Interim Award of Expenses: The Need for Rule Change

Submission to the Scottish Civil Justice Council on behalf of the Faculty of Advocates

Introduction

1. This briefing note is submitted in support of the proposed insertion of a new paragraph (4) into Rule 42.1 of the Rules of the Court of Session, providing for interim awards on account of expenses within 28 days of lodging an account. The proposed amendment addresses a crisis in access to justice caused by systemic delays in the taxation of expenses, which are undermining the viability of speculative fee arrangements upon which access to the Scottish courts fundamentally depends.

2. In order to assist, a draft amendment (proceeding by way of Act of Sederunt) is appended here, along with a draft Explanatory Note.

The Access to Justice Problem

2. Speculative fee arrangements are the principal means by which pursuers in personal injury and clinical negligence cases access the courts with equality of arms against insurer-funded defenders. This was recognised by the Taylor Review and given legislative effect in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Without counsel and solicitors willing to act speculatively, pursuers would be forced either to abandon meritorious claims or place unsustainable demands on the legal aid system.

3. The system depends on legal representatives being paid within a reasonable time following success. Counsel acting for pursuers must wait until completion of the substantive action even to begin the process of payment, carrying significant financial risk throughout. What now threatens the model's viability is the inordinate period from substantive resolution until payment.

4. Data from two of Scotland's leading stables demonstrates the severity of the problem. At Ampersand Advocates, aged debt in speculative cases increased by 42% in a single year, from £2.2 million to £3.85 million, despite fees rendered increasing by only 29%. Compass Chambers reports a disproportionate increase in aged debt against revenue growth.

5. The human consequences are stark. Senior counsel report waiting over five years for payment on work first undertaken in 2014. Others report having "effectively no income for significant periods" and questioning whether to remain in the profession. Members are increasingly declining speculative instructions. As one senior counsel stated: "the only people who will take on cases that are speculatively funded are those that cannot get work elsewhere."

6. Paying parties have identified that insisting on taxation and delaying agreement maximises their negotiating position, compelling counsel to accept abatements of 15–25% simply to receive payment at all. The current delays incentivise obstructive behaviour by paying parties and penalise success.

7. The foregoing comments relate to speculative cases, primarily in the field of personal injury. However, and as is discussed further below, the problems are not restricted to such cases. Even a fairly well-resourced commercial entity, having succeeded in litigation and yet left uncompensated in terms of

expenses incurred for months or years, may experience difficulties which could, with minimal change, be alleviated.

Why a Rule Change is Necessary

7. The existing law recognises that interim awards of expenses are competent. However, recent case law has restricted the court's willingness to make such orders. In *Harkin v McNeil* [2025] SC EDIN 84, an interim payment was refused because the delay disadvantaged agents and counsel rather than the pursuer personally. If that represents the court's policy, interim awards will be available only in the most exceptional cases, leaving the systemic problem unaddressed.

8. The existing discretionary framework, requiring "special reasons" (*Martin & Co (UK) Ltd, Petrs* [2013] CSOH 25) or "sufficient reason" (*Kidd v Paull & Williamson LLP* [2017] CSOH 124), creates uncertainty and discourages applications. A rule change establishing a presumptive entitlement, with the burden on the paying party to resist, is necessary to shift incentives and provide the certainty that the market requires.

The Proposed Rule is Principled and Proportionate

9. The proposal is founded on the principle articulated by Jacob J in *Mars UK Limited v Teknowledge Limited* [1999] 2 Costs LR 44, adopted across multiple jurisdictions: where a party has won and obtained an order for costs, the only reason payment is delayed is the need for detailed assessment. A payment of a lesser amount which the successful party will "almost certainly collect" is a closer approximation to justice.

10. In *Crociani v Crociani* [2014] JCA 095, the Jersey Court of Appeal endorsed this as a matter of principle: "the achievement of justice... would usually require that a party, who is, pursuant to a court order, entitled to its costs, should be paid on account a percentage of the amount he is likely to recover on taxation." Critically, the Court held that "Justice, not need, is the touchstone" — rejecting the argument that a receiving party must demonstrate particular urgency.

11. In England and Wales, CPR 44.2(8) now provides a presumption in favour of interim payment: the court "*will* order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so." In *International Game Technology v The Gambling Commission* [2024] Costs LR 125, Coulson LJ ordered an interim payment of approximately 50% of total costs, holding that "justice requires an amount to be identified and paid on account, rather than making the successful party wait for the completion of the potentially lengthy assessment process."

12. The proposed 50% default is consistent with the norm in these jurisdictions. It is conservative: a party entitled to expenses will ordinarily recover substantially more than half their account on taxation. Setting the default at 50% avoids any real risk of overpayment while providing meaningful relief.

The Rule Protects the Paying Party

13. The proposed rule is not one-sided. Sub-paragraph (c) expressly permits the paying party to oppose the motion and, on cause shown, argue for a different percentage. This preserves the court's discretion while placing the burden appropriately. There may be cases where an account is manifestly excessive, or where other circumstances justify a lower payment. The court retains full power to do justice in individual cases.

14. The requirement of "cause shown" prevents bare opposition from frustrating the rule's purpose. It also provides an incentive for paying parties to engage constructively with accounts rather than relying on delay as a tactical weapon. This is consistent with the Gill Review's recommendation that parties should be able to agree elements of an account and restrict taxation to disputed items.

The Change Complements Existing Provisions

15. The proposed paragraph operates within the existing architecture of Rule 42.1. It does not affect the Auditor's role, the right to lodge objections, or the final determination of expenses. The paying party already receives intimation of the account forthwith on lodging under paragraph (2A), providing adequate notice to prepare any opposition. The 28-day window ensures prompt but not precipitate action.

