

# COURTS REFORM (SCOTLAND) ACT 2014

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## EXPLANATORY NOTES

### THE ACT

#### Part 3 – Civil Procedure

99. [Part 3](#) (Civil procedure) chapter 1 makes provision for civil jury trials in an all-Scotland sheriff court (for example the proposed Sheriff Personal Injury Court). Since the enactment of section 11(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, it has not been possible for a civil action in the sheriff court to be tried before a jury. This was because even though the number of jury trials in the sheriff court was small, it was considered that the procedure had a disruptive effect on the work of the court. Civil jury trials have, however, continued to be available in the Court of Session and in recent years these have almost invariably been applied for in relation to personal injury actions under Chapter 43 of the Rules of the Court of Session. The intention is that the existing Court of Session practice and procedure in relation to jury trials will be transplanted in its entirety into the new Sheriff Personal Injury Court.
100. This chapter also includes provisions for a replacement for small claims and summary cause procedures in the sheriff court. The intention is that there should be a new single set of rules for cases for £5,000 or less which will be called “simple procedure” which it is proposed will be dealt with mainly by the new summary sheriffs. The most significant differences between the two procedures are that legal aid is not available for small claims and the expenses which can be awarded in small claims are limited.
101. The Scottish Civil Courts Review recommended: “The sheriff court legislation should be amended to provide that an interdict or interim order granted in one sheriff court should be enforceable throughout Scotland.” Chapter 1, therefore, includes provisions on the granting and enforcement of interdicts with effect in more than one sheriffdom.
102. [Chapter 2](#) makes provision on judicial review. The Scottish Civil Courts Review considered whether the rules governing the procedure in petitions for judicial review were satisfactory and made a number of recommendations. The Act takes forward those recommendations by introducing a time limit for applications and a new permission to proceed stage.
103. [Chapter 3](#) makes provision on the remit of cases to or from the Court of Session. This goes hand in hand with the proposals to raise the exclusive competence of the sheriff court. This facility is an important safeguard which counters the argument that personal injury cases in particular must be raised in the Court of Session in case they raise complex or novel points of law. The provision to permit remit to the Court of Session provides reassurance, however, that complex, but lower value, cases can receive the attention of the expertise of Court of Session judges. The provision permits remit from the Court of Session ensures that artificially inflated claims may be dealt with in the sheriff court.
104. Finally, chapter 3 makes provision to permit a case to be remitted by the sheriff to the Scottish Land Court in appropriate cases.

105. The Inner House of the Court of Session ruled in *Apollo Engineering Ltd. (in liquidation) v James Scott Ltd* ([2012] CSIH 4) that limited companies must have legal representation by a solicitor or counsel. This case is one of a series which continues the position that non-natural persons may not be represented by a lay person. This position has grave consequences for small business. A small company defending or pursuing a claim must incur irrecoverable legal costs when disputing a claim, whereas an individual need not instruct a solicitor and can appear as a party litigant at no cost. Small companies, partnerships and unincorporated associations may be disadvantaged by this restriction, particularly in simple procedure cases, because the cost of legal representation may be disproportionate to the value of the claim.
106. In addition, there may be circumstances outwith simple procedure cases where this rule may require to be loosened, allowing judicial discretion to be applied. Chapter 4, therefore, makes provision for lay representation in both simple procedure cases and other proceedings.
107. [Chapter 5](#) provides that the same rules should apply in relation to excusal from civil jury service as apply in relation to excusal from criminal jury service.
108. The Scottish Civil Courts Review identified litigants who conduct their cases in an unreasonable manner as a growing problem for the administration of justice. Their conduct was said to impact not only on their opponents but also on the efficient use of court resources and on other litigants with cases of more merit and substance. The Review proposed changes in this area to permit the courts to have greater control over litigants whose behaviour took advantage of the court process to frustrate the efficient resolution of cases or who used the raising of actions as a weapon itself. Therefore, in chapter 6, the opportunity has been taken to re-enact the Vexatious Actions (Scotland) Act 1898 and bring its provisions up to date. The re-enactment retains provisions for an order to be granted by the court, preventing a vexatious litigant from instituting new proceedings without first obtaining the permission of a judge of the Outer House of the Court of Session.
109. The Scottish Civil Courts Review recommended that the court itself should be able to make civil restraint orders similar to those which may be imposed in England and Wales, but adapted for Scots law and Scottish courts, and the Act makes provision for this.

## ***Chapter 1 – Sheriff court***

### **Civil jury trials**

110. [Sections 63 to 71](#) provide for civil jury trials in an all-Scotland sheriff court (for example, the proposed Sheriff Personal Injury Court - see sections 41 and 42). The intention is to introduce a procedure similar to that operating in the Court of Session and, accordingly, the provisions largely reflect the language and procedures currently set out in the Court of Session Act 1988.

