

2015 No. 408

COURT OF SESSION

**Act of Sederunt (Rules of the Court of Session 1994
Amendment) (No. 4) (Protective Expenses Orders) 2015**

<i>Made</i>	- - - -	<i>2nd December 2015</i>
<i>Laid before the Scottish Parliament</i>		<i>4th December 2015</i>
<i>Coming into force</i>	- -	<i>11th January 2016</i>

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.

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(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 Amendment) (No. 4) (Protective Expenses Orders) 2015.

(2) It comes into force on 11th January 2016.

(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(c) are amended in accordance with this paragraph.

(2) For rule 58A.1 (protective expenses orders in environmental appeals and judicial reviews – application and interpretation) and rule 58A.2 (availability of protective expenses orders)(d) substitute—

(a) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3).

(b) 2014 asp 18.

(c) The Rules of the Court of Session 1994 are in Schedule 2 to the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443, last amended by S.S.I. 2015/312).

(d) Rules 58A.1 and 58A.2 were inserted by S.S.I. 2013/81. Rule 58A.1 was amended by S.S.I. 2013/120.

“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^(a) as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004^(b);
- (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 assigned 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;

proceedings are prohibitively expensive for an applicant for a protective expenses order if the applicant could not reasonably proceed with them in the absence of such an order.

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 make an application for a protective expenses order.

(3) Such an 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 for the applicant, it must make a protective expenses order.

(5) The court may refuse to make a protective expenses order if it considers that the applicant has no real prospect of success.

Public participation in decisions on specific environmental activities

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

(a) 2002 asp 13.
(b) S.S.I. 2004/520.

(2) The petitioner or the appellant may make an application for a protective expenses order.

(3) Such an 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 for the applicant.

(5) The court may refuse to make a protective expenses order if it considers that the applicant has no real prospect of success.

Contravention of the law relating to the environment

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

(2) The petitioner or the appellant may make an application for a protective expenses order.

(3) Such an 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 for the applicant.

(5) The court may refuse to make a protective expenses order if it considers that the applicant has no real prospect of success.”.

(3) In rule 58A.3 (applications for protective expenses orders)(a), omit paragraph (2).

(4) In rule 58A.4 (terms of protective expenses orders)(b), after paragraph (5) insert—

“(6) Where the applicant is the respondent in proceedings referred to in rule 58A.1(1)(a)—

- (a) paragraph (1) 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 (3) 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.

(7) In paragraphs (1) and (3), “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.”.

(a) Rule 58A.3 was inserted by S.S.I. 2013/81.

(b) Rule 58A.4 was inserted by S.S.I. 2013/81.

Saving provision

3. Paragraph 2 does not apply in relation to proceedings commenced before 11th January 2016.

Edinburgh
2nd December 2015

CJM SUTHERLAND
Lord Justice Clerk
I.P.D.

EXPLANATORY NOTE

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

This Act of Sederunt amends Chapter 58A of the Rules of the Court of Session 1994. The rules in Chapter 58A make provision for the granting of protective expenses orders in certain proceedings relating to the environment. The amendments add to the categories of proceedings in which such an order can be granted.

New rule 58A.2 makes provision for the granting of protective expenses orders in appeals to the Court of Session against decisions of the Scottish Information Commissioner when the decision appealed relates to a request for information under the Environmental Information (Scotland) Regulations 2004. Only the party seeking the information can apply for the order.

New rule 58A.2A makes provision for the granting of protective expenses orders in judicial reviews and statutory appeals where the decision, act of omission being challenged is subject to the public participation provisions of Article 6 of the United Nations Economic Commission for Europe Convention on Access to Justice in Environmental Matters. The person seeking the order must be a member of the public concerned, and must have a sufficient interest. This supersedes the previous provision under which the proceedings in which an order could be sought were defined by reference to the public participation provisions of specified EU Directives.

New rule 58A.2B makes provision for the granting of protective expenses orders in judicial reviews and statutory appeals that involve a challenge to an act of omission on the grounds that it contravenes the law relating to the environment. The party seeking the order must be a member of the public.

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