
STIRLING COUNCIL

GOVERNANCE

22 AUGUST 2011

NOT EXEMPT

THE PATRONS OF COWANE'S HOSPITAL TRUST

1 SUMMARY

- 1.1 Various reports have been brought to Stirling Council and its Committees about the relationship between Cowane's Hospital Trust, The Stirlingshire Educational Trust, and Stirling Council concerning the long-standing dispute over the validity of past land transactions between Cowane's Hospital Trust and Stirling Council's statutory predecessors.
- 1.2 With a view to finally resolving this dispute, a Petition for approval of a Cy-Pres Scheme in relation to Cowane's Hospital Trust was served on Stirling Council in February 2009.
- 1.3 In accordance with the Decision of Stirling Council dated 2 April 2009 Stirling Council opposed the Petition for approval of a Cy-Pres Scheme, but only in relation to the proposed administrative changes.
- 1.4 The parties negotiated changes to the Cy-Pres Scheme which were reported to and approved by Stirling Council at its Meeting on 11 March 2010. The revised Cy-Pres Scheme was agreed by the Court of Session in January 2011.

2 OFFICER RECOMMENDATION(S)

The Council notes that:-

- 2.1 The Cy-pres Scheme has been approved by The Court of Session;
- 2.2 The Stirlingshire Educational Trust has been paid £2,363,251.90 and is no longer a beneficiary of Cowane's Hospital Trust;
- 2.3 At a Meeting of the new independent Patrons of Cowane's Hospital Trust in March 2011 a decision was made not to pursue Stirling Council for alleged breaches of trust and as such this matter is finally at an end; and
- 2.4 Stirling Council's annual accounts need no longer be qualified in this regard.

3 CONSIDERATIONS

Background

- 3.1 In terms of the Deed of Foundation of Cowane's Hospital dated 13 February 1637, a trust known as the Cowane's Hospital Trust was constituted. The trustees are known as the Patrons of Cowane's Hospital and all elected councillors of Stirling Council were eligible to be Patrons. In practice, councillors who sat on the Planning Panel declined to act as Patrons.
- 3.2 Cowane's income was divided into two parts, one half being paid to the Stirlingshire Educational Trust and the other half being used for the provision of housing, in particular, sheltered housing.

Dispute between the parties

- 3.3 There has been a long-standing dispute between Cowane's Hospital Trust, the Stirlingshire Educational Trust and Stirling Council over the validity of land transactions between the Cowane's Hospital Trust and Stirling Council's statutory predecessors. The dispute centred around a principle of trust law that a trustee must not be *auctor in rem suam* – or *actor in his own cause*. This means that a trustee must exercise his powers in the way that best furthers the interests of the trust's beneficiaries rather than the trustee. To this end, a trustee cannot profit from his position as trustee; must avoid any conflict with the interests of the beneficiaries; and must not engage in self-dealing with the trust fund.
- 3.4 Stirlingshire Educational Trust were concerned that because councillors of both Stirling District Council and Stirling Town Council formed the majority of the Patrons of Cowane's Hospital that these Patron's were acting *auctor in rem suam*. In addition they contended that they had sustained a loss as a beneficiary of Cowane's Hospital Trust because full value had not been received for these land disposals.
- 3.5 Cowane's Hospital Trust and Stirlingshire Educational Trust were advised by their legal advisers not to pursue Stirling Council for damages in respect of these land transactions as the prospects of success were remote. Following on from this The Patron's of Cowane's Hospital Trust granted a Discharge to Stirling Council of all liability in respect of these land transactions. However, in the opinion of the solicitors acting for Cowane's Hospital Trust, the application of the *auctor in rem suam* principle would negate the taking of such a decision and the grant of the Discharge.
- 3.6 Stirling Council were advised by Senior Counsel that the *auctor in rem suam* principle does not apply to the Patrons' dealings with Stirling Council as a body corporate and that the whole dispute has been predicated on a fundamental error of law.

Proposals to resolve the dispute

- 3.7 In order to resolve the dispute, it was agreed that the Patrons would raise a Cy-Pres Petition in the Court of Session seeking approval of the Schemes required to facilitate the separation of the two Trusts and amend the governance arrangements which had led to the allegations of breach of trust.

