

2026 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 Sheriff Court Rules Amendment)
(Protective Expenses Orders) 2026

<i>Made</i>	- - - -	***
<i>Laid before the Scottish Parliament</i>		***
<i>Coming into force</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 [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 Sheriff Court Rules Amendment) (Protective Expenses Orders) 2026.

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

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

Amendment of the Rules of the Court of Session 1994

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

(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.

(c) 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), last amended by S.S.I. 2026/xx. Chapter 58A was inserted by S.S.I. 2013/81, substituted by S.S.I. 2018/348 and last amended by S.S.I. 2024/xxx.

(2) For the Chapter heading substitute “PROTECTIVE EXPENSES ORDERS IN ENVIRONMENTAL PROCEEDINGS”.

(3) In rule 58A.1 (application and interpretation of this Chapter)—

(a) in paragraph (1)—

(i) omit “relevant” in both places where it occurs;

(ii) after “proceedings” in both places where it occurs, insert “, other than those to which Chapter 26A (group procedure) applies,”;

(b) in paragraph (2), omit the definition of “relevant proceedings”.

(4) In rule 58A.3 (public participation in decisions on specific environmental activities)—

(a) for the heading, substitute “**Proceedings pursuant to Article 6 of the Aarhus Convention**”;

(b) in paragraph (2), for “petitioner or the appellant”, substitute “pursuer (or petitioner, or appellant in an appeal under statute, as the case may be)”;

(c) in paragraph (3), for “petition or appeal is”, substitute “proceedings are”.

(5) In rule 58A.4 (contravention of the law relating to the environment)—

(a) in paragraph (2), for “petitioner or the appellant”, substitute “pursuer (or petitioner, or appellant in an appeal under statute, as the case may be)”;

(b) in paragraph (3), for “petition or appeal is”, substitute “proceedings are”.

(6) In rule 58A.5 (applications for protective expenses orders), in paragraph (3)(a)—

(a) omit sub-paragraph (ii);

(b) in sub-paragraph (iii), after “proceedings;”, insert “and”;

(c) omit sub-paragraph (iv).

(7) In rule 58A.7 (terms of protective expenses orders), in paragraph (1)—

(a) in sub-paragraph (a), for “£5,000, or such other”, substitute “£5000 (inclusive of court fees), or such lower”;

(b) in sub-paragraph (b), after “£30,000”, insert “(inclusive of court fees)”.

(8) In rule 58A.8 (expenses protection in reclaiming motions), for paragraph (2), substitute—

“(2) The limits on the parties’ liability in expenses set by the order include liability for expenses occasioned by the appeal.

(2A) The order may be reviewed by the court either on its own motion or on the motion of a party to the reclaiming motion.”.

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

“ **Expenses protection in appeals from lower courts**

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) The limits on the parties’ liability in expenses set by the order include liability for expenses occasioned by the appeal.

(3) The order may be reviewed by the court either on its own motion or on the motion of a party to the appeal.

(4) 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 (but did not make a successful application) may apply for a protective expenses order in relation to the appeal.

(5) The application is to be made no later than is reasonably practicable after the appeal has been marked.

Expenses protection: appeals to the Supreme Court

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

- (a) the court has made a protective expenses order; or
- (b) a protective expenses order has been made in the lower courts and that order remains in effect by virtue of rule 58A.8A(2).

(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 application for permission to appeal under Chapter 41A.

(3) A party who would have been entitled to apply for a protective expenses order in the proceedings which are the subject of the application for permission to appeal (but did not make a successful application) may apply for a protective expenses order in relation to the application for permission to appeal.

(4) The application is to be made no later than is reasonably practicable after the application for permission to appeal has been made.”.

(10) In rule 58A.9 (Expenses of application), in paragraph (2), omit “, other than on exceptional cause shown.”.

(11) In rule 58A.10 (Expenses of interveners)—

- (a) in paragraph (1), omit “, except on cause shown”.
- (b) omit paragraph (2).

Amendment of the Sheriff Appeal Court Rules 2021

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

(2) In Part 6 (incidental procedure: special procedures) after Chapter 28 (reporting restrictions)(b), 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—

- (a) 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;
- (b) 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;

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

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

“the public” and “the public concerned” have the meanings given by Article 2 of the Aarhus Convention.

