

2021 No. 226

COURT OF SESSION

SHERIFF APPEAL COURT

SHERIFF COURT

**Act of Sederunt (Rules of the Court of Session 1994, Sheriff
Appeal Court Rules and Sheriff Court Rules Amendment)
(Qualified One-Way Costs Shifting) 2021**

Made - - - - - *28th May 2021*

Laid before the Scottish Parliament *1st June 2021*

Coming into force - - - *30th June 2021*

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013(a), the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council.

The Court of Session therefore makes this Act of Sederunt under the powers conferred by sections 103(1) and 104(1) of the Courts Reform (Scotland) Act 2014(b), section 8(6) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(c) and all other powers enabling it to do so.

Citation and commencement etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021.

(2) It comes into force on 30th June 2021.

(3) A certified copy is to be inserted in the Books of Sederunt.

Application

2. This Act of Sederunt applies to first instance proceedings commenced on or after 30th June 2021, and to any appeals arising from first instance proceedings commenced on or after the same date.

(a) 2013 asp 3. Section 4 was amended by the Courts Reform (Scotland) Act 2014 (asp 18), schedule 5, paragraph 31(3) and by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).
(b) 2014 asp 18.
(c) 2018 asp 10.

Amendment of the Rules of the Court of Session 1994

3.—(1) The Rules of the Court of Session 1994(a) are amended in accordance with this paragraph.

(2) After Chapter 41A (appeals to the Supreme Court)(b) insert—

“CHAPTER 41B QUALIFIED ONE-WAY COSTS SHIFTING

Application and interpretation of this Chapter

41B.1.—(1) This Chapter applies in civil proceedings, where either or both—

- (a) an application for an award of expenses is made to the court;
- (b) such an award is made by the court.

(2) Where this Chapter applies—

- (a) rules 29.1(2) and (3) (abandonment of actions)(c), 40.15(6) (appeals deemed abandoned)(d) and 41.17(3)(b) (procedure on abandonment)(e);
- (b) any common law rule entitling a pursuer to abandon an action or an appeal, to the extent that it concerns expenses,

are disapplied.

(3) In this Chapter—

“the Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(f);

“the applicant” has the meaning given in rule 41B.2(1), and “applicants” is construed accordingly;

“civil proceedings” means civil proceedings to which section 8 of the Act (restriction on pursuer’s liability for expenses in personal injury claims) applies.

Application for an award of expenses

41B.2.—(1) Where civil proceedings have been brought by a pursuer, another party to the action (“the applicant”) may make an application to the court for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both—

- (a) section 8(4)(a) to (c) of the Act;
- (b) paragraph (2) of this rule.

(2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows—

- (a) failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender lodged in process;
- (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
- (c) abandonment of the action or the appeal by the pursuer in terms of rules 29.1(1), 40.15(1) or 41.15(1), or at common law.

(a) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443), last amended by S.S.I. 2021/153.

(b) Chapter 41A was inserted by S.S.I. 2015/228.

(c) Rule 29.1(2) was amended by S.S.I. 2001/305.

(d) Rule 40.15 was substituted by S.S.I. 2010/30.

(e) Chapter 41 was substituted by S.S.I. 2011/303.

(f) 2018 asp 10.

Award of expenses

41B.3.—(1) Subject to paragraph (2), the determination of an application made under rule 41B.2(1) is at the discretion of the court.

(2) Where, having determined an application made under rule 41B.2(1), the court makes an award of expenses against the pursuer on the ground specified in rule 41B.2(2)(a) or (b)—

- (a) the pursuer's liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;
- (b) the liability of the pursuer to the applicant, or applicants, who lodged the tender is to be limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer, and that sum is to be calculated without offsetting against those expenses any expenses due to the pursuer by the applicant, or applicants, before the date of the tender;
- (c) the court must order that the pursuer's liability is not to exceed the sum referred to in sub-paragraph (b), notwithstanding that any sum assessed by the Auditor of Court as payable under the tender procedure may be greater or, if modifying the expenses in terms of rule 42.5 (modification or disallowance of expenses)(a) or 42.6(1) (modification of expenses awarded against assisted persons), that such modification does not exceed that referred to in sub-paragraph (b);
- (d) where the award of expenses is in favour of more than one applicant the court, failing agreement between the applicants, is to apportion the award of expenses recoverable under the tender procedure between them.

