

POLICY NOTE
ACT OF SEDERUNT (RULES OF THE COURT OF SESSION 1994, SHERIFF
APPEAL COURT RULES AND SHERIFF COURT RULES AMENDMENT)
(QUALIFIED ONE-WAY COSTS SHIFTING) 2021 S.S.I. 2021/[226]

Introduction

1. This Policy Note is published to accompany the Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021 made by the Court of Session on 28 May 2021. The Policy Note has been prepared by the Scottish Civil Justice Council Secretariat to set out the Council's policy behind the rules. It does not form part of the rules.

Policy Objectives

2. The objective of the Act of Sederunt is to provide court rules to implement Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018¹ ("the Act"). The new rules regulate the procedure for handling applications to the court for one-way costs shifting in personal injury cases provided for under the Act. The rules provide procedures for handling applications and the basis upon which applications will be considered under the legislative framework.
3. The rules are designed to align procedures across the civil courts wherever possible, for the benefit of court users. The emphasis is on supporting the practical operation of the key provisions set out in the primary legislation and supplementing these provisions to add operational value where appropriate. The rules provide the essential procedural elements that are required to enable the costs-shifting regime to operate effectively in the courts and provide further exceptions to the restriction on the pursuer's liability for payment of expenses.
4. In developing court rules, the Scottish Civil Justice Council has complied with its duty under section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 to have regard to the following guiding principles² when carrying out its functions:

¹ <http://www.legislation.gov.uk/asp/2018/10/contents/enacted>

² Section 2(3) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013
<https://www.legislation.gov.uk/asp/2013/3/section/2>

Compatibility with SCJC guiding principles

5.

Principle

The civil justice system should be fair, accessible and efficient

Compatibility

The rules aim to provide clarity in the regulation of applications made to the court under section 8 of the 2018 Act. The rules are intended to be fair and accessible to court users and create efficient operational practices.

Rules relating to practice and procedure should be as clear and easy to understand as possible

The policy intention that the rules be as clear and easy to understand as possible has been a relevant consideration by Council when developing these rules.

Practice and procedure should, where appropriate, be similar in all civil courts

The rules relate to a costs shifting regime for personal injury cases proceeding in the Court of Session, Sheriff Appeal Court, Sheriff Court Ordinary Cause and summary cause. Where possible, the procedures have been aligned across the courts for the benefit of all court users.

Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted

There is no scope within the context of these rules to promote methods of resolving disputes out with the courts.

Background

6. The Act received Royal Assent on 5 June 2018 and takes forward many of the recommendations of Sheriff Principal James Taylor's Review of Expenses and Funding of Civil Litigation in Scotland³ (The Taylor Report).

³ Taylor Report

<https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/0043/00433831.pdf>

7. The Taylor Report recommended the introduction of qualified one-way cost shifting (QOCS) in personal injury actions. This is an expenses regime under which the defender pays the pursuer's expenses if the action is successful, but the pursuer does not pay the defender's expenses if the action is unsuccessful. The regime is 'qualified' as in certain circumstances, for example, where the pursuer has acted unreasonably during proceedings, the pursuer may be found liable for the defender's expenses
8. Section 8 of the Act introduces the legal framework for QOCS and section 8(6) of the framework enables further exceptions to the general operation of the regime to be specified in an Act of Sederunt⁴.
9. The Council's Costs and Funding Committee (CAFC) and Personal Injury Committee (PIC) developed the policy for rules on the question of exceptions beyond those specified in the Act. The Scottish Government agreed with and endorsed the conclusions of CAFC/PIC and invited the Council to consider developing rules of court to provide for exceptions under section 8(6) in circumstances where:
 - there is failure to beat an offer (tender);
 - the case is summarily dismissed;
 - the case is abandoned.
10. In addition to the above exceptions, the CAFC/PIC proposed that rules should make provision for an additional exception in circumstances whereby there has been unreasonable delay on the part of the pursuer in accepting a tender.
11. The Scottish Government advised that these exceptions to the general provisions for QOCS were not included in the primary legislation since the law on these matters appeared to be mainly in common law or rules of court, especially in relation to tenders and summary dismissal. Moreover, it noted that in the case of summary dismissal, the Council is yet to fully implement recommendation 123 of the Scottish Civil Courts Review⁵ on the matter.

