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SCOTTISH STATUTORY INSTRUMENTS

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**2008 No. 349**

**COURT OF SESSION**

**Act of Sederunt (Rules of the Court of Session  
Amendment No. 5) (Miscellaneous) 2008**

*Made - - - - 24th October 2008  
Coming into force in accordance with paragraph 1(1),  
(2) and (3)*

The Lords of Council and Session, under and by virtue of the powers conferred by section 5 of the Court of Session Act 1988<sup>(1)</sup>, and this instrument making provision for a purpose mentioned in section 2(2) of the European Communities Act 1972<sup>(2)</sup>, and it appearing to the Lords of Council and Session that it is expedient for the reference to Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13th November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No. 1348/2000 to be construed as a reference to that instrument as amended from time to time, under and by virtue of the powers conferred by paragraph 1A of Schedule 2 to the European Communities Act 1972<sup>(3)</sup> and under and by virtue of all other powers enabling them in that behalf, do hereby enact and declare:

**Citation, commencement and interpretation**

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2008 and, subject to subparagraphs (2) and (3), shall come into force on 1st December 2008.

(2) Paragraphs 7 and 9 shall come into force on 3rd November 2008.

(3) Paragraph 5 shall come into force on 13th November 2008.

(4) This Act of Sederunt shall be inserted in the Books of Sederunt.

(5) In this Act of Sederunt, “the Rules” means the Rules of the Court of Session 1994<sup>(4)</sup>.

**Amendment of the Rules**

2. The Rules are amended in accordance with paragraphs 3 to 9.

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(1) 1988 c. 36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 c. 32, section 2(3), the Children (Scotland) Act 1995 c. 36, Schedule 4, paragraph 45 and by the Vulnerable Witnesses (Scotland) Act 2004 (asp 3), section 14(1).  
(2) 1972 c. 68.  
(3) Paragraph 1A of Schedule 2 was inserted by section 28 of the Legislative and Regulatory Reform Act 2006 (c. 51).  
(4) S.I.1994/1443, last amended by S.S.I. 2008/123.

### **Designation of parties**

- 3.—(1) In rule 13.2 (form of summonses), in paragraph (4)—
- (a) omit “and” after subparagraph (c); and
  - (b) after subparagraph (d) insert—
    - “; and
    - (e) if applicable, any special capacity in which the pursuer is suing or any special capacity in which the defender is being sued.”.
  - (2) In rule 14.4 (form of petitions), in paragraph (2)—
    - (a) after subparagraph (a) omit “and”; and
    - (b) after subparagraph (b) insert—
      - “; and
      - (c) the name, designation and address of the petitioner and a statement of any special capacity in which the petitioner is presenting the petition”.
  - (3) In rule 47.3 (election of procedure for commercial actions and form of summons), after paragraph 2(b) insert—
    - “(ba) specify any special capacity in which the pursuer is bringing the action or any special capacity in which the action is brought against the defender;”.
  - (4) In Forms 13.2-A (form of summons and backing) and 43.2-A (form of summons and backing in personal injuries action), in the instance—
    - (a) for “[A.B.] (*designation and address*), Pursuer” substitute “[A.B.] (*designation, statement of any special capacity in which the pursuer is suing, and address*), Pursuer”; and
    - (b) for “[C.D.] (*designation and address*), Defender” substitute “[C.D.] (*designation, statement of any special capacity in which the defender is being sued, and address*), Defender”.
  - (5) In Form 14.4 (form of petition), in the instance, for “The Petition of [A.B.] (*name, designation and address of petitioner*)” substitute “The Petition of [A.B.] (*name, designation and address of petitioner and statement of any special capacity in which the petitioner is presenting the petition*)”.
  - (6) In Form 58.6 (form of petition in application for judicial review), in the instance, for “[A.B.] (*designation and address*)” substitute “[A.B.] (*designation and address and statement of any special capacity in which the petitioner is presenting the petition*)”.