(3) Where, having determined an application made under rule 41B.2(1), the court makes an award of expenses against the pursuer on the ground specified in rule 41B.2(2)(c), the court may make such orders in respect of expenses, as it considers appropriate, including—

- (a) making an award of decree of dismissal dependant on payment of expenses by the pursuer within a specified period of time;
- (b) provision for the consequences of failure to comply with any conditions applied by the court.

Procedure

41B.4.—(1) An application under rule 41B.2(1)—

- (a) must be made by motion, in writing, and Chapter 23 (motions)(b) otherwise applies to motions made under this Chapter;
- (b) may be made at any stage in the case prior to the pronouncing of an interlocutor disposing of the expenses of the action or, as the case may be, the appeal.

(2) Where an application under rule 41B.2(1) is made, the court may make such orders as it thinks fit for dealing with the application, including an order—

- (a) requiring the applicant to intimate the application to any other person;
- (b) requiring any party to lodge a written response;
- (c) requiring the lodging of any document;
- (d) fixing a hearing.

(a) Rule 42.5 was amended by S.S.I. 2019/74.

(b) Chapter 23 was last amended by S.S.I. 2017/414

Award against legal representatives

41B.5. Section 8(2) of the Act does not prevent the court from making an award of expenses against a pursuer’s legal representative in terms of section 11 (awards of expenses against legal representatives) of the Act.”.

Amendment of the Sheriff Appeal Court Rules 2015

4.—(1) The Act of Sederunt (Sheriff Appeal Court Rules) 2015(a) is amended in accordance with this paragraph.

(2) After Chapter 19 (expenses)(b) insert—

“CHAPTER 19A

QUALIFIED ONE-WAY COSTS SHIFTING

Application and interpretation of this Chapter

19A.1.—(1) This Chapter applies in civil proceedings, where either or both—

- (a) an application for an award of expenses is made to the Court;
- (b) such an award is made by the Court.

(2) Where this Chapter applies—

- (a) rules 9.1(4) and (5) (application to abandon appeal);
- (b) any common law rule entitling a pursuer to abandon an appeal, to the extent that it concerns expenses,
are disapplied.

(3) In this Chapter—

“the Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(c);

“the applicant” has the meaning given in rule 19A.2(1), and “applicants” is construed accordingly;

“civil proceedings” means civil proceedings to which section 8 of the Act (restriction on pursuer’s liability for expenses in personal injury claims) applies.

Application for an award of expenses

19A.2.—(1) Where civil proceedings have been brought by a pursuer, another party to the action (“the applicant”) may make an application to the Court for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both—

- (a) section 8(4)(a) to (c) of the Act;
- (b) paragraph (2) of this rule.

(2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows—

- (a) failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender lodged in process;
- (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;

(a) S.S.I. 2015/356, last amended by S.S.I. 2020/28.

(b) Chapter 19 was amended by S.S.I. 2019/74.

(c) 2018 asp 10.

- (c) abandonment of the appeal by the pursuer in terms of rule 9.1(1) to (3), or at common law.

Award of expenses

19A.3.—(1) Subject to paragraph (2), the determination of an application made under rule 19A.2(1) is at the discretion of the court.

(2) Where, having determined an application made under rule 19A.2(1), the Court makes an award of expenses against the pursuer on the ground specified in rule 19A.2(2)(a) or (b)—

- (a) the pursuer’s liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;
- (b) the liability of the pursuer to the applicant, or applicants, who lodged the tender is to be limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer and that sum is to be calculated without offsetting against those expenses any expenses due to the pursuer by the applicant, or applicants, before the date of the tender;
- (c) the Court must order that the pursuer’s liability is not to exceed the sum referred to in sub-paragraph (b), notwithstanding that any sum assessed by the Auditor of Court as payable under the tender procedure may be greater or, if modifying those expenses to a fixed sum in terms of rule 19.1(2) (taxation of expenses), that such sum does not exceed that referred to in sub-paragraph (b);
- (d) where the award of expenses is in favour of more than one applicant the Court, failing agreement between the applicants, is to apportion the award of expenses recoverable under the tender procedure between them.