The Change Produces Other Benefits

16. Whilst the difficulties posed by the current situation are most keenly felt in speculative cases, it should not be thought that they are limited thereto. Scots law, and the Scottish Courts, promote themselves as accessible and efficient in terms of the administration of justice. The Scottish Courts are in competition with others across the UK and Channel Islands for commercial litigation. A situation in which even commercial entities require to wait lengthy periods of time before receipt of any aspect of an award of expenses is not attractive to potential litigants.

17. As has been noted, such other jurisdictions have provision, either by way of Rules or the development of the common law, allowing for recovery of interim awards which are consistent with those proposed herein. Failure to move to meet the requirements of the commercial market will drive people away from, rather than attracting them to, this jurisdiction.

Conclusion

16. The proposed rule change is urgently required. Without it, the current system permits paying parties to weaponise delay, erodes the financial viability of speculative practice, and progressively diminishes the pool of experienced counsel willing to act for pursuers. It is disincentivising the choice of Scotland as a *forum* for commercial disputes. The inevitable result is reduced access to justice for those who most need the protection of the courts, and lower levels of work for the Courts themselves. The rule is principled, proportionate, consistent with comparative practice, and fair to both parties. It should be adopted without delay.

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28 May 2026

Appendix:

<u>Proposed Amendment to Rule 42.1 – Interim Award on Account of Expenses</u>

<u>Act of Sederunt (Interim Awards of Expenses in the Court of Session) 2026</u>

Background

RCS 42.1 currently provides for the remit of accounts of expenses to the Auditor for taxation. Under the existing rule, a party found entitled to expenses must lodge an account of expenses in process not later than four months after the final interlocutor, or at any time with leave of the court. On lodging, the party must intimate a copy of the account forthwith to the party found liable to pay those expenses.

The existing law recognises that an order for payment of interim expenses before an account has been taxed is competent, though the circumstances in which such an order will be made have been the subject of judicial consideration.

Proposed New Paragraph (4) to Rule 42.1

The following new paragraph (4) shall be inserted after paragraph (3) of Rule 42.1:

> (4) Within 28 days of the lodging of an account of expenses under paragraph (2)(a) or (b)—
>
> (a) the party found entitled to expenses may apply by motion to the court for an interim award on account of those expenses;
>
> (b) where no opposition to such motion is made, the court shall grant an interim award of a sum equal to 50 per cent of the amount of the account of expenses lodged under paragraph (2)(a) or (b); and
>
> (c) the party found liable in expenses may oppose such motion and, on cause shown, seek that the court order payment of a different percentage of the amount of the account of expenses, and the court may order payment of such different percentage as it considers appropriate in all the circumstances.

Explanatory Note

Purpose of the Amendment

This amendment introduces a structured mechanism by which a party found entitled to expenses can obtain an interim payment on account of those expenses within a defined period following the lodging of the account. This addresses the practical difficulty that the taxation process can take considerable time, during which the receiving party bears the cost of the litigation without recovery. The existing case law confirms the competency of interim awards of expenses but provides limited procedural guidance. Moreover, recent caselaw has restricted the readiness of the Court to make such orders. Given that the funding of litigation, especially in speculative fee cases, raises difficulties for access to justice, a change in the rules is necessary.

Sub-paragraph (a) – Right to Apply by Motion

The amendment provides that the party found entitled to expenses may apply by motion within 28 days of lodging the account of expenses. The 28-day period runs from the date on which the account is lodged in process under paragraph (2)(a) or (b). Since intimation of the account to the paying party is already required forthwith on lodging under paragraph (2A), the paying party will have notice of the account and can anticipate a possible motion for an interim award. The express ability to order payment on account is consistent with the provisions in England and Wales: see CPR44.2(8). It is also consistent with the approach followed in other related jurisdictions even where there is no express provision within the Rules – see e.g. for Jersey (and Guernsey follows the same approach) *Crociani v Crociani* [2014] JCA 095.

Sub-paragraph (b) – Default of 50% Where Unopposed

Where the motion is not opposed, the court shall grant an interim award of 50 per cent of the amount of the account lodged. This provides certainty and a proportionate default position, recognising that taxation may reduce the account but that a substantial proportion is ordinarily likely to be allowed. This removes the need for the receiving party to demonstrate "special reasons" or "sufficient reason" in unopposed cases, departing from the approach suggested in *Martin & Co (UK) Ltd, Petrs* [2013] CSOH 25 and *Kidd v. Paull & Williamson LLP* [2017] CSOH 124.

The 50% figure is consistent with the norm followed in other jurisdictions: see e.g. *Crociani, cit.sup*; *International Game Technology plc and Others v The Gambling Commission and Others* [2024] Costs L.R. 125.

Sub-paragraph (c) – Opposition on Cause Shown

The paying party may oppose the motion and argue for a different percentage. The burden is on the paying party to show cause why the default 50 per cent should not apply. This recognises that there may be cases in which the account is manifestly excessive or inflated, or where other circumstances justify a lower (or indeed higher) interim payment. The court retains a discretion to order such different percentage as it considers appropriate. The requirement of "cause shown" ensures that bare opposition without substantive justification will not succeed in displacing the default position.

Relationship with Existing Provisions

The amendment complements the existing structure of Rule 42.1, in which the court pronounces an interlocutor finding a party entitled to expenses and remitting to the Auditor for taxation, and further decerns against the party found liable in expenses as taxed. The interim award mechanism operates between the lodging of the account and the completion of taxation. It does not affect the rights of parties to object to the Auditor's report or the final determination of expenses following taxation.