### ***Section 63 – Civil jury trials in an all-Scotland sheriff court***

111. Subsection (1), read together with subsection (7), sets out the types of actions which may require a jury trial. The section only applies to those types of civil proceedings which have been specified in an order made under section 41, and only at the sheriff court or courts which have been specified as having jurisdiction throughout Scotland for those types of civil proceedings. Further, subsection (7) provides that a civil jury trial is only to take place for those types of proceedings which, if they were competent in the Court of Session, would be tried by a jury there, under section 11 of the Court of Session Act 1988.
112. [Section 63\(2\)](#) makes it clear that a jury trial must take place where proceedings have been remitted to probation (that is, where it has been decided to allow evidence to be

led to establish the facts). This qualification makes it clear that it is unnecessary to have a jury trial where the pleadings are irrelevant or there is some other fundamental problem. However, subsection (2) also makes it clear that a jury trial will not go ahead if the parties agree otherwise or special cause is shown. The use of the phrase “special cause” is deliberately identical to that in section 9(b) of the Court of Session Act 1988 and subsection (3) explicitly provides that the sheriff will apply that test in the same way as the Court of Session currently does.

113. Subsection (4) sets out the questions which are to be put to the jury, being the “issues” put to the jury in the equivalent action in the Court of Session, in terms of section 12 of the 1988 Act. Again, as with civil jury trials in the Court of Session, a jury will consist of 12 people (subsection (5)).

#### ***Section 64 – Selection of the jury***

114. **Section 64** is based on section 13 of the Court of Session Act 1988, with the continued expectation that practice and procedure in the Court of Session, including with regard to the effect of any challenge to a potential juror, will be adopted in this regard in the sheriff court. Further detailed rules in relation to civil jury trials in the sheriff court, for example, on how the ballot is to be conducted, may be made in an act of sederunt under section 104.

#### ***Section 65 – Application to allow the jury to view property***

115. **Section 65** is based on section 14 of the Court of Session Act 1988. It provides for a party to the proceedings to apply to the sheriff to allow the jury to view any property (whether moveable or immovable) which is relevant to the proceedings.

#### ***Section 66 – Discharge or death of juror during trial***

116. **Section 64** provides that the sheriff may allow a juror not to take any further part in the proceedings, and for the way in which the proceedings are to continue should a juror be permitted to take no further part or die during proceedings. It is based on section 15 of the Court of Session Act 1988, except that subsection (4) makes further provision if the number of members of the jury falls below 10.

#### ***Section 67 – Trial to proceed despite objection to opinion and direction of the sheriff***

117. **Section 67** is based on section 16 in the Court of Session Act 1988 and provides similarly that, if an objection is taken during the trial to the opinion or direction of the sheriff, this is not to prevent the trial from proceeding nor the jury returning the verdict and assessing damages.

#### ***Section 68 – Return of verdict***

118. **Section 68** is drawn from section 17 of the Court of Session Act 1988. It concerns the determination of a verdict by the jury and the status of that verdict, and includes provisions on the selection of a juror to speak for the jury and the ability of the sheriff to discharge the jury and order another jury trial should the jury be unable to agree upon a verdict after a period of three hours. Court rules will be provided under section 104 in relation to giving effect to the jury’s verdict.

#### ***Section 69 – Application for new trial***

119. Subsections (1) to (4) are based on section 29(1) and (2) of the Court of Session Act 1988 except that the application for a new trial from an all-Scotland sheriff court will be to the Sheriff Appeal Court rather than the Inner House of the Court of Session. It concerns the grounds under which a party to the proceedings may apply to the Sheriff Appeal Court for a new trial and what that court may do with such an application.

Subsection (4) makes it clear that the powers of the Sheriff Appeal Court are subject to the operation of section 70 which sets out conditions on those powers. Subsection (5) is new and makes clear, for the avoidance of doubt, what the consequences are of granting a new trial. Subsections (6) and (7) are based on section 29(3) of the Court of Session Act 1988 and provide where the Sheriff Appeal Court may, instead of granting a new trial, set aside the decision of the jury and enter a judgment in favour of the unsuccessful party. Subsection (8) sets out that, if the Sheriff Appeal Court consists of more than one Appeal Sheriff, the Court may set aside the verdict of a jury or enter judgment for the party unsuccessful at the trial only if that is the opinion of all the Appeal Sheriffs hearing the appeal.

