

# Compass Chambers



## QOCS

*A one way street or room for manoeuvre?*



# Surely not another QOCS talk?!

Purpose of today :-

- Not (really) a history lesson!
- Some war stories from James and I
- Some practical considerations
- Our view on the likely direction of travel





# The Rules (briefly)!

## Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018

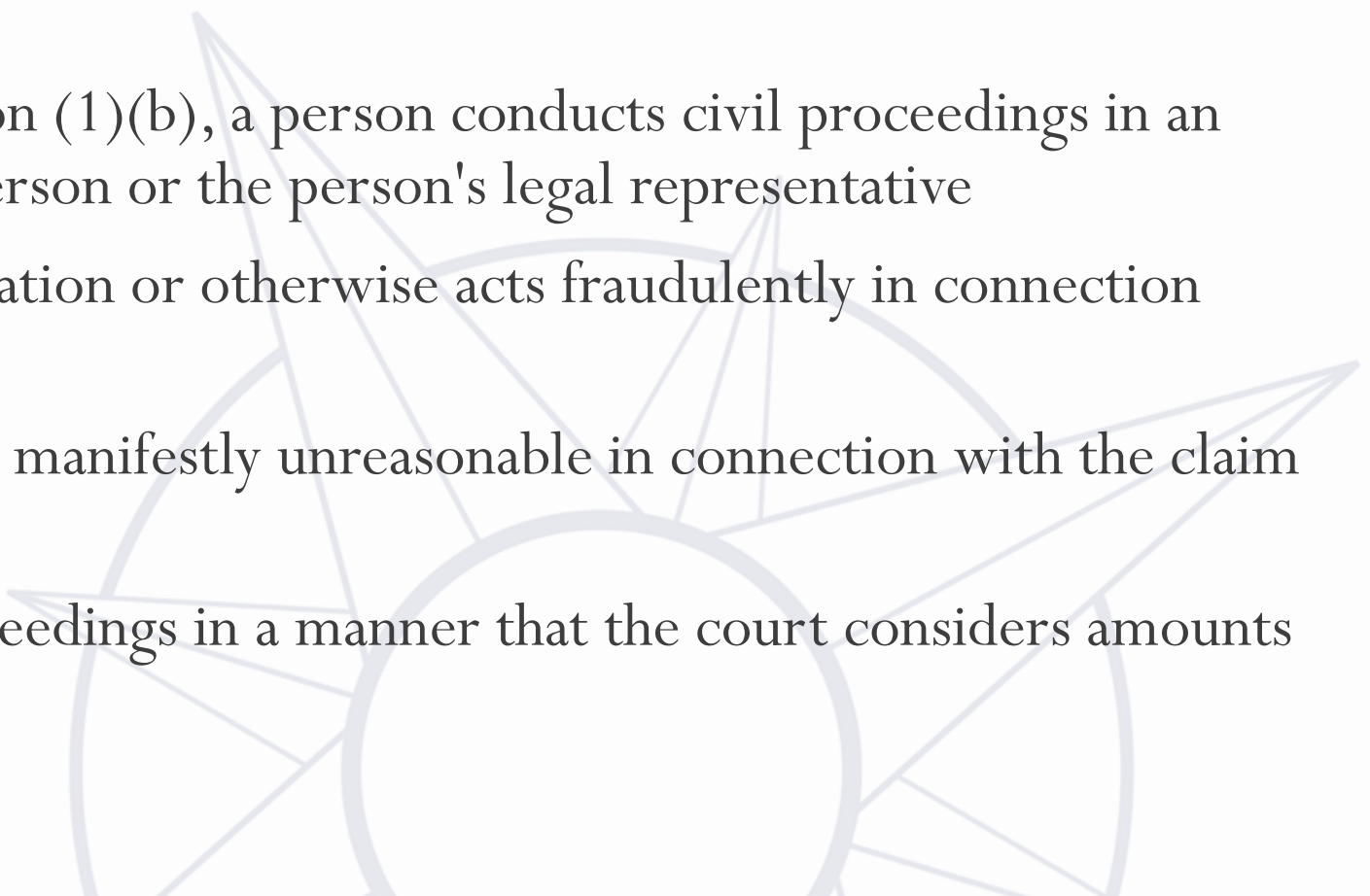
### 8 Restriction on pursuer's liability for expenses in personal injury claims