(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 relation to proceedings in the sheriff court; and
- (b) a decision within those proceedings is appealed.

(2) The limits on the parties’ liability in expenses set by the order include liability for expenses occasioned by the appeal.

(3) The order may be reviewed by the court either on its own motion or on the motion of a party to the appeal.

(4) A party who would have been entitled to apply for a protective expenses order in sheriff court proceedings which are appealed to the Court (but did not make a successful application) may apply for a protective expenses order in relation to the appeal.

(5) The application is to be made 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) The applicant must lodge with the motion—

- (a) a statement setting out—
 - (i) the grounds for seeking the order;
 - (ii) an estimate of the expenses that the applicant will incur in relation to the proceedings; and
 - (iii) 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.

(3) 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.

(4) 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 are to be disposed of by the procedural Appeal Sheriff.

(2) The procedural Appeal Sheriff must make a protective expenses order where the procedural Appeal Sheriff is satisfied that—

- (a) the applicant is a member of the public or, as the case may be, the public concerned;
- (b) in relation to proceedings mentioned in rule 28A.1(1)(a), the applicant has a sufficient interest in the subject matter of the proceedings; and
- (c) the proceedings are prohibitively expensive.

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

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

(5) Where a motion to grant an order under rule 28A.3(4) is opposed, 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 (inclusive of court fees), or such lower 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 (inclusive of court fees), 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 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.

(2) 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 Ordinary Cause Rules 1993

- 4.—(1) The Ordinary Cause Rules 1993(a) are amended in accordance with this paragraph.
- (2) After Chapter 31A (Qualified One-Way Costs Shifting)(b), insert—

“CHAPTER 31B PROTECTIVE EXPENSES ORDERS

Application and interpretation of this Chapter

31B.1.—(1) This Chapter applies to applications for protective expenses orders in—

- (a) 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;
- (b) 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 given by Article 2 of the Aarhus Convention.

(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.

(a) The Ordinary Cause Rules 1993 are in schedule 1 of the Sheriff Court (Scotland) Act 1907 (c. 51). Schedule 1 was substituted by S.I. 1993/1956 and last amended by S.S.I. 2025/xx.

(b) Chapter 31A was inserted by S.S.I. 2021/226.

Proceedings pursuant to Article 6 of the Aarhus Convention

31B.2.—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 31B.1(1)(a).

(2) An application for a protective expenses order may be made by the pursuer.

(3) The application is to be made no later than is reasonably practicable after the pursuer becomes aware that the proceedings are defended.

(4) The sheriff must make a protective expenses order where the sheriff is satisfied that—

- (a) the pursuer is a member of the public concerned;
- (b) the pursuer has a sufficient interest in the subject matter of the proceedings; and
- (c) the proceedings are prohibitively expensive.

Contravention of the law relating to the environment

31B.3.—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 31B.1(1)(b).

(2) An application for a protective expenses order may be made by the pursuer.

(3) The application is to be made no later than is reasonably practicable after the pursuer becomes aware that the proceedings are defended.

(4) The sheriff must make a protective expenses order where the sheriff is satisfied that—

- (a) the applicant is a member of the public; and
- (b) the proceedings are prohibitively expensive.

Applications for protective expenses orders

31B.4.—(1) A protective expenses order is applied for by motion.

(2) The applicant must lodge with the motion—

- (a) a statement setting out—
 - (i) the grounds for seeking the order;
 - (ii) an estimate of the expenses that the applicant will incur in relation to the proceedings; and
 - (iii) 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 31B.6(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.

(3) 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.

(4) The motion may request that the sheriff 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

31B.5.—(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 to grant an order under rule 31B.4(4) is opposed, the hearing must take place in chambers.

Terms of protective expenses orders

31B.6.—(1) A protective expenses order must—

- (a) limit the applicant’s liability in expenses to the respondent to the sum of £5,000 (inclusive of court fees), or such lower 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 (inclusive of court fees), 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

31B.7.—(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 sheriff must, other than on 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

31B.8. Expenses are not to be awarded in favour of or against a party who has been granted or refused leave to intervene after lodging a minute of intervention under rule 13A.2(2).”.

Amendment of the Summary Application Rules 1999

5.—(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 Part

3.55.1.—(1) This Part applies to applications for protective expenses orders in—

- (a) proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of the Aarhus Convention;
- (b) proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.