### ***Section 70 – Restrictions on granting a new trial***

120. **Section 70** is drawn from the provisions of section 30 of the Court of Session Act 1988. It provides for various circumstances where, in the case of an application under section 69(1), the court must grant a new trial, may grant a new trial restricted to the question of damages, or may not grant a new trial. Subsection (4) varies from section 30(2) of the Court of Session Act 1988, however, in that in the circumstances set out in section 70(3), the court must refuse to grant a new trial, whereas section 30(2) states that the court may refuse to grant a new trial. Subsection (7) explains that, where the Court is constituted by more than one Appeal Sheriff, an application for a new trial may not be granted unless the majority of those Appeal Sheriffs hearing the case agree that it should.

### ***Section 71 – Verdict subject to opinion of the Sheriff Appeal Court***

121. **Section 71** is based on section 31 of the Court of Session Act 1988. It provides that a party to the case may apply to the Sheriff Appeal Court for that court to direct that a verdict be returned in whole (or in part) in that party's favour. It further sets out what the Sheriff Appeal Court may do in respect of that application.

### **Simple procedure**

122. At present, cases for sums up to £5,000 fall to be dealt with under small claims or summary cause procedure in the sheriff court. The Scottish Civil Courts Review concluded that it was unnecessary to have two different sets of procedures for cases for £5,000 or less, but that there was a continuing need for a distinct procedure for low value claims. It considered that the financial limit should be set at £5,000 for the time being, but recommended the creation of a new procedure for cases under £5,000 to be dealt with primarily by summary sheriffs. The Act refers to this new procedure as "simple procedure".
123. The Review advocated a flexible procedure based on a problem-solving, interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. The new procedure should be accessible to party litigants, with clear, straightforward court rules in plain English and under which the summary sheriff would be able to assist the parties to reach settlement.

### ***Section 72 – Simple procedure***

124. Subsection (1) establishes a new type of civil proceedings in the sheriff court called simple procedure. Simple procedure replaces the form of procedure known as summary cause which will be abolished through the repeal of sections 35 to 38 of the Sheriff Courts (Scotland) Act 1971 by paragraph 6 of schedule 5 to this Act. The abolition of summary cause proceedings will also mean the abolition of small claim proceedings which are a subset of summary cause proceedings. Subsection (2) makes it clear that most of the provisions about simple procedure will be made by court rules made under section 104(1).

125. Subsection (3) lists the types of proceedings which can only be brought by simple procedure, providing a monetary limit of £5,000 with respect to such proceedings. No other types of proceedings can be brought subject to simple procedure. Subsection (4) makes clear that the limitation on the type of case which must be brought under simple procedure does not prevent cases already raised under different forms of procedure from being transferred to simple procedure under section 78, or affect the operation of section 83 which provides that cases which are subject to summary cause procedure will become subject to simple procedure. It also makes clear that this limitation does not prevent a simple procedure case from being transferred out of that procedure under section 80.
126. Subsection (5) makes it clear that the obligation to raise an action falling within the description in 72(3)(a) by simple procedure does not apply where such a case is also of a type affected by section 73 (proceedings in an all-Scotland sheriff court), nor where it is also of a type affected by section 74 (proceedings for aliment of small amounts under simple procedure). Subsection (6) provides that court rules made by an act of sederunt by the Court of Session will determine the way in which the sum in subsection (3) may be calculated. Subsection (8) enables rules of court to clarify when proceedings are of a type that are to be subject to simple procedure. The method through which the court has determined whether a case must be raised under summary cause procedure is set out in the case of *Milmor Properties v W & T Investments Co. Ltd.* [2000]. This power permits rules of court to adopt or modify this method.
127. Subsection (9) ensures that the term “simple procedure case”, when used in Part 3 of the Act includes cases which have been transferred to simple procedure under sections 78 and 79 and cases which have been made subject to simple procedure by other enactments. Subsection (12) provides that the £5,000 limit may be varied by the Scottish Ministers by order (which is subject to the affirmative procedure by virtue of section 133(2)(a) of the Act).

### ***Section 73 – Proceedings in an all-Scotland sheriff court***

128. **Section 73** provides that where proceedings for the payment of a sum of £5,000 or less may be brought in an all-Scotland sheriff court (for example, the proposed Sheriff Personal Injury Court) by virtue of an order under section 41(1), then those proceedings are not subject to simple procedure in the specialist court. The claimant has the choice of raising his or her claim in the local sheriff court under simple procedure, or in the all-Scotland sheriff court.

### ***Section 74 – Proceedings for aliment of small amounts under simple procedure***

129. **Section 74** re-enacts and updates the drafting of section 3 of the Sheriff Courts (Civil Jurisdiction and Procedure) (Scotland) Act 1963. It provides that, regardless of the general rules in any enactment on simple procedure, that an action for aliment where the amount claimed does not exceed a certain sum may be brought subject to simple procedure. The sum set by the section may be varied by an order made by the Scottish Ministers, subject to negative procedure. Given the re-enactment of section 3, the 1963 Act is now wholly repealed by paragraph 21 of schedule 5 to this Act.

