*These notes relate to the Courts Reform (Scotland) Act 2014 (asp 18) which received Royal Assent on 10 November 2014*

# COURTS REFORM (SCOTLAND) ACT 2014

## EXPLANATORY NOTES

### THE ACT

### Part 5 – Civil Appeals

### Appeals to the Court of Session

#### *Section 113 – Appeal from the Sheriff Appeal Court to the Court of Session*

203. Section 113 provides for an appeal to the Court of Session from a final judgment of the Sheriff Appeal Court, subject to a requirement to obtain permission, in the first instance from the Sheriff Appeal Court and, if refused, then from the Court of Session (subsection (1)). "Final judgment" is defined in section 136(1). This further right of appeal from a first instance decision is subject to the test set out in subsection (2). That subsection provides that permission to appeal may only be granted if the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Session to hear the appeal (in other words, the "second appeals test" discussed in the context of section 89). Subsections (3) and (4) restate section 28(2) of the Sheriff Courts (Scotland) Act 1907 to preserve any specific provision regarding appeals from the Sheriff Appeal Court to the Court of Session that may be contained in other enactments.

#### *Section 114 – Appeal from the sheriff principal to the Court of Session*

204. There are some enactments which provide for applications direct to the sheriff principal rather than the sheriff (as explained with reference to section 109 these are unaffected that section). Section 114 deals with such first instance judicial decisions made by sheriffs principal and makes it clear that appeals from such judgments are to the Inner House of the Court of Session rather than the Sheriff Appeal Court.

#### *Section 115 –Appeals: granting of leave or permission and assessment of grounds of appeal*

205. Section 115 inserts a new section 31A into the Court of Session Act 1988 to give the Court of Session power to provide by act of sederunt for a single judge (a) to determine any applications to the Inner House of the Court of Session for leave or permission to appeal to the Inner House; and (b) to consider any appeal proceedings initially (and, where appropriate, after leave or permission has been granted).

206. Section 115 relates to paragraphs 97 to 99 of Chapter 4 of the Scottish Civil Courts Review which also referred to the Inner House Business Review by Lord Penrose which recommended at paragraph 6.27 what the Scottish Civil Courts Review termed a "sift mechanism" whereby a single Inner House judge could consider grounds of appeal.

207. By way of background to the new provisions, it is relevant to note that section 2(4) of the Court of Session Act 1988 provides that, subject to section 5(ba), the quorum for a Division of the Inner House of the Court of Session shall be three judges. Section 5(ba) was inserted by the Judiciary and Courts (Scotland) Act 2008. Subsection 103(2)(p) of

the Act gives the Court of Session power to make provision by act of sederunt as to the quorum for a Division of the Inner House considering solely procedural matters. That power is considered sufficient to provide for a single Inner House judge to deal with procedural matters including applications for leave or permission – see Rule 37A of the Rules of Court and as confirmed by the case of *MBR v Secretary of State for the Home Department*[1]. However, the power is not considered sufficient to enable Rules of Court to enable a single judge to consider the initial stages of the appeal proceedings and decide by reference to the grounds of appeal whether the appeal proceedings should be allowed to proceed and if so on what grounds.

208. Since a decision on whether to grant leave or permission and an assessment of the grounds of appeal both require some consideration of the merits and will ordinarily affect whether an appeal or part of it can proceed. The Act provides a power for both of the above matters to enable a consistent approach.

209. New section 31A(1), therefore, provides the Court of Session with a new power relating to applications for leave or permission. When the act of sederunt is made under this new power the existing provisions that deal with the leave or permission process in Chapter 37A (as considered by the Court in the MBR case cited above) will be removed. Subsection (1) does not set out the test to be applied by the Court in determining whether leave or permission should be granted. That will be determined by the common law and any particular provisions in the relevant statutes that provide for leave or permission. The second appeals test has now been introduced for the majority of cases – see *Hoseini v Secretary of State for the Home Department 2005 SLT* 550 as referred to by the Court in the MBR case.

210. New section 31A(2) provides the Court of Session with a separate power to make provision for the initial appeal proceedings to be dealt with by a single judge with reference to whether the grounds of appeal or any of them are arguable. The Court is also given discretion through this power to apply this procedure to cases where leave or permission has already been granted.

211. New section 31A(3) requires the act of sederunt to make provision about the procedure including for the parties to be heard and for review by a Division of the Inner House of the Court of Session.

212. New section 31A(4) provides for the single judge's decision to be final subject to the Inner House review process.

213. New section 31A(7) contains a definition of appeal proceedings. The new process is not capable of being applied to the procedure for permission to appeal to the Supreme Court that is separately provided for through section 117 of the Act.

### *Section 116 – Effect of appeal*

214. Section 116 is intended to restate section 29 of the Sheriff Courts (Scotland) Act 1907 and makes provision about the effect of an appeal to either the Sheriff Appeal Court or the Court of Session. It provides that the court considering an appeal will be able to review all of the decisions in the proceedings, whether the decisions are made at first instance or on appeal (subsection (2)), and that the appeal may be insisted upon by any party to the appeal, regardless of whether that party was the one who originally brought the appeal (subsection (3)).

### *Section 117 – Appeals to the Supreme Court*

215. Section 117 sets out new provisions for appeals from the Court of Session to the UK Supreme Court by replacing section 40 of the Court of Session Act 1988 with new sections 40 and 40A. It will be competent to appeal against a judgment of the Court of

**1** 2013 SLT 1108; www.scotcourts.gov.uk/opinions/2013CSIH66.html.

Session to the Supreme Court, but only with the permission of the Inner House of the Court of Session or, failing such permission, with the permission of the Supreme Court.