The following financial changes were proposed:-

- 3.7.1 to divide the capital of the Cowane's Hospital Trust and to pay a proportion thereof to the Governors of the Stirlingshire Educational Trust; and
- 3.7.2 for the Patrons thereafter to cease to be liable to pay to the Governors any part of the income.

The following administrative changes were proposed:-

- 3.7.3 that the Patrons no longer be drawn exclusively from the elected councillors of Stirling Council; and
- 3.7.4 that provision be made to the effect that those Patrons who were councillors should not be allowed to consider or vote on matters in which Stirling Council has an interest.

The financial proposals

- 3.8 The financial changes were not controversial. Indeed the Council at its meeting on 8 February 2007, approved the consequential changes to the Stirlingshire Educational Trust Scheme in its capacity as one of the appointing bodies to the governing body of Stirlingshire Educational Trust.
- 3.9 In accordance with the Cy-Pres Scheme agreed by the Court of Session in January 2011 Cowane's Hospital Trust has paid and made over to The Stirlingshire Educational Trust the sum of TWO MILLION THREE HUNDRED AND SIXTY THREE THOUSAND POUNDS TWO HUNDRED AND FIFTY ONE POUNDS AND NINETY PENCE (£2,363,251.90).
- 3.10 As such The Stirlingshire Educational Trust is no longer a beneficiary of Cowane's Hospital Trust.

The administrative proposals

- 3.11 The administrative changes were considered to be more far-reaching than required and contrary to the original testamentary wishes of John Cowane. If approved, the Scheme would have provided for the existing Patrons ceasing to hold office and being replaced with five members of Stirling Council ("the Council Patrons") and six "Independent Patrons". It was proposed that these Independent Patrons should be the Minister of the Church of the Holy Rood, Stirling or a member of the Kirk Session, a person nominated by the University of Stirling, a person appointed by the Guildry, a person appointed by the Community Council of Cowane's Hospital and two members of the public resident within the Stirling Council area.
- 3.12 It was also proposed that The Council Patrons would not be able to be present at any meeting to consider "Reserved Matters" which are defined as :-
 - 3.12.1 any transaction of sale, lease or excambion to which both the Patrons and Stirling Council are parties;
 - 3.12.2 any application for planning permission made to Stirling Council; and

3.12.3 any actual or proposed claim or court proceedings or arbitration against Stirling Council, or brought by Stirling Council against the Patrons, including any actual or proposed claim or proceedings designed to obtain redress from Stirling Council in respect of transactions between the Patrons and the predecessors of Stirling Council where a majority of the Patrons may have been *auctor in rem suam*.

3.13 It was further proposed that any such meeting at which a Reserved Matter was discussed would require to be held in premises belonging to the Patrons and that any advice received by the Independent Patrons in relation to a Reserved Matter would be confidential to them and not communicated to the Council Patrons.

The revised administrative proposals

3.14 After much negotiation the parties reached an agreed position, the basis of which was reported to and approved by Stirling Council at its Meeting on 11 March 2010. The administrative terms of the revised Scheme provide for the appointment of Patrons as follows:-

Council Patrons

3.14.1 Elected members of Stirling Council (or any statutory successor) will remain in the majority as Patrons of Cowanes Hospital Trust; and

3.14.2 There will be either nine or ten 'Council Patrons' appointed as follows:-

- those elected members representing the Castle, Stirling East and Stirling West wards will remain as ex officio Patrons. This was proposed on the basis that these three wards comprise the majority of the geographical area of the former Royal Burgh; and
- if the Provost is not an elected member representing the Castle, Stirling East or Stirling West wards, the Provost will serve as an additional ex officio Patron. In addition, the Provost will serve as Chair of the Patrons.

Independent Patrons

3.14.3 There will be five 'Independent Patrons' appointed as follows:-

- the Minister of any Church serving the Parish of the Church of the Holy Rude and the Session Clerk of the Church of the Holy Rude whom failing a member of the Kirk Session nominated by the Minister and/or the Session Clerk respectively;
- the Dean and the Treasurer of the Guildry of Stirling both as ex officio Patrons whom failing members of the Guildry nominated by the Dean and/or the Treasurer respectively; and
- the Deacon Convenor of the Seven Incorporated Trades of Stirling whom failing a member of the Seven Incorporated Trades of Stirling nominated by the Deacon Convenor.

