after lodging a minute of intervention under rule 2.38(2).”

Saving

5. Paragraphs 2, 3 and 4 do not apply in respect of proceedings commenced before [DATE].

Edinburgh
[Date]

PAUL CULLEN
Lord President
I.P.D.

EXPLANATORY NOTE

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

This Act of Sederunt amends the Rules of the Court of Session 1994, Sheriff Appeal Court Rules 2021 and Summary Applications, Statutory Applications and Appeals etc. Rules 1999.

Paragraph 2(2) amends rule 58A.1 of the Rules of the Court of Session 1994 to allow an application for a protective expenses order in group proceedings which are subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention, or which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.

Paragraph 2(3) changes the name of Chapter 58A to reflect the amendment to rule 58A.1.

Paragraph 2(4) inserts provision into Chapter 58A to enable expenses protection for protective expenses orders made in the lower courts, which are subsequently appealed to the Court of Session.

Paragraph 3(2) inserts a new chapter 28A into the Sheriff Appeal Court Rules 2021. Chapter 28A preserves the effect of a protective expenses order made by the sheriff in appeals to the Sheriff Appeal Court. It also enables parties to apply for a protective expenses order in appeals to the Sheriff Appeal Court where it would have been competent to make an application in the proceedings at first instance.

Paragraph 4(2) inserts a new Part LV into the Summary Applications, Statutory Applications and Appeals etc. Rules 1999. Part LV enables parties in certain proceedings under the Environmental Protection Act 1990 to apply for a protective expenses order.

Paragraph 5 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 [DATE].