- (1) This section applies in civil proceedings where—(a) the person bringing the proceedings makes a claim for damages for—(i) personal injuries, or  
(ii) the death of a person from personal injuries, and  
(b) the person conducts the proceedings in an appropriate manner.
- (2) The court **must not make an award of expenses** against the person in respect of any expenses which relate to—(a) the claim, or  
(b) any appeal in respect of the claim.



# The Rules (briefly)!

## **Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018**

- (4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative
- (a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,
  - (b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or
  - (c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.
- 



# The Rules (briefly)!

## Sheriff Court Ordinary Cause Rules

### 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.



# The Rules (briefly)!

## Sheriff Court Ordinary Cause Rules

- (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);
  - (d) abandonment of the cause in terms of rule 23.1(1), or at common law.



# The Court's Approach to Date



- Not much to go on so far!
- *Helen Lennox v Iceland Foods Limited* [2022] SC EDIN 42
  - Defender's submission
  - Sheriff Fife's decision.


*“The test was high – “manifestly unreasonable” or “no, or substantially no chance of success.” It was not “is the pursuer likely to lose?”*



# The Court's Approach to Date

*Helen Lennox v Iceland Foods Limited* [2022] SC EDIN 42

So, what are the learning points?

- High bar
  - Motion for summary decree?
  - Highly fact specific
  - Access to Justice?
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# The Court's Approach to Date

## *Gilchrist v Chief Constable*

- Case where defender won at proof - decision [2022] SC EDIN 32
- Thereafter defender moves for an award of expenses seeking to have QOCS disappplied on grounds (a) pursuer had made a fraudulent misrepresentation and/or (b) behaved in a manner that was manifestly unreasonable
- *Lennox* was issued a couple of days before the argument and sheriff asked that parties address him on that case



# The Court's Approach to Date

*Gilchrist* continued

- The fraudulent representation argument centred on the specific and detailed and to some extent unusual circumstances in which the pursuer said she was injured. If the court didn't accept it, it was difficult to conclude other than she had lied.
- Submissions were made in relation to what constituted fraud – submissions the sheriff accepted – principally from McBryde on Contract
- “The simplest form of fraud is the straight lie”



Gilchrist continued

- However on the fraud argument he simply found that he had not made a finding she was incredible and so that was that
- He had simply preferred the evidence of the police as he said and no meta-analysis of his reasoning was needed
- On the manifestly unreasonable argument he agreed with Sheriff Fife in *Lennox* and concluded there was no manifest unreasonableness here.




- *Gilchrist* continued
- A procedural point
- Hearing fixed for expenses – written submissions to be lodged
- So I decided no point in putting in a written motion
- Other side took the point but didn't make it an issue
- Sheriff Campbell said “in future the court will expect all [such] applications to be in the form of written motions”
- OOPS