- 3.15 Given that the Patrons originally appointed in terms of John Cowane's 1637 Deed of Foundation of Trust were the Provost, Bailies, Dean of Guild, Deacons of the Seven Incorporated Trades of Stirling and the First Minister of Stirling, the administrative changes proposed in the revised Scheme in relation to the appointment of the Patrons is narrower in scope and more closely reflects John Cowane's original testamentary wishes.
- 3.16 The remaining administrative changes proposed in the revised Scheme are also narrower in scope than those in the original Scheme. Insofar as the revised Scheme provides for the Independent Patrons voting alone in relation to matters in which Stirling Council has an interest these "Reserved Matters" in respect of which the Council Patrons will not be permitted to consider or vote on are as follows:-
- 3.16.1 entering into any disposal or lease of land, or the creation or renunciation of other rights in land to which both the Patrons and Stirling Council are parties;
- 3.16.2 entering into any contract (including a contract for services) to which both the Patrons and Stirling Council are parties; and
- 3.16.3 any actual or proposed claim or court proceedings or arbitration by the Patrons against Stirling Council, or brought by Stirling Council against the Patrons.
- 3.17 The revised Scheme also reduces the quorum for a Patron's Meeting from seven to five. Where a Reserved Matter is being determined the quorum will be three of the five Independent Patrons.

Decision that the auctor in rem suam principle did not apply

- 3.18 At a Meeting of the new independent Patrons of Cowane's Hospital Trust in March 2011 a decision was made not to pursue Stirling Council for alleged breaches of trust and as such this matter is finally at an end.

4 POLICY/RESOURCE IMPLICATIONS AND CONSULTATIONS

Policy Implications	
Equality Impact Assessment	No
Strategic Environmental Assessment	No
Single Outcome Agreement	Yes
Diversity (age, disability, gender, race, religion, sexual orientation)	No
Sustainability (community, economic, environmental)	No
Effect on Council's green house gas emissions	No Effect
Strategic/Service Plan	No
Existing Policy or Strategy	No
Risk	No
Resource Implications	
Financial	No
People	No
Land and Property or IT Systems	No
Consultations	
Internal or External Consultations	No

Equality Impact Assessment

- 4.1 This report has been considered under the Council's Equality Impact Assessment, and was assessed as not relevant for the purposes of Equality Impact Assessment.

Strategic Environmental Assessment

- 4.2 The contents of this report were considered under the Environmental Assessment (Scotland) Act 2005, and a strategic environmental assessment is not required.

Single Outcome Agreement

- 4.3 The outcome of this Report supports Strategic Theme B Making Stirling a Place where Participation and Democracy are encouraged.

Other Policy Implications

- 4.4 None.

Resource Implications

- 4.5 None.

Consultations

- 4.6 None.

Council and Executive Only

Tick (✓)
to confirm

The appropriate Portfolio Holder(s) has been consulted on this report	✓
The Chief Executive/appropriate Assistant Chief Executive(s) has been consulted on this report	✓

5 BACKGROUND PAPERS

- 5.1 SC487 of Minute of Meeting of Stirling Council dated 8 February 2007 and Report dated 24 January 2007 by Bob Jack Director of Corporate Services.
- 5.2 EX218 of Minute of Meeting of Executive dated 5 March 2009 and Report dated 26 February 2009 by Elizabeth Mary Duncan Acting Solicitor to the Council.
- 5.3 SC340 of Minute of Meeting of Stirling Council dated 2 April 2009 and Report dated 26 February 2009 by Elizabeth Mary Duncan Acting Solicitor to the Council.
- 5.4 SC515 of Minute of Meeting of Stirling Council dated 11 March 2010 and Report by Alison M Gallacher, Solicitor.

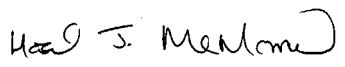
6 APPENDICES

- 6.1 Certified Copy of Court of Session Interlocutor dated 27 January 2011 and copy Cy-Pres Scheme.