### ***Section 75– Rule-making: matters to be taken into consideration***

130. **Section 75** establishes that, as far as possible, the rules of court which govern simple procedure will enable an interventionist and problem-solving approach. It is to be read subject to the obligation on the Scottish Civil Justice Council to draft the rules in accordance with the principle that they should be as clear and easy to understand as possible, in terms of section 2(3)(b) of the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013. The obligation to make rules of court which reflect such principles is deliberately framed to be exercised “so far as possible” in order to avoid any obligation to create rules that may be inconsistent or contradictory with one

another. Paragraph (d) is intended to ensure that the rules are flexible enough to allow a sheriff to follow the procedure that is most appropriate to the circumstances of the case.

### ***Section 76 – Service of documents***

131. **Section 76**, which is derived from section 36A of the Sheriff Courts (Scotland) Act 1971, permits rules made under section 104(1) to provide for the sheriff clerk to be required to effect service of any document on behalf of parties in a simple procedure case.

### ***Section 77 – Evidence in simple procedure cases***

132. Subsection (1) is based on section 35(3) of the Sheriff Courts (Scotland) Act 1971 and is a reflection of the desire to make the simple procedure less bound up in technical, legal rules. Subsection (2) restates section 36(3) of the 1971 Act which was included as ordinary cause rules in the sheriff court require the recording of evidence. Ordinary cause procedure will not exist after the Act is fully commenced (by virtue of the repeal of Schedule 1 to the Sheriff Courts (Scotland) Act 1907 by schedule 5 paragraph 4(h) of this Act). However the new rules of procedure are likely to require the recording of evidence in at least some cases and so section 77(2) is necessary to make it clear that such recording is not required in simple procedure cases.

### ***Section 78 – Transfer of cases to simple procedure***

133. **Section 78** provides for cases which are not being dealt with under simple procedure to be transferred to that form of proceedings, provided they are now of a type that could be brought under simple procedure. Accordingly if proceedings develop to such an extent that, if they had been raised at that point, they would have had to have been raised under simple procedure, they may be transferred to simple procedure. Subsection (2) (b) permits cases to be transferred to simple procedure if the parties agree, even if the sum sought would exceed the usual monetary limit for simple procedure cases. In such a transfer there is no obligation that the sum sought requires to be lowered to meet the financial limit set out in section 72(3) or 74(2). Accordingly the parties' agreement to continue subject to simple procedure does not have the effect of capping the sum sought to those financial limits. The sheriff has no discretion and must give effect to the parties' joint application. Unlike sections 79 and 80, a single party cannot make a section 78 application.

### ***Section 79 – Proceedings in an all-Scotland sheriff court: transfer to simple procedure***

134. This section provides for a party to a case raised in an all-Scotland sheriff court to apply to have it transferred out of that court and into simple procedure in another sheriff court having jurisdiction, on special cause shown. The sheriff has discretion as to whether to give effect to the application.

### ***Section 80 – Transfer of cases from simple procedure***

135. **Section 80** provides for the transfer of cases out of simple procedure. Given the abolition of ordinary cause rules, it is left to court rules under section 104 to determine if a uniform set of rules is to be adopted for all remaining cases outwith simple procedure or if different rules are to apply to different kinds of case. This provision simply states that cases will be transferred from simple procedure without specifying the procedure to which they are being transferred. As with section 79, a single party may make an application and the sheriff has discretion as to whether to give the application effect.

### ***Section 81 – Expenses in simple procedure cases***

136. **Section 81** re-enacts section 36B of the Sheriff Courts (Scotland) Act 1971 with modifications to reflect the new system of simple procedure. Subsection (1) provides

that the Scottish Ministers may prescribe, by order (subject to the affirmative procedure by virtue of section 133(2)(a)), categories of simple procedure to which alternative expenses rules will apply. In other words, in those cases the normal rules on expenses will not apply. Subsection (2) makes it clear that these categories will be defined by reference to the value of the claim or the subject matter of the claim, permitting types of actions, for example personal injury, to be excluded from any limitation on expenses.

137. An order under subsection (3) could also specify some civil proceedings where different expenses could apply, excepting them from categories set out in subsection (2).
138. Subsection (4) then sets out cases in which those rules are disapplied. Subsection (5) is based on section 36B(3) of the 1971 Act and lists the circumstances in which the restrictions on expenses should not apply owing to the behaviour of one of the parties to the case. Subsections (6) and (7) allow the sheriff to make an direction disapplying the restrictions on expenses in an order under subsection (1) in complex cases.