(3) In the event that the Court makes an award of expenses against the pursuer on the ground specified in rule 19A.2(2)(c), the Court may make such orders in respect of expenses, subject to such conditions if any, as it considers appropriate.

Procedure

19A.4.—(1) An application under rule 19A.2(1)—

- (a) must be made by motion, in writing, and Chapters 12 (motions: general), 13 (motions lodged by email)(a) and 14 (motions lodged by other means) otherwise apply to motions made under this Chapter;
- (b) may be made at any stage in the case prior to the granting of an order disposing of the expenses of the appeal.

(2) Where an application under rule 19A.2(1) is made, the Court may make such orders as it thinks fit for dealing with the application, including an order—

- (a) requiring the applicant to intimate the application to any other person;
- (b) requiring any party to lodge a written response;
- (c) requiring the lodging of any document;
- (d) fixing a hearing.

Award against legal representatives

19A.5. Section 8(2) of the Act does not prevent the Court from making an award of expenses against a pursuer’s legal representative in terms of section 11 (awards of expenses against legal representatives) of the Act.”.

(a) Chapter 13 was amended by S.S.I. 2015/419.

Amendment of the Ordinary Cause Rules 1993

- 5.—(1) The Ordinary Cause Rules 1993(a) are amended in accordance with this paragraph.
(2) After Chapter 31 (appeals)(b) insert—

“CHAPTER 31A QUALIFIED ONE-WAY COSTS SHIFTING

Application and interpretation of this Chapter

- 31A.1.**—(1) This Chapter applies in civil proceedings, where either or both—
- (a) an application for an award of expenses is made to the sheriff;
 - (b) such an award is made by the sheriff.
- (2) Where this Chapter applies—
- (a) rules 23.1(2) and (3) (abandonment of causes)(c);
 - (b) any common law rule entitling a pursuer to abandon a cause, to the extent that it concerns expenses,
are disapplied.
- (3) In this Chapter—
- “the Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(d);
 - “the applicant” has the meaning given in rule 31A.2(1), and “applicants” is construed accordingly;
 - “civil proceedings” means civil proceedings to which section 8 of the Act (restriction on pursuer’s liability for expenses in personal injury claims) applies.

Application for an award of expenses

- 31A.2.**—(1) Where civil proceedings have been brought by a pursuer, another party to the action (“the applicant”) may make an application to the sheriff for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both—
- (a) section 8(4)(a) to (c) of the Act;
 - (b) paragraph (2) of this rule.
- (2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows—
- (a) failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender lodged in process;
 - (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
 - (c) decree of absolvitor or decree of dismissal has been granted against the pursuer in terms of rule 17.2(3)(b) (applications for summary decree)(e);
 - (d) abandonment of the cause in terms of rule 23.1(1), or at common law.

(a) The Ordinary Cause Rules 1993 are in schedule 1 of the Sheriff Courts (Scotland) Act 1907 (c.51). Schedule 1 was substituted by S.I. 1993/1956 and last amended by S.S.I. 2021/75.
(b) Chapter 31 was last amended by S.S.I. 2015/419.
(c) Rule 23.1 was amended by S.S.I. 2003/26.
(d) 2018 asp 10.
(e) Rule 17.2 was substituted by S.S.I. 2012/188 and amended by S.S.I. 2015/227.

Award of expenses

31A.3.—(1) Subject to paragraph (2), the determination of an application under rule 31A.2(1) is at the discretion of the sheriff.

(2) Where, having determined an application made under rules 31A.2(1), the sheriff makes an award of expenses against the pursuer on the ground specified in rule 31A.2(2)(a) or (b)—

- (a) the pursuer's liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;
- (b) the liability of the pursuer to the applicant, or applicants, lodging the tender is to be limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer and that sum is to be calculated without offsetting against those expenses any expenses due to the pursuer by the applicant, or applicants, before the date of the tender;
- (c) the sheriff must order that the pursuer's liability is not to exceed the sum referred to in sub-paragraph (b), notwithstanding that any sum assessed by the Auditor of Court as payable under the tender procedure may be greater or, if modifying those expenses to a fixed amount in terms of rule 32.1 (taxation before decree for expenses)(a), that such amount does not exceed that referred to in sub-paragraph (b);
- (d) where the award of expenses is in favour of more than one applicant the sheriff, failing agreement between the applicants, is to apportion the award of expenses recoverable under the tender procedure between them.