Author(s)

Name	Designation	Telephone Number/E-mail
Elizabeth Mary Duncan	Solicitor to the Council	443352 duncanl@stirling.gov.uk

Approved by

Name	Designation	Signature
Hazel McMorrow	Head of Governance	

Date 15 August 2011

Service
Reference

APPENDIX 1

Certified Copy of Court of Session Interlocutor dated 27 January 2011 and copy Cy-Pres Scheme

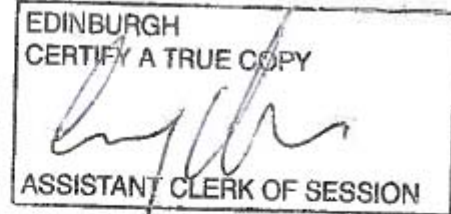
IN THE COURT OF SESSION

COPY



Certified Copy Interlocutor

In the
PETITION
Of



Neil Benny, residing at 141 Glasgow Road, Stirling, **Margaret Brisley**, residing at 18 Milnepark Road, Bannockburn, Stirling, **Ian Brown**, residing at 1 Bohun Court, Stirling, **Scott Farmer**, residing at 76 Clark Street, Bannockburn, Stirling, **Tony Ffinch**, residing at 38 Lagrannoch Drive, Callander, **Colin Finlay**, residing at 5 Westhaugh Road, Stirling, **John Hendry**, residing at Inverteith, 180 Drip Road, Stirling, **Graham Houston**, residing at 6 Newton Crescent, Dunblane, **Graham Lambic**, residing at 23 Queen Street, Stirling, **Colin O'Brien**, residing at 20 Clairinch Way, Drymen, **Paul Owens**, residing at Benview, Lochard Road, Aberfoyle, **Steven Paterson**, residing at 18F Main Street, Cambusbarron, Stirling, **Graham Reed**, residing at Kaimes Farm, Dumbarton Road, Stirling, **James Thomson**, residing at 7 Munro Avenue, Causewayhead, Stirling, **James Wood**, residing at Ledard Farm, Kinlochard, Stirling and **The Reverend Ian Paterson**, Interim Moderator, Church of the Holy Rude, Stirling, the **Patrons of Cowane's Hospital** (Scottish charity number SC019364)

Petitioners

for

Approval of a Cy-Pres Scheme

27 January 2011

Lord Brodie

Act: Lake QC

The Lord Ordinary, having heard Counsel and having resumed consideration of the petition and productions; the answers previously lodged having been withdrawn at the Hearing on 16 June 2010,

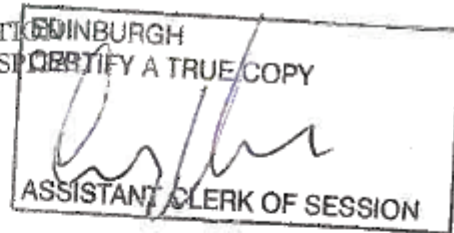
- (1) Allows the draft scheme as set forth in Appendix 1 to the Petition as amended, no 11 of process, to be further amended by inserting the sum of "Two million, three hundred and sixty three thousand pounds, two hundred and fifty one pounds and ninety pence" (£2,363,251.90) at 2(ii)
- (2) Approves said scheme as amended, which is annexed hereto, for the future government and management of the Cowane's Hospital Trust and Decerns;
- (3) Finds the Petitioners entitled to the expenses of and incidental to the petition out of the funds of Cowane's Hospital Trust; and
- (4) Appoints a certified copy of this Interlocutor together with a copy of the said Scheme, as amended, as certified by the Solicitors for the Petitioners to be registered in the Books of Council and Session.

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P H Brodie



SCHEME FOR THE ADMINISTRATION OF THE FUNDS OF COWANE'S HOSPITAL



1 In this Scheme:

the term "Foundation Deed" means the Deed of Foundation of Cowane's Hospital being a Contract of Agreement between the Provost, Baillies and Town Council of the Burgh of Stirling and Alexander Cowane of Wester Polmaise as Heir and Executor of John Cowane dated 13 February 1637;

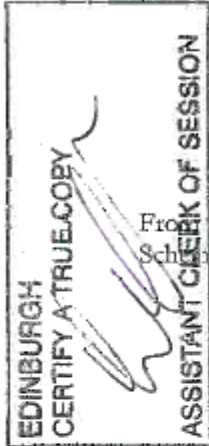
the term "the Patrons" means the Patrons of Cowane's Hospital acting from time to time in terms of the Foundation Deed as varied by the Stirlingshire Educational Trust Scheme 1957, by the Scheme approved by interlocutor of the Court of Session dated 5 July 1994 and, after the date of the interlocutor of the Court of Session approving this Scheme, by this Scheme;

the term "the existing Patrons" means the Patrons acting immediately prior to the date of the interlocutor of the Court of Session approving of this Scheme;

the term "the Trust Fund" means the whole property and assets of whatsoever sort held by the Patrons from time to time; and

the term "Stirling Council" shall, save where the context requires otherwise, be deemed to be a reference also to any statutory successor or successors of Stirling Council for the area of the former Burgh of Stirling.