(a) S.I. 1999/929, last amended by S.S.I. 2024/xxx.

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

(2) In this Part—

“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 given by Article 2 of the Aarhus Convention.

(3) 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.

(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.

Proceedings pursuant to Article 6 of the Aarhus Convention

3.55.2.—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 3.55.1(1)(a).

(2) An application for a protective expenses order may be made by the pursuer.

(3) The application is to be made no later than is reasonably practicable after the pursuer becomes aware that the proceedings are defended.

(4) The sheriff must make a protective expenses order where the sheriff is satisfied that—

- (a) the pursuer is a member of the public concerned;
- (b) the pursuer has a sufficient interest in the subject matter of the proceedings; and
- (c) the proceedings are prohibitively expensive.

Contravention of the law relating to the environment

3.55.3.—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 3.55.1(1)(b).

(2) An application for a protective expenses order may be made by the pursuer.

(3) The application is to be made no later than is reasonably practicable after the pursuer becomes aware that the proceedings are defended.

(4) The sheriff must make a protective expenses order where the sheriff is satisfied that—

- (a) the applicant is a member of the public; and
- (b) the proceedings are prohibitively expensive.

Applications for protective expenses orders

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

(2) Intimation of the motion and of the documents mentioned in paragraph (4) must be given to every other party not less than 14 days before the date of lodging.

(3) The applicant must lodge with the motion—

(a) a statement setting out—

- (i) the grounds for seeking the order;
- (ii) an estimate of the expenses that the applicant will incur in relation to the proceedings; and
- (iii) 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 3.55.6(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 sheriff grant an order treating any of the information listed in paragraph (4) as confidential and open only to the court and the parties to the proceedings.

Determination of applications

3.55.5.—(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 to grant an order under rule 3.55.4(5) is opposed, the hearing must take place in chambers.

Terms of protective expenses orders

3.55.6.—(1) A protective expenses order must—

- (a) limit the applicant's liability in expenses to the respondent to the sum of £5,000 (inclusive of court fees), or such lower 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 (inclusive of court fees), 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

3.55.7.—(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 sheriff must, other than on 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

3.55.8. Expenses are not to be awarded in favour of or against a party who has been granted or refused leave to intervene after lodging a minute of intervention under rule 2.38(2).”.

Amendment of the Summary Cause Rules 2002

- 6.—**(1) The Summary Cause Rules 2002(a) are amended in accordance with this paragraph.
(2) After Chapter 23A (Qualified One-Way Costs Shifting)(b) insert—

“CHAPTER 23B PROTECTIVE EXPENSES ORDERS

Application and interpretation of this Chapter

23B.1.—(1) This Chapter applies to applications for protective expenses orders in—

- (a) 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;
- (b) 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 given by Article 2 of the Aarhus Convention.

(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.

(a) The Summary Cause Rules 2002 are in schedule 1 of the Act of Sederunt (Summary Cause Rules) 2002 (S.S.I. 2002/132), last amended by S.S.I. 2024/353.

(b) Chapter 23A was inserted by S.S.I. 2021/226.

- (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.

Proceedings pursuant to Article 6 of the Aarhus Convention

23B.2.—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 23B.1(1)(a).

(2) An application for a protective expenses order may be made by the pursuer.

(3) The application is to be made no later than is reasonably practicable after the pursuer becomes aware that the proceedings are defended.

(4) The sheriff must make a protective expenses order where the sheriff is satisfied that—

- (a) the pursuer is a member of the public concerned;
- (b) the pursuer has a sufficient interest in the subject matter of the proceedings; and
- (c) the proceedings are prohibitively expensive.

Contravention of the law relating to the environment

23B.3.—(1) This rule applies to an application for a protective expenses order in proceedings mentioned in rule 23B.1(1)(b).

(2) An application for a protective expenses order may be made by the pursuer.

(3) The application is to be made no later than is reasonably practicable after the pursuer becomes aware that the proceedings are defended.

(4) The sheriff must make a protective expenses order where the sheriff is satisfied that—

- (a) the applicant is a member of the public; and
- (b) the proceedings are prohibitively expensive.

Applications for protective expenses orders

23B.4.—(1) A protective expenses order is made by incidental application under rule 9.1.(1)(b).