### ***Section 82 – Appeals from simple procedure cases***

139. This section provides that an appeal on a point of law may be taken under section 110 to the Sheriff Appeal Court, however only against the final judgment of the sheriff (“final judgment” is defined in section 136(1)). No further provision is required in this section for onward appeals of simple procedure cases from the Sheriff Appeal Court to the Court of Session since such appeals will be governed by the general rules applicable to section 110 appeals.

### ***Section 83 – Transitional provision: summary causes***

140. **Section 83** makes provision to deal with the transition between summary cause procedure and its replacement, simple procedure. This ensures that all references in legislation which refer to summary cause are to be read as referring to simple procedure.

## **Interdicts and other orders: effect outside sheriffdom**

### ***Section 84 – Interdicts having effect in more than one sheriffdom***

### ***Section 85 – Proceedings for breach of an extended interdict***

141. **Section 84** gives a sheriff competence to grant an interdict or interim interdict having effect outwith the sheriff’s sheriffdom (i.e., within any other sheriffdom in Scotland).
142. **Section 85** sets out that these types of interdicts are to be known as “extended interdicts” and that proceedings for a breach of an extended interdict will be capable of being validly raised and enforced by an action in a number of sheriff courts: in the sheriffdom in which the defender is domiciled; in the sheriffdom in which the interdict was granted; and in the sheriffdom in which the alleged breach occurred.
143. However, on the application of a party to the proceedings or on the sheriff’s own initiative, a sheriff may transfer proceedings to a sheriff of another sheriffdom, if satisfied that this would be more appropriate. This sheriff may transfer the proceedings to any other sheriffdom in this case and is not limited to the sheriffdom in which the defender is domiciled, the sheriffdom in which the interdict was granted or the sheriffdom in which the alleged breach occurred. Where a case is transferred to another sheriff in this way, then that sheriff has the competence to consider and determine the proceedings.
144. This provision is a permissive one, however and makes it clear that the sheriff will be able to use discretion in determining whether proceedings should be raised before them. This discretion applies to the operation of all the rules in the section. It is anticipated that, by providing that the test does not affect the power of the sheriff to decline jurisdiction, a sheriff will continue to be able to decline jurisdiction on the basis that his

or her court is not an appropriate forum for determining the matter in dispute (*forum non conveniens*).

### **Section 86 – Power to enable sheriff to make orders having effect outside sheriffdom**

145. **Section 86** enables the Scottish Ministers to provide by order (subject to the negative procedure) for the types of orders (including interim orders) which a sheriff has competence to make which would be capable of having effect and be able to be enforced outwith the sheriffdom in which they were granted. This provides that other types of court proceedings may be identified and the effect and enforcement of these proceedings extended in a similar way to that of interdict (which is dealt with in sections 84 and 85).

### **Execution of deeds relating to heritage**

#### **Section 87 – Power of sheriff to order sheriff clerk to execute deed relating to heritage**

146. **Section 87** provides, where the grantor (as defined in subsection (6)) of any deed relating to immovable property (i.e. land and buildings), is unable, refuses or fails to execute a deed relating to such property, or cannot be found, that the sheriff may make an order which dispenses with the need for the grantor to execute the deed and directs the sheriff clerk to execute the deed. The effect of an execution by the sheriff clerk is that the deed is taken to have the same effect as it would have if it had been executed by the grantor. This section is intended to restate and to have the same legal effect as section 5A of the Sheriff Courts (Scotland) Act 1907, though the distinction in section 5A(2) between applications and summary applications is not perpetuated as the latter are no longer to be a defined category of proceedings in the Act. The grantee will simply make an application for an order in either of the cases mentioned in subsection (1).

### **Interim orders**

#### **Section 88 – Interim orders**

147. Previously, there have been no statutory powers conferring on sheriffs a general power to grant interim orders corresponding to section 47 of the Court of Session Act 1988. This suggests that there has been a real doubt regarding the power of a sheriff to grant an interim order *ad factum* praestandum (that is, an order requiring that something (other than the payment of a sum of money) be done pending the final determination of the proceedings). Section 88 rectifies this by conferring an express power on sheriffs to make such orders along with the power to grant orders regarding the interim possession of any property to which the proceedings relate. Section 90 concerns similar provision as regards the Court of Session.