216. Section 40 of the Court of Session Act 1988 provides that it is competent to appeal to the Supreme Court against certain types of judgments without requiring leave from the Inner House. The only restriction on those appeals is that the Supreme Court under Practice Direction 4 requires that the note of appeal must be signed by two Scottish Counsel who certify that the appeal is reasonable.

217. In addition to changing the process for appeals to the Supreme Court, in line with the overall approach in the Act the opportunity has been taken to update the language and modernise terminology (noting that section 40 was itself a consolidation of the Court of Session Acts of 1808 and 1925), where appropriate. The Supreme Court in the judgment of *Apollo Engineering Limited (Appellant) v James Scott Limited (Respondent) (Scotland) [2013] UKSC 37*[2] made some criticism of the language of section 40.

218. The main changes in terminology in the new section 40 are:

- "cause" becomes "proceedings" – Lord Hope notes in the Apollo judgment that "cause" has a very wide meaning and is defined in Rules of Court as covering "any proceedings";
- "leave" becomes "permission" as that is the term that is used more widely now, for example section 288AA(5) of the 1995 Act and the Constitutional Reform Act 2005;
- "judgment" and "interlocutory judgment" become "decision". This reflects the fact that "an interlocutory judgment" is any judgment other than a final one and on that basis "decision" is clearer for the user;
- "judgment on the whole merits" becomes "final judgment" as defined in new section 40(10). This is consistent with the definition of "final judgement" as in section 136(1) of the Act which in turn is drawn from the definition of "final judgement" in section 3 of the Sheriff Courts (Scotland) Act 1907; and
- "dilatory defence" becomes "preliminary defence". This is discussed in the Apollo judgment where Lord Hope notes that "preliminary defence" is more favoured nowadays. The term is defined in new section 40(10).

219. New section 40(1) provides that an appeal may be taken to the Supreme Court against the relevant types of case only with the permission of the Inner House of the Court of Session or, if the Inner House has refused permission, with the permission of the Supreme Court.

220. Subsection (2) lists the kinds of decisions that can be appealed with the permission of the Supreme Court (even though the Inner House has refused permission). These are intended to be the same categories of decision as are covered by the existing provisions in section 40(1)(a) and (2) (with the terminological changes mentioned above and with the addition of a decision in an exchequer cause). Exchequer causes are subject to special rules in the Court of Session Act 1988 (namely sections 3 and 21 to 23 which are unaffected by the Act). An example of an exchequer cause is an appeal from the Upper Tax Tribunal for Scotland to the Inner House of the Court of Session under section 36 of the Revenue Scotland and Tax Powers Act 2014. The reference to exchequer causes in new section 40(2)(b) effects a restatement without modification of section 24 of the 1988 Act, bringing all the relevant provisions into a single section. See also *Massie v McCaig [2013] CSIH 37*.[3]

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**2** http://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0038_Judgment.pdf
**3** http://www.scotcourts.gov.uk/opinions/2013CSIH14.html

221. Subsection (3) then sets out the rule for other cases. It provides that for those other cases the decision is appealable with the permission of the Inner House of the Court of Session. In other words, the Inner House is the gatekeeper alone.

222. Subsection (4) is intended to restate the second part of the old section 40(2). It sets out that the Supreme Court has the same powers as the Inner House had in relation to an appeal against an application under section 29 of the Court of Session Act 1988 to grant or refuse a new trial in any proceedings, including in particular the powers in section 29(3) of the 1988 Act (power to set aside the verdict in place of granting a new trial) and section 30(3) of the 1988 Act (power to grant a new trial restricted to the question of the amount of damages).

223. Subsections (5) and (6) are intended to restate the old section 40(3), namely that an appeal cannot be taken to the Supreme Court against a decision of a Lord Ordinary unless that decision has been reviewed by the Inner House.

224. Subsection (7) is intended to restate the old section 40(4), with the effect that once an appeal is taken to the Supreme Court all prior decisions, whether at first instance or at any stage of appeal, are opened up for review by the Supreme Court.

225. Subsection (8) restates the opening qualification that is expressed in the old section 40(1), namely that the procedure is subject to sections 27(5) and 32(5) of the Court of Session Act 1988 which make special provision for appeals to the Supreme Court and to provisions in any other enactment which restrict or exclude appeals from the Court of Session to the Supreme Court.

226. Under new section 40(9), the provisions do not affect any right of appeal from the Court of Session to the Supreme Court that arises other than under the new section 40 of the 1988 Act – whether statutory appeals or at common law (although the assumption is that all such appeals are statutory now). For example, paragraph 13 of Schedule 6 to the Scotland Act 1998 sets out a separate process in relation to civil devolution issue appeals which is unaffected by the Act.

227. New sections 40A(1) and (2) provide a time limit for applications for permission to appeal to the Supreme Court. Applications to the Inner House of the Court of Session must be made within 28 days of the date of the decision against which the appeal lies, or such longer period as the court considers equitable having regard to the circumstances. The application to the Supreme Court should be made within 28 days of the date on which the Inner House refused permission, or such longer period as the Supreme Court considers equitable having regard to the circumstances. The time limit is equivalent to the time limits provided for in relation to applications for permission to appeal compatibility issues (European Convention on Human Rights and European Union challenges) to the Supreme Court through section 288A(7) and (8) of the Criminal Procedure (Scotland) Act 1995.

228. New section 40A(3) sets out that the test that the Court is to apply when considering an application for leave is whether the appeal raises an arguable point of law of general public importance that ought to be considered by the Supreme Court at the time. This is in line with the comments made by Lord Reed in the case of *Uprichard v Scottish Ministers [2013] UKSC 21*.[4]

**4** http://supremecourt.uk/decided-cases/docs/UKSC_2012_0034_Judgment.pdf