⁴ An Act of Sederunt is secondary legislation made by the Court of Session (the supreme civil court of Scotland), to regulate the proceedings of Scottish courts and tribunals hearing civil matters.

⁵ SCCR recommendation 123 <http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

12. In regulating the procedure, the Council's intention was to produce straightforward rules encompassing the essential procedural elements required to enable QOCS to operate effectively in the court. It is anticipated that the rules will create an efficient, accessible and suitably flexible system regulating these applications.

The QOCS regime

13. The new rules provide a procedural regime to regulate applications to the court under Section 8 of the Act. The underlying policy applied to the rules is described in the following paragraphs.

Scope

14. The rules instrument makes amendments to add new Chapters 41B, 19A, 31A and 23A to the Rules of the Court of Session (RCS), the Sheriff Appeal Court Rules (SACR), the Ordinary Cause Rules (OCR) and the Summary Cause Rules (SCR) respectively. Each chapter specifies further exceptions in terms of section 8(6) of the Act and establishes and regulates the court procedure for applications under section 8 of the Act in personal injury cases and for assessing whether exceptions apply.

15. The rules instrument does not make provision amending the Simple Procedure Rules since personal injury actions do not yet fall within the scope of simple procedure. Consideration will therefore require to be given to the interaction of section 8 of the Act when the Simple Procedure Special Claims rules are enacted in due course.

16. Where appropriate, the rules utilise existing procedural provision by application of relevant chapters, e.g. chapter 23 RCS motions.

Rules provision

17. Each new rules chapter set out in the instrument provides for:

- Application and interpretation of the chapter
- Application for an award of expenses
- Award of expenses
- Procedure
- Award against legal representative

Application and interpretation

18. Where appropriate, certain rules relating to abandonment are dis-applied in order to provide the court with discretion and flexibility when considering questions of expenses in the circumstances of individual cases.

Application for an award of expenses

19. Section 8(2) of the Act provides that a court should generally not make an award of expenses against a pursuer in personal injury proceedings. The expenses protection provision is dependent on the pursuer having conducted the proceedings in an appropriate manner. Section 8(1) (b) of the Act operates as a barrier to another party seeking expenses, unless a pursuer or their legal representative has conducted themselves in an inappropriate manner (as prescribed in section 8(4) of the Act).

20. This means that if circumstances in section 8(4) of the Act apply (i.e. inappropriate behaviour by the pursuer) then the expenses protection under section 8(2) of the Act will not be available to the pursuer. In these cases, a defender could seek expenses relying on section 8(4).

21. The CAFC recommended that court rules should include reference to applications under section 8(4) of the Act as this has the benefit of procedural clarity for court users and avoids any potential ambiguity in the procedural provisions. It also allows the section 8(4) and 8(6) grounds to be relied upon in the same way, and in the same application if applicable.

22. The court rules provide that where a pursuer has brought civil proceedings, another party to the action may make an application to the court for an award of expenses to be made against the pursuer.

23. Each new chapter provides that an application to dis-apply QOCS may be made on any of the grounds set out in section 8(4) (a) to (c) of the Act, together with further exceptions set out in the instrument itself.

24. The additional 'exception provisions' are set out in each new chapter and provide, in all chapters for:

- failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender;
- unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender;

- abandonment of the action or the appeal by the pursuer,

and in chapter 31A where:

- decree of absolvitor or decree of dismissal has been granted against the pursuer in terms of rule 17.2(3)(b) (applications for summary decree).

Award of expenses

25. Each new chapter provides that an application is determined at the discretion of the court, subject to specific provisions set out in the related rule. These are broadly that in circumstances where there is failure to beat a tender/unreasonable delay in accepting a tender:

- the pursuer's liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;
- the liability of the pursuer to the applicant is to be limited to an aggregate sum (payable to all applicants) of 75% of the amount of damages awarded to the pursuer - the sum is to be calculated without offsetting against those expenses any expenses due to the pursuer before the date of the tender;
- the court must order that the pursuer's liability is not to exceed that 75% cap;
- where the award of expenses is in favour of more than one applicant, failing agreement between the parties, the court is to apportion the award of expenses recoverable between them.
- The rules also provide for circumstances where the court makes an award of expenses against the pursuer on the ground of abandonment, it may make such orders in respect of expenses as it considers appropriate, including whether to make a decree of dismissal dependant on payment of expenses within a specified time and whether to make provision for the consequences of failure to comply with any conditions applied by the court.