### **Chapter 2 – Court of Session**

#### **Section 89 – Judicial review**

148. **Section 89** inserts new sections 27A to 27D into the Court of Session Act 1988 which reform the procedures for petitions for judicial review as recommended in Chapter 12 of the Scottish Civil Courts Review. Previously, there have been no statutory time limits within which an application for judicial review must be made. Section 27A provides that a time limit of three months starting from the date that the grounds giving rise to the application for judicial review arose will apply to applications to the supervisory jurisdiction of the court. This is subject to the exercise of the court's discretion to permit an application to be made outwith that period, for example, if there is good reason for delay in making an application, or where the court is satisfied that injustice would result if an application presented outwith the time period is not allowed to proceed. Subsection

(2) provides that the time limit of three months will not apply to an application to the supervisory jurisdiction of the court under any enactment that specifies another period ending before the period of three months. Sections 27B, 27C and 27D add a new preliminary stage at which permission to proceed to judicial review is granted or refused. Each case will be considered by a judge from the Outer House of the Court of Session. There will be no necessity for a hearing at this stage. The judge will consider whether the applicant has sufficient interest in the subject matter and whether the application has a real prospect of success.

149. The Supreme Court, in *Axa General Insurance Ltd & Ors v the Lord Advocate & Others* [2011] UK SC 46<sup>1</sup>, reviewed the law on title and interest to sue as regards judicial review provision – in particular, Lord Hope at paragraphs 62 to 63 and Lord Reed at paragraphs 170 and 175. The decision related to the “standing” of a third party to enter the process as respondents, but it is clear from the judgments that the statements on “standing” apply to applicants for judicial review, and that the substantive law in Scotland allows for a single test in which the petitioner for judicial review must demonstrate a sufficient interest in the subject matter of the proceedings. The Act reflects this in section 27B(2)(a) as part of the permission test.
150. The reference to a real prospect of success in section 27B(2)(b), reflects Lord Gill’s recommendations. In deciding whether or not to grant permission, the court will assess not whether the case is merely potentially arguable, but whether it has a realistic prospect of success subject to the important qualification that arguability cannot be judged without reference to the nature and gravity of the issue to be argued. Court rules will set out the process for the permission hearing. Lord Gill envisaged that the applicant would be required to serve upon the respondent and any interested party, within seven days of lodging the application, the application itself, a time estimate for the permission hearing, any written evidence in support of the application, copies of any document on which the applicant proposes to rely and a list of essential documents for advance reading by the court with the respondent having 21 days to answer the application and to decide whether to oppose the granting of leave.
151. The possible outcomes at the permission stage are that the court may:
  - grant permission for the application to proceed
  - grant permission for the application to proceed, but with specified conditions or only on particular grounds; or
  - refuse permission.
152. Section 27C provides that, if the permission to apply for judicial review is refused or granted subject to conditions or only on particular grounds and this was done without an oral hearing, then the applicant has seven days within which to request an oral hearing to review the original decision.
153. The request for review requires to be considered by a different judge. Section 27C(6) provides that section 28 of the Court of Session Act 1988 (reclaiming) does not apply where there is a right to request a review at an oral hearing. In other words, there is no right of appeal to the Inner House of the Court of Session against a decision made under section 27B – an applicant who wishes to challenge the decision must request a review under section 27B(2). Similarly, there is no right of appeal to the Inner House if the judge refuses the request for a review.
154. Under section 27D, where the court refuses permission or grants permission subject to conditions or only on particular grounds following an oral hearing (whether at the first stage of permission or following a request under section 27C(2)), the applicant can appeal to the Inner House of the Court of Session within 7 days of the Outer House’s decision.

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<sup>1</sup> [http://supremecourt.uk/decided-cases/docs/UKSC\\_2011\\_0108\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf)

155. The provisions in the Act also deal (at section 27B(3)) with the interaction between the new judicial review permission stage and applications to the Court of Session for judicial review of unappealable decisions of the Upper Tribunal for Scotland. Section 50(4) of the Tribunals (Scotland) Act 2014 makes provision preventing the Court of Session and the Upper Tribunal for Scotland from granting permission for a second appeal unless the “second appeals test” set out by the Supreme Court in *Eba v Advocate General for Scotland [2011] UKSC 29*<sup>2</sup> is satisfied – that the second appeal raises an important point of principle or practice or there is some other compelling reason for allowing it to proceed.
156. The Act ensures that the same second appeals test is applied at the permission stage where the application for judicial review relates to a decision of the Upper Tribunal for Scotland in an appeal from the First-tier Tribunal for Scotland under section 46 of the Tribunals (Scotland) Act 2014 – see section 27B(3). Therefore, the court may only grant permission for the application to proceed if it is satisfied that the second appeals test is satisfied in addition to the new judicial review permission test set out in section 27B(3) (a) and (b). The second appeals test is set out in section 27B(3)(c).