# The Court's Approach to Date

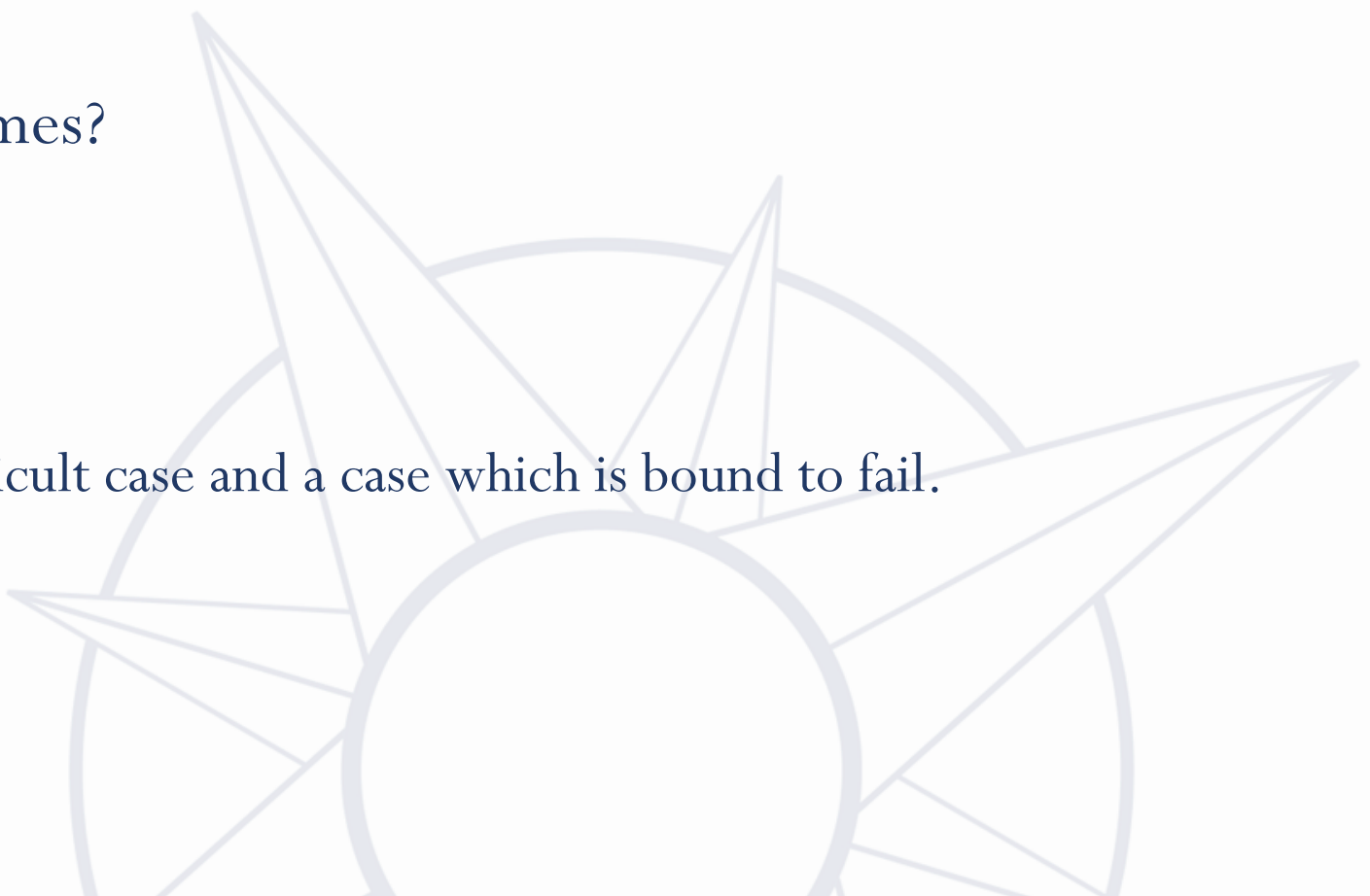
## “The unreported case”

- The facts
  - The argument
  - The decision
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# The Court's Approach to Date