(3) In the event that the sheriff makes an award of expenses against the pursuer on the ground specified in rule 31A.2(2)(d), the sheriff may make such orders in respect of expenses, as it considers appropriate, including—

- (a) making an award of decree of dismissal dependant on payment of expenses by the pursuer within a specified period of time;
- (b) provision for the consequences of failure to comply with any conditions applied by the court.

Procedure

31A.4.—(1) An application under rule 31A.2(1)—

- (a) must be made by written motion, and Chapters 15 (motions)(b) and 15A (motions intimated and lodged by email)(c) otherwise apply to motions made under this Chapter;
- (b) may be made at any stage in the case prior to the granting of an order disposing of the expenses of the cause.

(2) Where an application under rule 31A.2(1) is made, the sheriff may make such orders as the sheriff thinks fit for dealing with the application, including an order—

- (a) requiring the applicant to intimate the application to any other person;
- (b) requiring any party to lodge a written response;
- (c) requiring the lodging of any document;
- (d) fixing a hearing.

(a) Rule 32.1 was amended by S.S.I. 2019/74.

(b) Chapter 15 was last substituted by S.I. 1996/2445 and last amended by S.S.I. 2015/227.

(c) Chapter 15A was inserted by S.S.I. 2015/227 and amended by S.S.I. 2015/296.

Award against legal representatives

31A.5. Section 8(2) of the Act does not prevent the sheriff from making an award of expenses against a pursuer's legal representative in terms of section 11 (awards of expenses against legal representatives) of the Act.”.

Amendment of the Summary Cause Rules 2002

- 6.**—(1) The Summary Cause Rules 2002(a) are amended in accordance with this paragraph.
(2) After Chapter 23 (decrees, extracts, execution and variation)(b) insert—

“CHAPTER 23A QUALIFIED ONE-WAY COSTS SHIFTING

Application and interpretation of this Chapter

23A.1.—(1) This Chapter applies in civil proceedings, where either or both—

- (a) an application for an award of expenses is made to the sheriff;
- (b) such an award is made by the sheriff.

(2) Where this Chapter applies—

- (a) rules 21.1(2) to (4) (abandonment of action);
- (b) any common law rule entitling a pursuer to abandon an action, to the extent that it concerns expenses,
are disapplied.

(3) Where the sheriff would be entitled to make an award of expenses, and before expenses are dealt with in terms of rules 23.3 (expenses)(c), 23.3A (taxation)(d) and 23.3B (objections to auditor's report), the sheriff is to have regard to rules 23A.2 and 23A.3.

(4) In this Chapter—

“the Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018(e);

“the applicant” has the meaning given in rule 23A.2(1), and “applicants” is construed accordingly;

“civil proceedings” means civil proceedings to which section 8 of the Act (restriction on pursuer's liability for expenses in personal injury claims) applies.

Application for an award of expenses

23A.2.—(1) Where proceedings have been brought by a pursuer, another party to the action (“the applicant”) may make an application to the sheriff for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both—

- (a) section 8(4)(a) to (c) of the Act;
- (b) paragraph (2) of this rule.

(a) The Summary Cause Rules are in schedule 1 of the Act of Sederunt (Summary Cause Rules) 2002 (S.S.I. 2002/132), last amended by S.S.I. 2017/186.
(b) Chapter 23 was last amended by S.S.I. 2015/419.
(c) Rule 23.3 was last amended by S.S.I. 2015/419.
(d) Rules 23.3A and 23.3B were inserted by S.S.I. 2002/516.
(e) 2018 asp 10.

(2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows—

- (a) failure by the pursuer to obtain an award of damages greater than the sum offered by way of a tender lodged in process;
- (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
- (c) abandonment of the action by the pursuer in terms of rule 21.1, or at common law.

Award of expenses

23A.3.—(1) Subject to paragraph (2), the determination of an application made under rule 23A.2(1) is at the discretion of the sheriff.