(2) The application is to be made no later than is reasonably practicable after the applicant becomes aware that the proceedings are defended.

(3) The applicant must lodge with the incidental application—

- (a) a statement setting out—
 - (i) the grounds for seeking the order;
 - (ii) an estimate of the expenses that the applicant will incur in relation to the proceedings; and
 - (iii) 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 23B.(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 sheriff 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

23B.5.—(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 to grant an order under rule 23B.4(5) is opposed, the hearing must take place in chambers.

Terms of protective expenses orders

23B.6.—(1) A protective expenses order must—

- (a) limit the applicant’s liability in expenses to the respondent to the sum of £5,000 (inclusive of court fees), or such lower 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 (inclusive of court fees), 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

23B.7.—(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 has been found liable comprise or include the expenses occasioned by the application.

(2) The sheriff must, other than on 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

23B.8. Expenses are not to be awarded in favour of or against a party who has been granted or refused leave to intervene after making an application for leave to intervene under rule 14A.2(2).”.

Amendment of the Simple Procedure Rules

7.—(1) The Act of Sederunt (Simple Procedure) 2016(a) is amended in accordance with this paragraph.

(2) In paragraph 3 (interpretation of the Simple Procedure Rules)(b), after the definition “postal service which records delivery”, insert—

““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) In schedule 1 (the Simple Procedure Rules)(c), after rule 17.17 (what if a question of national security arises in an Equality Act 2010 claim?), insert—

(a) S.S.I. 2016/200, last amended by S.S.I. 2024/xx.

(b) Paragraph 3 was amended by S.S.I. 2016/315.

“Protective Expenses Orders

17.18 When is a protective expenses order available?

- (1) Protective expenses orders are available where a claimant challenges a decision, act or omission on the grounds that it contravenes the law relating to the environment.
- (2) A protective expenses order is only available in a case where the expenses of a claim are not otherwise capped.
- (3) A protective expenses order caps the expenses in the case. The caps apply to the expenses which the claimant may have to pay to the respondent, and also the expenses which the respondent may have to pay to the claimant.
- (4) The expenses which the claimant may have to pay to the respondent are capped at £5000.
- (5) The expenses which the respondent may have to pay to the claimant are capped at £30,000[OR £5000] .
- (6) Where the application for a protective expenses order is unsuccessful, the sheriff will also place a cap of £500 on the [recovery of expenses][cost] of making the application.
- (7) The sheriff may vary any of the amounts set out in this rule if the sheriff considers that there is a good reason to do so.
- (8) A statutory intervener cannot claim expenses, or be made to pay expenses, and so a protective expenses order cannot be made in relation to a statutory intervener.

17.19 How do I apply for a protective expenses order?

- (1) Protective expenses orders are applied for in the Claim Form.

17.20 When must the sheriff make a protective expenses order?

- (1) The sheriff must make a protective expenses order if the sheriff considers that bringing the case would otherwise be prohibitively expensive.
- (2) In deciding whether bringing the case would be prohibitively expensive, the sheriff will consider—
 - (a) your situation and the situation of the other parties;
 - (b) whether your application has reasonable prospects of success;
 - (c) the importance of the case to you;
 - (d) the importance of the case to the environment;
 - (e) how complex the relevant law and procedure is; and

(e) Schedule 1 was last amended by S.S.I. XXX.

(f) whether your application is frivolous.”.

(4) In schedule 2 (forms)(a), in Form 3A (the simple procedure claim form)(b), at the end of section A1 insert a new entry of “(In environmental cases only) I want expenses to be capped in this case”.

Saving

8. Paragraphs 2 to 7 do not apply in respect of proceedings commenced before [DATE].

Edinburgh
[Date]

PAUL CULLEN
Lord President
I.P.D.

(a) Schedule 2 was last amended by S.S.I. 2024/353.
(b) Form 3A was substituted by S.S.I. 2022/211.

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, the Sheriff Appeal Court Rules 2021, the Ordinary Cause Rules 1993, the Summary Applications Rules 1999, the Summary Cause Rules 2002 and the Simple Procedure Rules, in respect of protective expenses orders.

The amendments provide that protective expenses orders may be applied for by the person who initiates any court proceedings other than 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.