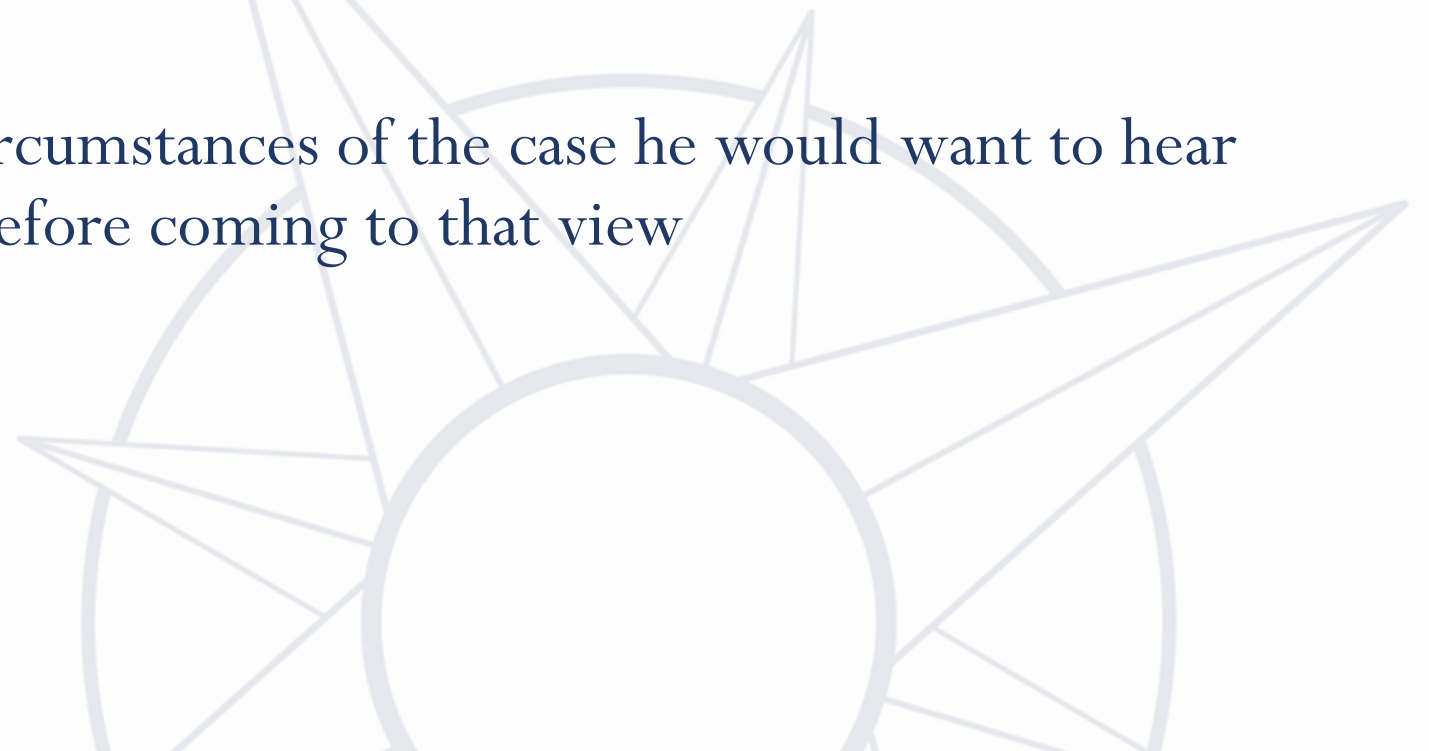
## “The unreported case”

- What are the learning outcomes?
    - Unique case on the facts.
    - The difference between a difficult case and a case which is bound to fail.
    - Unwillingness to write?
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## Another unreported case!

- Lord Sandison – for manifestly unreasonable he didn't align himself with ASPIC and said he thought it meant “unquestionably unreasonable”
- And then suggested in the circumstances of the case he would want to hear evidence from the pursuer before coming to that view