(2) Where, having determined an application made under rule 23A.2(1), the sheriff makes an award of expenses against the pursuer on the ground specified in either rule 23A.2(2)(a) or (b)—

- (a) the pursuer's liability is not to exceed the amount of expenses the applicant has incurred after the date of the tender;
- (b) the liability of the pursuer to the applicant, or applicants, lodging the tender is to be limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer and that sum is to be calculated without offsetting against those expenses any expenses due to the pursuer by the applicant, or applicants, before the date of the tender;
- (c) the sheriff is to order that the pursuer's liability is not to exceed the sum referred to in sub-paragraph (b), notwithstanding that any sum assessed by the Sheriff Clerk, or by the Auditor of Court as payable under the tender procedure may be greater;
- (d) where the award of expenses is in favour of more than one applicant the sheriff, failing agreement between the applicants, is to apportion the award of expenses recoverable under the tender procedure between them.

(3) In the event that the sheriff makes an award of expenses against the pursuer on the ground other than that specified in rule 23A.2(2)(c), the sheriff may make such orders in respect of expenses, as it considers appropriate, including—

- (a) making an award of decree of dismissal dependant on payment of expenses by the pursuer within a specified period of time;
- (b) provision for the consequences of failure to comply with any conditions applied by the court.

Procedure

23A.4.—(1) An application under rule 23A.2(1)—

- (a) is to be made by incidental application, in writing, and Chapter 9 (incidental applications and sists) otherwise applies to incidental applications under this Chapter;
- (b) may be made at any stage in the case prior to assessment of the amount of expenses to be awarded in the cause, in terms of rule 23.3, an order for an account of expenses to be taxed in terms of rule 23.3A or a finding by the sheriff that expenses in the cause are to be awarded as not due to or by any party.

(2) Where an application under rule 23A.2(1) is made, the sheriff may make such orders as the sheriff thinks fit for dealing with the application, including an order—

- (a) requiring the applicant to intimate the application to any other person;
- (b) requiring any party to lodge a written response;
- (c) requiring the lodging of any document;

(d) fixing a hearing.

Award against legal representatives

23A.5. Section 8(2) of the Act does not prevent the sheriff from making an award of expenses against a pursuer's legal representative in terms of section 11 (awards of expenses against legal representatives) of the Act.”.

Edinburgh
28th May 2021

CJM SUTHERLAND
Lord President
I.P.D.

EXPLANATORY NOTE

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

This Act of Sederunt amends the Rules of the Court of Session 1994, the Act of Sederunt (Sheriff Appeal Court Rules) 2015, the Ordinary Cause Rules 1993 and the Summary Cause Rules 2002.

Section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the Act”) introduces a procedure known as “Qualified One-Way Costs Shifting”. Section 8 of the Act makes provision in civil proceedings for damages for personal injury or death to the effect that the court must not make an award of expenses against the person bringing the action or the appeal arising therefrom, even if the person fails in their claim, provided the person has conducted the proceedings in an appropriate manner. Section 8(4) of the Act sets out exceptions to that principle whereby such a person, or their legal representative, may be held not to have conducted proceedings in an appropriate manner. Section 8(6) of the Act provides that further exceptions may be specified by Act of Sederunt.

This instrument makes amendments to the Rules of the Court of Session, the Sheriff Appeal Court Rules, the Ordinary Cause Rules and the Summary Cause Rules to add a new Chapter to each set of rules. In each case it specifies further exceptions, in terms of section 8(6) of the Act, and establishes court procedure for assessing whether exceptions apply.

The instrument provides that where the court makes an award of expenses on the ground that the pursuer has failed to beat a tender, or unreasonably delayed in accepting it, the liability of that person to the applicant, or applicants, lodging the tender is not to exceed expenses incurred by the applicant after the date of the tender, and is limited to an aggregate sum, payable to all applicants (if more than one) of 75% of the amount of damages awarded to the pursuer.

In each case the relevant new Chapter provides that an application may refer to one or more of the exceptions set out in section 8(4) of the Act and in the instrument itself. The instrument provides that applications are to be in writing, made by way of motion procedure in the Court of Session, the Sheriff Appeal Court and in ordinary causes in the sheriff court, and by way of incidental application in summary causes; and that such an application must be made before the pronouncing of an interlocutor disposing of the expenses of the action or, as the case may be, the appeal.

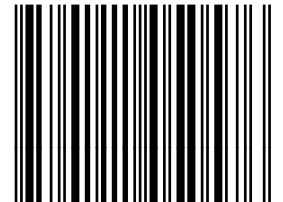
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