### **Dismissal of claims due to delay**

- 4.—(1) In rule 15.1 (applications by minute), in paragraph (6)—
- (a) after subparagraph (d), omit “or”; and
  - (b) after subparagraph (e), insert—
    - “; or
    - (f) a minute to dismiss a claim under rule 21A.”.
  - (2) After Chapter 21 (summary decrees) insert—

## “CHAPTER 21A

### DISMISSAL OF A CLAIM DUE TO DELAY

**21A.**—(1) Any party to a claim may, while that claim is depending before the court, apply by minute for the court to dismiss the claim due to inordinate and inexcusable delay by another party or another party’s agent in progressing the claim, resulting in unfairness.

(2) A minute under paragraph (1) shall—

- (a) include a statement of the grounds on which dismissal of the claim is sought; and
- (b) be lodged in the process of the action to which it relates.

(3) On lodging a minute under paragraph (2)(b), the party seeking dismissal of the claim shall enrol a motion for—

- (a) intimation of the minute on any other parties to the claim; and
- (b) an order for answers to the minute to be lodged in process within the period of 21 days from the date of intimation.

(4) On the expiry of the period referred to in paragraph (3)(b), the party seeking dismissal of the claim shall enrol a motion for further procedure.

(5) In determining an application made under this rule, the court may dismiss the claim if it appears to the court that—

- (a) there has been an inordinate and inexcusable delay on the part of any party or any party’s agent in progressing the claim; and
- (b) such delay results in unfairness specific to the factual circumstances, including the procedural circumstances, of that claim.

(6) In determining whether or not to dismiss a claim under paragraph (5), the court shall take account of the procedural consequences, both for the parties and for the work of the court, of allowing the claim to proceed.”.

#### **Service under the EC Service Regulation**

**5.** In rule 16.2A (service under the Council Regulation)—

- (a) for the heading substitute “Service under the EC Service Regulation”;
- (b) in paragraph (1), for the definition of “Council Regulation” substitute—

““EC Service Regulation” means Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13th November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and repealing Council Regulation (EC) No. 1348/2000, as amended from time to time (5).”; and

- (c) for “Council Regulation” wherever it otherwise appears substitute “EC Service Regulation”.

#### **Service by post**

**6.**—(1) In rule 16.4 (service by post), for paragraph (5) substitute—

“(5) Where a document is served by a registered post service, a receipt of posting by the operator of that service shall be attached to the certificate of service”.

(2) In rule 21.2 (applications for summary decree), for paragraph (3)(b)(ii) substitute—

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(5) O.J. L 324, 10.12.2007, p.79.

- “(ii) a certificate of intimation by post in Form 16.4 in respect of each letter of intimation.”.
- (3) In rule 50.2 (parties to, and service and intimation of, actions of declarator under the Presumption of Death (Scotland) Act 1977), for paragraph (8)(b) substitute–
  - “(b) lodge in process a certificate of intimation of those defences by post in Form 16.4.”.
- (4) In rule 50.5 (applications for variation or recall of decrees), for paragraph (4)(b) substitute–
  - “(b) lodge in process a certificate of intimation of those answers by post in Form 16.4.”.
- (5) In Form 16.4 (form of certificate of service, or intimation on a warrant, by post)–
  - (a) after “(name of defender or other person on whom served)” insert “[where applicable, by first class recorded delivery]”; and
  - (b) omit “The post office receipt [or certificate of posting] is attached to this certificate.”.