- 2 (i) From and after the date of the interlocutor of the Court of Session approving of this Scheme, the income of the Trust Fund will cease to be divided into two halves.
- (ii) Within 21 days of the date of the interlocutor of the Court of Session approving of this Scheme, the sum of TWO MILLION THREE HUNDRED AND SIXTY THREE THOUSAND TWO HUNDRED AND FIFTY ONE POUNDS NINETY PENCE (£2,363,251.90) will be paid by the Patrons from the Trust Fund to Stirlingshire Educational Trust, to be held and applied by the Stirlingshire Educational Trust or any successor body thereto in terms of Section 10(1) of the Stirlingshire Educational Trust Scheme 1957 or any amendment or re-enactment thereof from time to time in force. From and after the date of payment of said sum by the Patrons to Stirlingshire Educational Trust, Stirlingshire Educational Trust shall have no further claim of any kind on the Trust Fund, whether in terms of capital, income or otherwise.
- (iii) The remainder of the Trust Fund (which will be hereinafter referred to as "the Housing Fund") will be held and the income from it applied by the Patrons for the relief of those in need by reason of age, ill-health, disability, financial



hardship or other disadvantage through the provision of housing, and in particular sheltered housing, within the local government area of Stirling Council. To this end, the Patrons may pay the whole or part of the income arising from the Housing Fund to Cowane's Housing Association Limited, which the Patrons established under powers afforded them in terms of the Scheme approved by interlocutor of the Court of Session dated 5 July 1994. Notwithstanding the foregoing, in carrying out the purposes of the Trust the Patrons shall be and are hereby bound to ensure that the Trust Fund is applied only for purposes which are charitable in terms of both the Charities and Trustee Investment (Scotland) Act 2005 and the Taxes Acts and any statutory modification or re-enactment thereof

From and after the date of the interlocutor of the Court of Session approving of this Scheme:

the Patrons shall consist of

- (a) members of Stirling Council *ex officio*, as more particularly set out in paragraph 4 below,
- (b) the Provost of Stirling Council *ex officio*, in the event that the Provost is not appointed as a Patron by virtue of sub-paragraph 3(a) above,
- (c) five other individuals appointed in the manner described in paragraph 5 below (hereinafter referred to as "the Independent Patrons"),

and the Housing Fund shall be held by the Patrons as so constituted.

4. The Patrons appointed by virtue of paragraph 3(a) above shall be those members of Stirling Council representing the geographical area of the former Burgh of Stirling shown coloured green, orange and blue on the plan annexed to this Scheme as Appendix III. The Patrons appointed under sub-paragraphs 3(a) and 3(b) above shall collectively be known as "the Council Patrons".
5. The Independent Patrons shall be appointed as follows:
 - (i) the Minister or Interim Moderator of the Church of the Holy Rude, Stirling or the Church of Scotland Parish serving the whole or greater part of the current Parish of the Church of the Holy Rude *ex officio*, whom failing a member of the Kirk Session of the said Church nominated by the said Minister or Interim Moderator;
 - (ii) the Session Clerk of the Church of the Holy Rude, Stirling or of the Church of Scotland Parish serving the whole or greater part of the current Parish of the Church of the Holy Rude *ex officio*, whom failing a member of the Kirk Session of the said Church nominated by the said Session Clerk;
 - (iii) the Dean of the Guildry of Stirling *ex officio*, whom failing a member of the Guildry of Stirling nominated by the Dean;

(iv) the Treasurer of the Guildry of Stirling *ex officio*, whom failing a member of the Guildry of Stirling nominated by the Treasurer;

(v) the Deacon Convenor of the Seven Incorporated Trades of Stirling *ex officio*, whom failing a member of the Seven Incorporated Trades of Stirling nominated by the Deacon Convenor.