### **Section 90 – Interim orders**

157. The Scottish Civil Courts Review recommended at paragraphs 142 - 143 of Chapter 4 that powers to make orders *ad factum praestandum* (that is, orders requiring the performance of a certain act other than the payment of a sum of money) and orders for specific implement on an interim or final basis conferred on the Scottish Land Court by section 84 of the Agricultural Holdings (Scotland) Act 2003 should also be conferred on the Court of Session and the sheriff court. Section 90 confers on the Court of Session in section 47 of the Court of Session Act 1988 a power to make an order (either final or interim) *ad factum praestandum*. Section 88 concerns similar provision as regards the sheriff courts.

### **Section 91 – Warrants for ejection**

158. The Scottish Civil Courts Review recommended that the Court of Session should have jurisdiction to grant a decree of removing or warrant of ejection (paragraph 144, Chapter 4). The Court of Session can only grant a decree of removing if this is ancillary to another remedy sought. Section 91 inserts a new section 47A into the Court of Session Act 1988 giving the Court of Session competence to grant a warrant of ejection where it grants a decree for removing, so that no further order is required to compel the occupier of land to give up occupation.

## **Chapter 3 - Remit of cases between courts**

### **Section 92 – Remit of cases to the Court of Session**

159. Subsections (1) and (2) permit a sheriff to remit a case (to which the exclusive competence of the sheriff court under section 39 does not apply i.e. if the £100,000 limit does not apply) to the Court of Session if the sheriff considers that the importance or difficulty of the case makes it appropriate. This restates section 37(1)(b) of the Sheriff Court (Scotland) Act 1971.
160. The recommendation that the Court of Session should be able to decline the remit of a case below the exclusive competence (where section 39 does apply) is given effect to in subsections (3) and (4) which permit the sheriff to request the Court of Session to allow proceedings to which section 39 does apply to be remitted to that Court if the importance or difficulty of the proceedings makes it appropriate to do so. Under subsection (5), the Court of Session may permit the proceedings to be remitted “on cause shown”.

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2 [http://supremecourt.uk/decided-cases/docs/UKSC\\_2010\\_0206\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2010_0206_Judgment.pdf)

161. In the particular case of proceedings against the Crown in the sheriff court, section 44 of the Crown Proceedings Act 1947 continues to have effect.

### ***Section 93 – Remit of cases from the Court of Session***

162. The Scottish Civil Courts Review also recommended that where the value of an action raised in the Court of Session is likely to be below the exclusive competence limit, as assessed by the judge at a case management hearing, there should be a presumption in favour of a remit to the sheriff court. Section 93 implements these recommendations.
163. Subsections (1) and (2) set out that proceedings must be remitted to the sheriff court (unless “on cause shown” there are reasons for not so doing), if at any stage the court is of the view that the value of the order is likely to be below the value set for the time being in section 39(1)(b)(ii). Subsection (1)(c) sets out that these provisions would apply to the aggregate total value of all orders likely to be granted in the proceedings below the value set for the time being in section 39(1)(b)(ii). Under subsection (3), the Court will not have to reach any view on liability or contributory negligence and “likely value” is to be assessed on the assumption that liability will be established. Subsections (4) and (5) give a permissive power to the Court to remit cases to which the monetary rule does not apply (i.e. non-monetary cases).

### ***Section 94 – Remit of cases to the Scottish Land Court***

164. **Section 94** reproduces section 37(2D) of the Sheriff Court (Scotland) Act 1971 to permit a case to be remitted by the sheriff to the Scottish Land Court in appropriate cases. There is no appeal to the Sheriff Appeal Court against a decision to remit or not to remit.

## ***Chapter 4 – Lay representation for non-natural persons***

### ***Section 95 – Key defined terms***

165. **Section 95** sets out key definitions of non-natural persons (companies and other bodies) in Chapter 4, as well as lay and legal representatives for the purposes of Chapter 4. Chapter 4 makes clear that non-natural persons are entitled to lay representation in certain circumstances in simple procedure cases and may be permitted, in certain circumstances to be represented by a lay person in other civil proceedings. “Solicitor” and “advocate” are defined in section 136(1).

### ***Section 96 - Lay representation in simple procedure cases***

166. **Section 96** sets out the scope for permitting lay representation on behalf of non-natural persons in simple procedure cases (see sections 72 to 83). Permission of the court is not required but this section is subject to provision that the Court of Session may make provision, by act of sederunt under section 98, to regulate the authorisation of lay representatives for non-natural persons.

### ***Section 97 – Lay representation in other proceedings***

167. **Section 97** sets out the scope for permitting lay representation on behalf of non-natural persons in non-simple procedure cases in the sheriff court, the Sheriff Appeal Court and the Court of Session. The decision on whether to permit lay representation in non-simple procedure cases lies with the court, who may grant permission subject to the fulfilment of the conditions in subsection (3). The suitability of the choice of lay representative is assessed in light of subsection (4) with the assessment of whether permitting lay representation is in the interest of justice in subsection (6). The assessment of such concepts as “interests of justice” and “suitability” in subsection (3) will ensure that the power to determine whether to permit lies firmly in the hands of the court taking into account the particular circumstances of the case.

