

CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Expenses in Civil Litigation

Section 8 – Restriction on pursuers’ liability for expenses in personal injury claims

24. **Section 8** makes provision for a qualified one-way costs shifting (“QOCS”) regime in Scotland for claims for personal injuries and appeals in civil proceedings for personal injuries, including clinical negligence. Subsections (1) and (2) provide together that the court must not make an award of expenses against the pursuer of the claim or appeal for personal injuries where they have conducted proceedings in an appropriate manner. Subsection (3) makes it clear that this does not prevent the court from making an award of expenses in relation to any other type of claim made in the same set of proceedings. Subsection (4) sets out the tests for considering if the person has acted in an inappropriate manner: these are fraudulent acts (including but not limited to fraudulent representations), manifestly unreasonable behaviour, and other abuses of process. Subsection (5) sets out that the standard of proof for fraudulent actings in subsection (4)(a) is the balance of probabilities. Subsection (6) gives the court the power to restrict the types of claims to which QOCS can be applied by an act of sederunt under section 103(1) or section 104(1) of the Courts Reform (Scotland) Act 2014. Subsection (7) explains what is meant by “personal injuries” in this section. That term includes diseases as well as physical or mental impairment.

Section 9 – Representation free of charge

25. This section makes provision for where a party to civil proceedings is represented for free (“pro bono”), or partly for free. Subsection (2) requires disclosure to the court that there has been free or partially free representation. Subsection (3) allows the court to order that a payment be made to a charity where expenses are awarded to the party benefitting from free or partially free representation. That charity is to be designated under the requirements of subsection (5). Subsection (4) sets out factors that the court is to have regard to in determining whether to make an order and in what terms to make any order. Subsection (5) details that the charity must be designated by the Lord President of the Court of Session and be registered in Scotland, with a charitable purpose of improving access to justice in respect of civil proceedings in Scotland. Subsection (6), however, provides that subsection (3) does not apply where sections 28 and 29 of the Equality Act 2006 apply. Those sections empower the Equality and Human Rights Commission to assist individuals involved in equality proceedings and provide that expenses awarded to a successful assisted person are recoverable by the Commission.

Section 10 – Third party funding of civil litigation

26. **Section 10** requires that a party receiving financial assistance from another person who is not a party to the proceedings must disclose to the court the identity of the funder

These notes relate to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp 10) which received Royal Assent on 5th June 2018

and any intermediary, as well as details of the assistance being provided. In those cases where financial assistance is commercial in nature, or otherwise where a non-commercial funder is to receive a share of any damages, the nature of the funder's financial interest must be disclosed once the dispute has been resolved. The court may then make an award of expenses against the funder and any intermediary. Subsection (4) provides that financial assistance under a success fee agreement or from a trade union or staff association is not to be treated as commercial funding. Subsection (5) is a more extensive exemption for close family funding of family proceedings¹, with the effect that the fact of financial assistance does not need to be disclosed to the court under subsection (2). Subsection (6) makes clear that payments from the Scottish Legal Aid Fund fall outside of section 10. There is already a requirement for legal aid funding to be disclosed under rule 3 of the Act of Sederunt (Civil Legal Aid Rules) 1987². Finally, under subsection (7), further provision relating to these issues may be made in court rules by means of an act of sederunt.

Section 11 – Awards of expenses against legal representatives

27. This section gives power to the civil courts to make an award of expenses against a legal representative in the proceedings who has committed a serious breach of their duties to the court³. Subsection (3) provides that limitations of this rule may be made in rules of court by means of an act of sederunt.

Section 12 – Minor and consequential modifications of the Courts Reform (Scotland) Act 2014

28. This section makes consequential modifications to the Courts Reform (Scotland) Act 2014 in consequence of sections 8 and 11. Subsection (2) aligns the reasonableness test in the 2014 Act for expenses in simple procedure case with section 8(4)(b) of the 2018 Act. Subsections (3) and (4) adjust the core rule-making powers for the civil courts in sections 103 and 104 of the 2014 Act. The modifications clarify that provision may be made in act of sederunt about expenses awarded to or against persons other than the parties.

Section 13 – Meaning of “legal representative”.

29. This section provides that legal representation in sections 8, 9 and 11 means representation by solicitors, advocates or others who are authorised to conduct civil litigation on behalf of a party.

¹ For the purposes of this section, family proceedings are defined in Section 10(6) of the Act.

² Act of Sederunt (Civil Legal Aid Rules) 1987 S.I. 1987 No. 492 (S.46)

³ See Paterson, Alan (2007) Duties to the court. In: Law, practice and conduct for solicitors. University of Strathclyde at <http://strathprints.strath.ac.uk/4793/>.