# The Court's Approach to Date

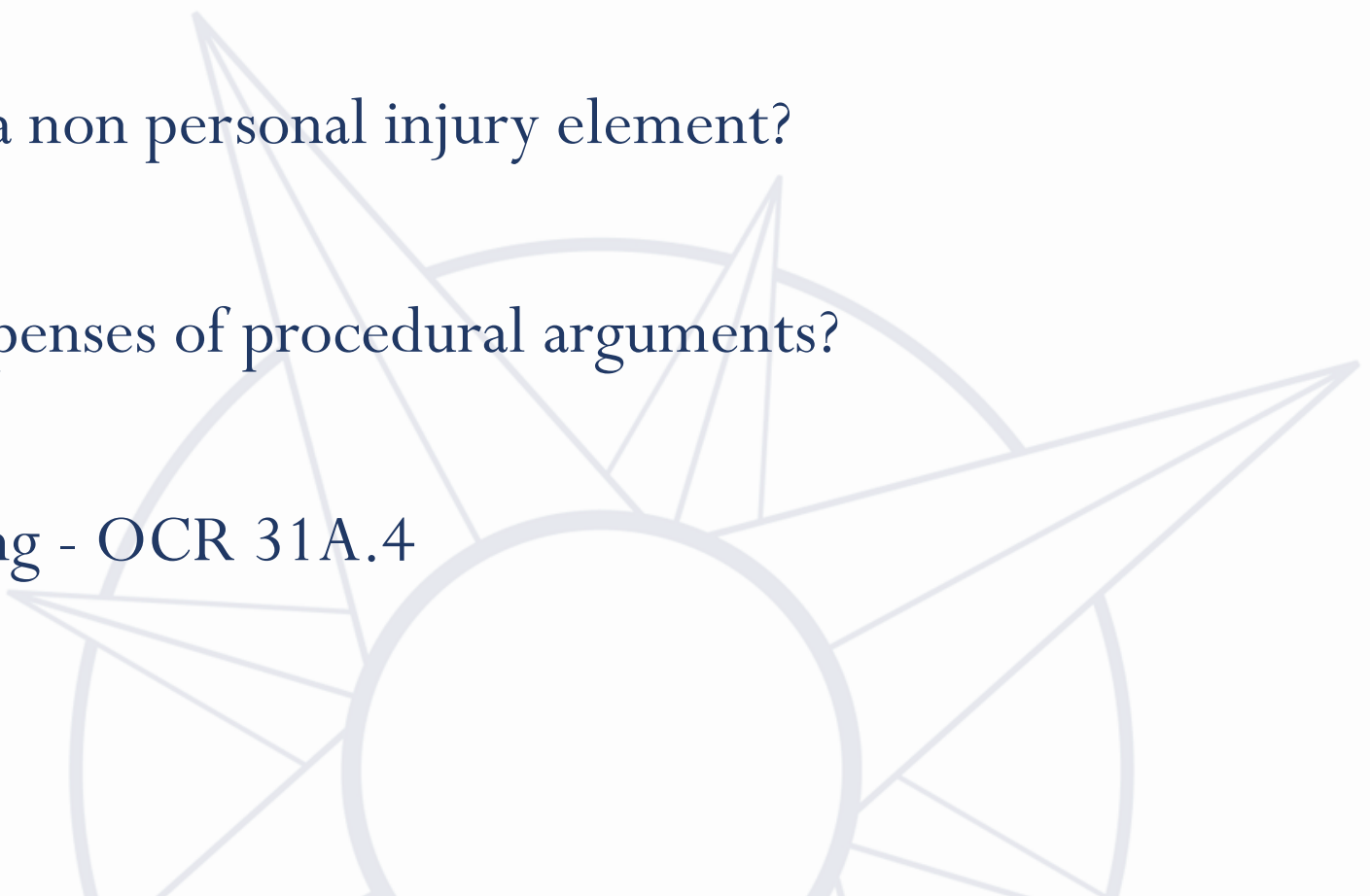
- So where does that leave us?
  - Probably not much further forward!
  - Lennox is clear, but only takes us so far.
  - Every case turns on its facts