### ***Section 98 – Lay representation: supplementary provision***

168. **Section 98** enables the Court of Session to make further provision by act of sederunt about granting permission for lay representatives under section 97 and, more generally, the way that the proceedings are conducted by lay representatives. Subsection (2) sets out particular provisions that the Court of Session may make in the act of sederunt through its powers in subsection (1) including enabling the court (including the sheriff in the case of proceedings in the sheriff court) to make an order preventing a lay representative from conducting proceedings other than non-simple procedure cases before the court and allowing applications to be considered in chambers and without hearing the parties. Subsection (2) is not an exhaustive list of the provisions which may be made under subsection (1).

### ***Chapter 5 – Jury service***

#### ***Section 99 – Jury service***

169. **Section 99** provides for the alignment of age limits for jury service for jurors in civil cases with those for jurors in criminal cases, i.e. it removes the upper age limit for jurors in civil cases of 65 years of age. It does this through an amendment to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (as amended by the Criminal Justice and Licensing (Scotland) Act 2010). Section 99 also brings arrangements for claiming excusal as of right from civil jury service into line with those established for criminal jury service by the Criminal Justice and Licensing (Scotland) Act 2010, that is, that civil jurors aged 71 or over could claim excusal as of right. Jurors serving in criminal cases who attended for jury service but did not serve had their automatic excusal time shortened from five years to two years by the 2010 Act, and this is now applied to jurors serving in civil cases.

### ***Chapter 6 – Vexatious proceedings***

#### ***Section 100 – Vexatious litigation orders***

##### ***Section 101 – Vexatious litigation orders: further provision***

170. **Sections 100** and **101** replace and update the Vexatious Actions (Scotland) Act 1898. They retain the role of the Lord Advocate as guardian of the public interest, permitting the Lord Advocate to seek a “vexatious litigation order” from the Inner House of the Court of Session which requires the vexatious litigant to obtain the consent of a Lord Ordinary prior to raising a civil action (section 100(2)(a)). The test for obtaining an order from the Inner House and the test which requires to be met by a litigant in seeking permission from a judge of the Outer House remain mostly the same but have been updated with a more modern form of drafting (section 101(1) and (4) respectively). For the first time however, the Court in determining whether to grant a vexatious litigation order will be able to take into account the proposed vexatious litigant’s behaviour in proceedings outwith Scotland (section 101(2)).
171. The sections also allow the Lord Advocate to seek to prevent a vexatious litigant from taking a specified step in specified on-going proceedings (section 100(2)(b)). This power is based on the similar powers of the Attorney General of England and Wales in section 42 of the Senior Courts Act 1981 and the existing power of the Lord Advocate in 33(2)(b) the Employment Tribunals Act 1996. Further, the court may also determine that a vexatious litigation order has effect only for such a period as specified in the order (section 100(4)).
172. Subsections (6) to (8) of section 101 make provision permitting a court dealing with on-going civil proceedings that are halted by an order under section 100(2)(b) to make orders in those proceedings in consequence, including with regard to the disposal of those proceedings.

**Section 102 – Power to make orders in relation to vexatious behaviour**

173. **Section 102(1)** allows the Scottish Ministers to make regulations (subject to the negative procedure) to empower the courts to deal with vexatious behaviour. Scottish Ministers will require to consult the Lord President prior to making regulations.
174. This section is designed to empower the courts to deal with vexatious behaviour and abuse of process in a similar way to the use of Civil Restraint Orders (CROs) by the courts of England and Wales. CROs are part of the inherent powers of the courts of that jurisdiction and are a form of order which may be granted by them in response to unmeritorious applications or claims by a litigant. The effect of such orders is to require a litigant to obtain the permission of a specified judge or court (as the case may be) prior to making applications in a particular case or cases, or from raising actions, either generally or in specific courts. They are a flexible, court-led response to abuse of the court process, which can be tailored to ensure that the rights of the litigant in question are balanced against both the rights of the other parties to any action and the efficient operation of the court.
175. Despite section 102 there will continue to be a role for the Lord Advocate as guardian of the public interest (under section 100 and 101): it may be possible for a vexatious litigant, through a wide geographical spread of different actions, not to trouble one court sufficiently to trigger the court-led sanction, but in his or her behaviour overall, to trouble the system or one litigant in a variety of courts. That said, now that the courts will be given this power, it is expected that the number of actions required to be taken by the Lord Advocate will decrease.