Procedure

26. The rules provide that in the Court of Session, Sheriff Appeal Court and sheriff court ordinary cause, an application is to be made in writing and by way of

motion procedure. Otherwise, the procedures set out in Chapter 23 RCS; Chapters 12, 13 and 14 SACR; Chapters 15 and 15A OCR, will apply respectively to motions made under each of the related new chapters.

27. It is considered that such a motion will generally be made at the conclusion of the case when expenses are under consideration. However, it is noted that there might be instances in which questions of expenses arise earlier. The Council agreed therefore that an application to dis-apply QOCS may be made at any stage in the case prior to the pronouncing of an interlocutor or order disposing of the expenses of the action or the appeal. This seems to be in line with section 8(2) of the Act.

28. In sheriff court summary causes, an application is to be made by incidental application in writing and Chapter 9 SCR otherwise applies to incidental applications made under the new chapter. An application may be made at any stage of the case prior to assessment of the amount of expenses to be awarded (in terms of SCR 23.3), an order for an account to be taxed (in terms of SCR 23.3A) or, a finding by the sheriff that no expenses are to be awarded as due to or by any party.

29. In each new chapter, the rules provide for intimation, answers, lodging documents and related hearings as may be required.

Award against legal representative

30. The Council noted that section 8(2) of the Act does not prevent the court from making an award of expenses against a pursuer's legal representative in terms of section 11 of the Act. It considered there was utility in making rules provision in each new chapter to clarify the interaction between sections 8 and 11 of the Act for the benefit of court users.

Application

31. The rules will apply to first instance proceedings commenced on or after 30 June 2021 and to any appeals arising from first instance proceedings commenced on or after the same date.

Issues raised during policy development

32. In developing the policy on potential additional exceptions under section 8(4) of the Act, the Council considered various issues discussed in the following paragraphs.

Tenders (failure to beat a tender)

33. The CAFC/PIC favoured implementation of the Taylor Review recommendation in creating an exception to costs protection in circumstances where the pursuer fails to obtain an award of damages greater than the sum offered by way of a tender. The pursuer's liability in this regard will be restricted to post-tender expenses only and will be capped at 75% of the damages awarded. This cap will be calculated without offsetting against those expenses, any expenses due to the pursuer by the applicant before the date of the tender.
34. The recommendation is designed to ensure that QOCS will not prevent pursuers from having to face the consequences of failing to accept a competitive tender, whilst protecting them from the possibility of the contra-account entirely exhausting any damages awarded.

Tenders (delay in accepting a tender)

35. The CAFC/PIC favoured the introduction of an exception to costs protection in circumstances where there has been unreasonable delay on the part of the pursuer in accepting a tender. Furthermore, the CAFC proposed that the 75% capping provision should apply with equal effect where there is failure to beat a tender as well as when there has been unreasonable delay on the part of a pursuer in accepting a tender. There was a lack of consensus amongst PIC members on the latter policy point.
36. Some members of PIC raised concerns about the operation of the capping provision in such cases and suggested that the court ought to retain the power to dis-apply QOCS where circumstances justify that approach. It was suggested that in an extreme example where an early tender is accepted late, there is no additional punitive element or penalty because of the operation of the expenses cap. It was also suggested that the rules would be open to abuse and that the Court retaining such a power would render poor behaviour more unlikely.
37. Other PIC members were of an opposing view and approved the operation of the expenses capping provisions proposed by the CAFC.
38. The Council agreed that an exception to QOCS protection should apply with equal effect where the liability in expenses was occasioned by failure to beat a tender or where there has been unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender. The 75% capping provision will apply to each exception.