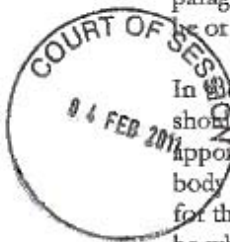
Any nomination made in terms of sub-paragraphs 5(i) to 5(v) above shall be renewed every three years. On renewal, the existing nominee shall be eligible for re-nomination.

In the event of the death or resignation of a nominee the nominator shall be asked to nominate a replacement to serve for the remainder of the term which the nominee would have served, but for his or her death or resignation. Such replacement nominee shall be eligible for re-nomination in the same way as would have the nominee whom he or she replaces.

Any person appointed or nominated, or reappointed or renominated, under sub-paragraphs 5(i) to 5(v) above may only hold or continue to hold office provided that he or she is not also a member of Stirling Council.

In the event that any of the bodies referred to in sub-paragraphs 5(iii) to 5(v) above should cease to exist, the Patrons shall be entitled to nominate another body to appoint an Independent Patron in place of the body that has ceased to exist, and the body so nominated shall be substituted in the relevant sub-paragraph of this Scheme for the body which it replaces: provided that any body nominated as aforesaid shall (a) be wholly independent of Stirling Council; and (b) have a connection with the City of Stirling.

- 6 The Provost of Stirling Council *ex officio* shall serve as the Chairman of the Patrons. At their first meeting held after 1 April in each year, the Patrons shall elect a Vice-Chairman, who shall hold office for a period of three years or until he or she ceases to hold office as a Patron, whichever shall be the earlier. If the existing Vice-Chairman at any time should cease to hold office as a Patron, then a successor will be elected by the Patrons at their next meeting. If the existing Vice-Chairman at any time remains a Patron, then he or she shall be eligible for re-election.
- 7 (i) Where any Reserved Matter (as defined in paragraph 7(ii) below) requires to be considered by the Patrons, it shall be considered and voted on by the Independent Patrons alone, and the Council Patrons shall not be entitled to consider or vote on any such matter.
- (ii) The following shall be Reserved Matters:
- (a) entering into any disposal or lease of land, or the creation or renunciation of other rights in land to which both the Patrons and Stirling Council are parties;

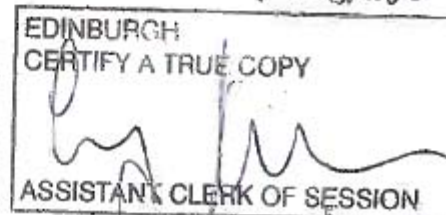


- (b) entering into any contract (including a contract for services) to which both the Patrons and Stirling Council are parties;
 - (c) any actual or proposed claim or court proceedings or arbitration by the Patrons against Stirling Council, or brought by Stirling Council against the Patrons.
- (iii) At any meeting of the Independent Patrons to consider a Reserved Matter:
- (a) the Vice-Chairman, if he or she is an Independent Patron, or another Independent Patron selected by those present shall preside;
 - (b) a quorum shall be 3 Independent Patrons; and
 - (c) no Council Patron shall be present;
- (iv) Any advice received by the Independent Patrons in relation to a Reserved Matter shall be confidential to the Independent Patrons, and shall not be communicated to the Council Patrons.
- (v) Any decision of the Independent Patrons in respect of a Reserved Matter shall be binding on the whole of the Patrons, and any contract, disposition, lease or other document relating to a Reserved Matter shall be entered into, and any court or other proceedings in respect of a Reserved Matter shall be conducted, in the name of the Patrons.
- (vi) At any meeting of the Patrons, other than a meeting of the Independent Patrons to consider a Reserved Matter:
- (a) the quorum shall be 5 Patrons; and
 - (b) it shall not matter whether the quorum comprises Council Patrons, Independent Patrons, or any combination of the two.
- 8 The Patrons may recover their reasonable expenses incurred in attending meetings of the Patrons or of the Independent Patrons, or otherwise attending to the business of the Patrons, out of the Housing Fund.

Edinburgh, 27 January 2011

Lord Brodie

The foregoing scheme as amended is signed and authenticated relative to Interlocutor of this date.



APPENDIX III

Ancient Royalty,
Stirling.

- Castle
- Stirling East
- Stirling West

EDINBURGH
CERTIFY A TRUE COPY

Stirling Council
Assets, Property &
Facilities Management,
Municipal Buildings,
Stirling,
Fife KY16 9JL
Tel: 01753 822222



ASSISTANT CLERK OF SESSION