### Appeals under Statute

- 7.—(1) In rule 41.20(2) (lodging of appeal in court)–
  - (a) for subparagraph (a) substitute–
    - “(a) section 37 of the Employment Tribunals Act 1996 (appeal on a question of law from a decision or order of the Employment Appeal Tribunal with leave of the Tribunal);”;
  - (b) for subparagraph (b) substitute–
    - “(b) section 15 of the Social Security Act 1998 (appeal from decision of a commissioner on a question of law with leave of a commissioner);”;
  - (c) after subparagraph (c) insert–
    - “(d) section 13 of the Tribunals, Courts and Enforcement Act 2007 (appeal from decision of Upper Tribunal with leave from the Upper Tribunal) in respect of the exercise of functions transferred from a Child Support Commissioner or a Social Security Commissioner to the Upper Tribunal.”.
- (2) After rule 41.20(2) (lodging of appeal in court) insert–
  - “(2A) Paragraph (2B) applies where an appeal lies to the court under any decision made by a Child Support Commissioner or a Social Security Commissioner which falls to be dealt with as if the decision were a decision made on or after 3rd November 2008 by the Upper Tribunal.
  - (2B) In such a case, paragraph (2) shall apply, subject to a requirement that the appeal shall be lodged in the General Department within 42 days after the date on which the decision of a Child Support Commissioner or a Social Security Commissioner to grant leave was intimated to the appellants.”.
- (3) In rule 41.21(3) (orders for service and answers)–
  - (a) for “section 25(1) of the Child Support Act 1991 (appeal from Child Support Commissioner) or section 24(1) of the Social Security Administration Act 1992 (appeal from Social Security Commissioner)” substitute “section 15 of the Social Security Act 1998 (appeal from a Social Security Commissioner) or, in respect of the exercise of functions transferred from a Child Support Commissioner or a Social Security Commissioner to the Upper Tribunal, section 13 of the Tribunals, Courts and Enforcement Act 2007 (appeal from Upper Tribunal)”;
  - (b) for subparagraph (a) substitute–
    - “(a) the Secretary of State for Work and Pensions;”.
- (4) In rule 41.41 (form of appeal under certain Social Security Acts), omit paragraph (a).

- (5) In rule 41.44(2) (appeals to be heard in the Outer House)—
- (a) for subparagraph (i) substitute—
- “(i) an appeal under section 13 of the Tribunals, Courts and Enforcement Act 2007 (appeal from the Upper Tribunal) in respect of the exercise of functions transferred from a Child Support Commissioner or a Social Security Commissioner to the Upper Tribunal;” and
- (b) for subparagraph (j) substitute—
- “(j) an appeal under section 15 of the Social Security Act 1998 (appeal from a Social Security Commissioner)”.
- (6) After Part XIII of Chapter 41 (references and appeals under an ACAS arbitration scheme), insert—

## “PART XIV

### APPEALS UNDER THE TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

#### **Permission to appeal against decisions of the Upper Tribunal**

**41.59.**—(1) This rule applies where an application is made to the court under section 13(4) of the Tribunals, Courts and Enforcement Act 2007(6) for permission to appeal a decision of the Upper Tribunal which falls within section 13(7) of that Act and for which the relevant appellate court is the Court of Session.

- (2) Permission shall not be granted on the application unless the court considers that—
- (a) the proposed appeal would raise some important point of principle or practice; or
- (b) there is some other compelling reason for the court to hear the appeal.”.

#### **Personal injuries actions appointed to proceed as ordinary actions**

**8.** In rule 43.5(4) (motions to dispense with timetable), after subparagraph (a) insert—

- “(aa) on the application of a party by motion, the court may, if satisfied that it is appropriate—
- (i) ordain a party to lodge a medical report which would have been lodged under Chapter 43 had the action not been withdrawn from that procedure;
- (ii) ordain a party to lodge a statement of valuation of claim which would otherwise have been lodged under rule 43.9;
- (iii) ordain the parties to hold a pre-trial meeting which would otherwise have been held under rule 43.10, and to lodge a minute of such meeting within such period as the court deems appropriate;”.

#### **Applications for judicial review**

**9.**—(1) After rule 58.7 (first order) insert—

**“Mandatory transfer of applications to the Upper Tribunal**

**58.7A.** Where an application to the supervisory jurisdiction of the court is presented to the Lord Ordinary under rule 58.7 and the conditions referred to in section 20(1)(a) of the Tribunals, Courts and Enforcement Act 2007 are met, the Lord Ordinary shall, instead of granting an order specifying a date for a first hearing, make an order transferring the application to the Upper Tribunal.”