Modification of expenses

39. A further policy question was considered relating to the operation of the capping provision – that is whether the rules should provide for a flat rate 75% cap or a variable rate of up to 75%.
40. A flat rate would see the court order a 75% cap in every tender case at the point it awards expenses. This would mean that if expenses after taxation were higher than 75% of the damages awarded, then the cap would apply and if not, it would not. It was suggested alternatively, that a discretion in the rules to vary the rate to allow the possibility of a lower cap would have a potential advantage of facilitating a more nuanced approach based on the circumstances of a case.
41. The Council favoured a standard flat cap rate being applied in each case without modification. The rules instrument makes provision to this effect.
42. The Council noted that the post-legislative review requirement in section 23 of the Act would allow proper, evidence based consideration of any practical issues arising from the operation of the capping provisions as well as any other matters arising.

Multiple Defenders

43. The CAFC/PIC agreed that in a situation whereby a pursuer incurs liability in post-tender expenses to multiple defenders, and where the aggregate liability in expenses exceeds 75% of the damages awarded, the apportionment of the capped expenses between defenders will be left to the court's discretion, failing agreement between the applicants.
44. Members noted that whilst the court would have discretion at common law to apportion such expenses, as there are a number of unknowns in this new procedure and for the avoidance of doubt, a rule requiring the court to apportion liability would be appropriate. The rules instrument makes provision to this effect.

Summary Dismissal

45. The Taylor Report recommended that the protection of QOCS should be lost where a pursuer's case is disposed of summarily. The CAFC/PIC agreed that rules should provide for an exception to costs protection in the event of summary dismissal, but in a manner that does not remove the court's discretion in relation to expenses (noting that it is not possible to envisage every scenario in which such a discretion could be exercised).

46. The Council agreed that rules will provide for an exception to costs protection in the event of summary dismissal (under rule 17.2 of the Ordinary Cause Rules) whilst retaining the court's discretion in relation to expenses. The rules instrument makes provision to this effect in new Chapter 31A of the Sheriff Court OCR.
47. During the initial stages of policy development, it was not intended that exceptions provisions on the basis of summary dismissal would be considered where there was no pre-existing provision in court rules.
48. However, the Secretariat received correspondence from the Medical and Dental Defence Union of Scotland ("MDDUS") inviting the Council to consider this issue and to provide a 'summary dismissal' provision in RCS.
49. The MDDUS noted that whilst the power to grant summary decree against both parties has been introduced in the Ordinary Cause Rules⁶, it has not yet been implemented in the Court of Session. It is noted that RCS 21.1 gives the court the power to grant summary decree against a defender, but not against a pursuer (except in the context of a counterclaim). The MDDUS asserted that making this procedural provision was seen by Sheriff Principal Taylor as a prelude to QOCS. It suggested that rules provision to this effect would be an important counter-balance and invited the Council to consider implementing changes to RCS at the earliest opportunity and prior to the commencement of the QOCS provisions in section 8 of the Act.
50. The Council considered the wider question of whether summary dismissal provisions (against a pursuer) would be appropriate for personal injury proceedings in the Court of Session or Sheriff Appeal Court. Members noted that the wider issue of implementing the Gill recommendation to make provision for summary dismissal in any action in the civil courts⁷ is a matter of consideration under the remit of the Council's Rules Rewrite Project (RRP).
51. In its first RRP report⁸, the Council stated: *The SCJC considers that parties should, on appropriate notice, be able to seek summary disposal of any*

⁶ OCR Chapter 17 <http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/ordinary-cause-rules>

⁷ SCCR Recommendation 123 <http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

⁸ The New Civil Procedure First Report <https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/the-new-civil-procedure-rules---first-report-and-annex.pdf?sfvrsn=2>

action. The test for summary disposal should be the opposing party having no real prospect of success and there being no other compelling reason why the case should proceed. The court should, on giving appropriate notice, be able to summarily dispose of an action, or part of an action.