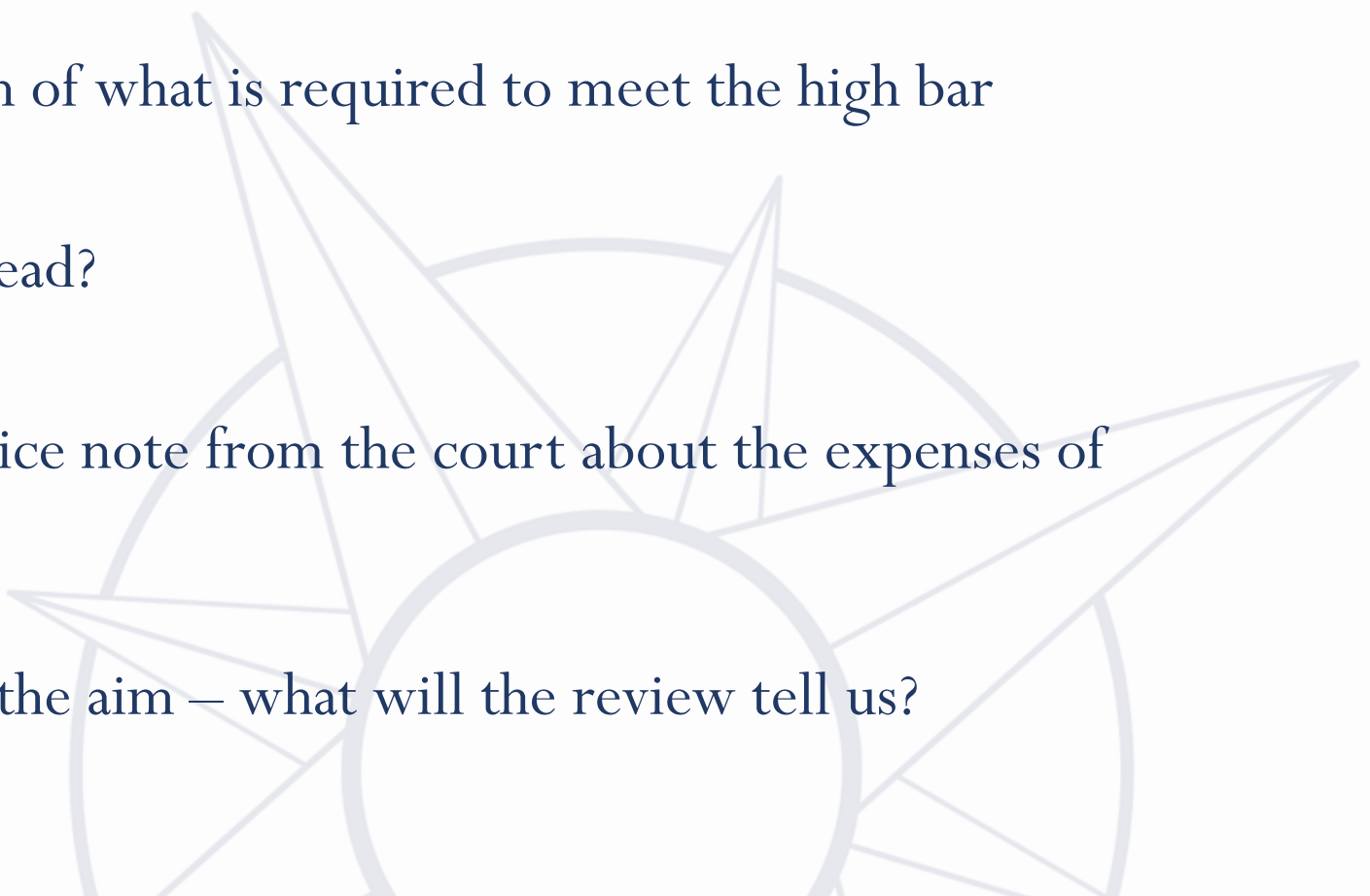
# Practical Considerations

- Tendering tactics
  - Personal Injury Claims with a non personal injury element?
  - What do we do about the expenses of procedural arguments?
  - Motions to be made in writing - OCR 31A.4
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# Direction of Travel



- “*a one-way street or room for manoeuvre*”
  - Lennox sets out the expectation of what is required to meet the high bar
  - Is ASPIC expected to take the lead?
  - Do we need a decision or practice note from the court about the expenses of procedural arguments?
  - Improved access to justice was the aim – what will the review tell us?
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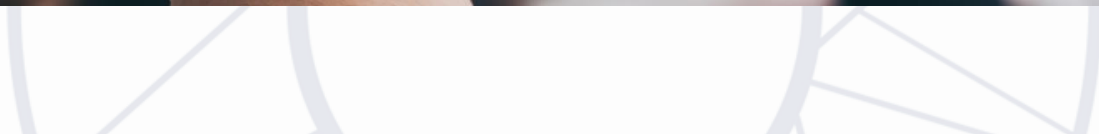


# Direction of Travel





# QUESTIONS?



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