(2) After rule 58.10 (second hearing) insert—

**“Discretionary transfer of applications to the Upper Tribunal**

**58.11.**—(1) Where—

- (a) an application is made to the supervisory jurisdiction of the court; and
- (b) Conditions 1, 3 and 4 are met, but Condition 2 is not met, as specified in section 20(1)(b) of the Tribunals, Courts and Enforcement Act 2007,

the Lord Ordinary may, if satisfied that it is in all the circumstances appropriate to do so, make an order transferring the application to the Upper Tribunal.

(2) The Lord Ordinary may, having heard parties, make an order under paragraph (1), whether or not such an order was sought in the petition or was sought by motion by any party to the proceedings.

(3) The Lord Ordinary may make an order under paragraph (1)—

- (a) when the petition is presented to the Lord Ordinary for a first order under rule 58.7;
- (b) at the first hearing; or
- (c) at any subsequent hearing.

(4) Where the Lord Ordinary makes an order transferring the application to the Upper Tribunal under paragraph (1) or rule 58.7A, the Lord Ordinary may make an order in respect of any expenses incurred by the parties up to the time at which the order transferring the application is granted.”

Edinburgh  
24th October 2008

*A. C. Hamilton*  
Lord President I.P.D.

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## EXPLANATORY NOTE

*(This note is not part of the Act of Sederunt)*

This Act of Sederunt makes amendments to the Rules of the Court of Session 1994.

Paragraph 3 amends rules 13.2, 14.4 and 47.3 and forms 13.2-A, 14.4, 43.2-A and 58.6 to provide that summons and petitions must state any special capacity in which a pursuer or petitioner is bringing proceedings, and that summons must state any special capacity in which a defender is being sued.

Paragraph 4 inserts a new Chapter 21A and rule 21A which makes provision for claims to be dismissed on the application of a party to the claim on the grounds of inordinate or inexcusable delay by another party in progressing the claim.

Paragraph 5 amends rule 16.2A to refer to applicable procedures relating to the service of documents under Regulation (EC) No. 1393/2007 of the European Parliament and of the Council on the service in EU Member States of judicial and extrajudicial documents in civil or commercial matters.

Paragraph 6 amends rules 16.4, 21.2, 50.2, 50.5 and Form 16.4 to provide for a new form of certification from a person where a document is served by first class recorded delivery post.

Paragraph 7(1) to (5) amends rules 41.20, 41.21, 41.41 and 41.44 in respect of appeals from the Employment Appeal Tribunal, appeals under Social Security legislation and, in respect of the exercise of functions transferred from a Child Support Commissioner or a Social Security Commissioner, appeals from the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007.

Paragraph 7(6) inserts a new rule 41.59 which makes provision for the criteria applicable for permission to appeal to the Court of Session from a decision of the Upper Tribunal under section 13 of the Tribunals, Courts and Enforcement Act 2007.

Paragraph 8 amends rule 43.5 by making provision for some of the aspects of Chapter 43 procedure to apply where the court appoints a personal injuries action to proceed as an ordinary action.

Paragraph 9 inserts new rules 58.7A and 58.11 which set out the mechanism by which an application to the supervisory jurisdiction of the Court of Session can be transferred from the court to the Upper Tribunal, established under the Tribunals, Courts and Enforcement Act 2007. Rule 58.7A provides for applications to be transferred to the Upper Tribunal on a mandatory basis under section 20(1) (a) of the 2007 Act when a petition for judicial review comes before the Lord Ordinary for a first order. Rule 58.11 provides a criterion for the transfer of an application on a discretionary basis (that the Lord Ordinary is satisfied that it is in all the circumstances appropriate to make such an order), provides that an order transferring the application may be made by the Lord Ordinary, having heard parties, whether or not the parties request this and provides for the times at which the Lord Ordinary may make an order transferring the application on a discretionary basis. Finally, rule 58.11 provides for an order to be made in respect of expenses incurred in the proceedings up to the time at which the application was transferred.