52. The Council noted that the Scottish Parliament's Justice Committee recommended that rules of court were the appropriate mechanism for legislating on this matter. It stated in its stage one report on the Bill: "*the SCJC is yet to address certain of Lord Gill's recommendations relevant to summary dismissal. Given that the rules on summary dismissal may change in future, it would be inappropriate to enact potentially inflexible provision in primary legislation now. If necessary in light of the SCJC Rules Rewrite Project, specific provision for QOCS and summary dismissal could be made in future rules of court under section 8(6)*"⁹.
53. The Council agreed that the introduction of new summary dismissal provisions would need to be considered in the wider context of civil procedure as a whole (as opposed to the narrow issue of exceptions to the QOCS regime in PI cases). The Council was of the view that it would not be prudent at this time to provide for summary dismissal in PI actions.
54. The Council agreed that if in due course, any proposal to enact summary dismissal provisions across the civil court rules came under consideration, the matter is one which will require consultation with, and input from, interested parties. In this respect, the interaction of any such provisions with the QOCS regime could be revisited at that time.

Abandonment

55. In relation to the exception on the grounds of abandonment, the Council considered the underlying policy position proposed by the CAFC/PIC. That is, that the court should have discretion to order a decree of dismissal if it considers appropriate (whether or not dependent upon payment of expenses within a certain period of time). The rules are drafted on this basis and in each new chapter are framed in such a way as to provide the court with discretion to engage an appropriate approach based on the individual circumstances of the case.

⁹ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20180111CLBill-SGresponsetoStage1Report.pdf

Award of expenses

56. The Council noted that where the court is dealing with a case (to which QOCS applies) and no application is made to dis-apply the QOCS provisions, then it would be open to the court to grant expenses in favour of the pursuer or for the court to make an award of no expenses due to or by the parties. The rules are therefore drafted to include circumstances where there is a finding of no expenses due to or by either party.

Consideration of Related Policy Issues

57. In developing the rules regime, the Council considered a number of other policy issues which resulted in no rules provision being made:

Pursuers' Offers

58. The PIC and CAFC submitted that the introduction of costs protection did not require any corresponding adjustment to the rules on pursuers' offers. The Council approved this position.

Multiple Pursuers

59. It was noted by CAFC/PIC that there is potential for a complex position arising in cases involving multiple pursuers. For example, at the conclusion of proceedings it would be possible to have a situation in which early tenders in settlement of certain claims have been beaten while others have not. The Council agreed that such a scenario could theoretically arise as a practical issue but took the view that it was not possible to regulate for such a scenario in court rules.

Uninsured Defenders

60. The Council acknowledged that costs protection could operate unfairly in some circumstances. However it was reluctant to recommend making an exception that had been rejected by the Scottish Parliament Justice Committee and that had not been favoured by the Taylor Review. In this respect, the Council agreed that the case for such an exception would be kept under review.

Other exceptions

61. The possibility of providing for an exception in circumstances where a pursuer was indemnified against any potential liability in expenses (e.g. under legal expenses insurance) was considered. The Council agreed that no rules would

be prescribed at this time but the case for such an exception would be kept under review.

Appeals

62. The CAFC/PIC considered a policy option of providing the Inner House of the Court of Session and the Sheriff Appeal Court with a discretionary power to remove an appellant's costs protection on a prospective basis, i.e. the loss of costs protection would only apply to expenses incurred after the date of any such order.

63. The Committees noted that the argument for giving courts the power to hear an application to dis-apply QOCS on a prospective basis acknowledges the risk that every case lost by a pursuer could potentially run through appeal stages at further cost to the defender. It was noted that any such additional costs would not be recoverable under QOCS and that the appeal court could potentially hear the same argument again to no obvious gain. It was noted however, that over 95% of cases settle before proof. In practical terms, and notwithstanding the availability of QOCS, it was considered that the number of cases taken to appeal would likely be low.

64. On balance, the Council considered the retrospective test set out in the Act is sufficient and there is no need to construct a prospective test within the new rules regime.

Consultation

65. The underlying law was consulted upon during the progress of the Scottish Government Bill¹⁰.

66. The Council's Personal Injury Committee was consulted to support the development of the policy underpinning the rules and again following the preparation of the draft rules instrument prior to it being approved by Council.

67. On 26 April 2021, the Scottish Civil Justice Council approved a draft rules instrument subject to minor amendments. The draft instrument was thereafter submitted to the Court of Session for consideration and approval.

Scottish Civil Justice Council Secretariat May 2021

¹⁰ <http://www.gov.scot/Publications/2015/01/9932>