

ANNEX D CHAPTER 58A OF THE RULES OF THE COURT OF SESSION

CHAPTER 58A

PROTECTIVE EXPENSES ORDERS IN ENVIRONMENTAL APPEALS AND JUDICIAL REVIEWS

Application and interpretation of this Chapter

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

- (a) an appeal under section 56 of the Freedom of Information (Scotland) Act 2002 as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004;
- (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).

(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 expense 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.

Applications for protective expenses orders

58A.3-(1) An application for a protective expenses order shall be made by motion.

(3) An application for a protective expenses order may be made in relation to a reclaiming motion at any stage of the proceeding whether or not an application for such an order was made, or an order granted, at first instance.

(4) A motion mentioned in paragraph (1) shall –

- (a) set out why the applicant is seeking the order;
- (b) be accompanied by any supporting evidence, which the applicant intends to refer to in making the application.
- (c) set out the terms on which the applicant is represented;
- (d) be accompanied by a schedule estimating –
 - (i) the expenses of the applicant in relation to the proceedings in respect of which the order is sought; and
 - (ii) the expenses of each other party for which the applicant may be liable in relation to the proceedings in respect of which the order is sought;
- (e) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.4, set out the grounds on which that lower or higher figure is applied for.

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).

(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).

(5) A protective expenses order may -

- (a) exclude any party's liability in expenses to any other party;
- (b) limit any party's liability in expenses to any other party;
- (c) provide that no party will be liable for the expenses of any other party;

- (d) include provision –
 - (i) as to a party's liability in expenses if the applicant is successful in the proceedings;
 - (ii) as to a party's liability in expenses if the applicant is unsuccessful in the proceedings; or
 - (iii) as to a party's liability in expenses regardless of the outcome of the proceedings.

(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.

Determination of terms of a protective expenses orders

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.

(2) The court shall not make a protective expenses order until it has given all of the parties an opportunity to be heard.