LITIGATION IN SCOTLAND. WHAT YOU SHOULD KNOW: 10 KEY FEATURES

"There's nac place like hame, quo the de'il when he fand himsel' in the Court of Session"[1].

Disputes arising in the course of trade are, for most, a commercial reality, and litigation remains an effective tool to enforce rights, recover damage, and resolve disputes. It is therefore important for companies operating in Scotland to understand the Scottish Court System and how litigation in Scotland differs from the rest of the UK.

This Client Guide highlights ten important features of litigation in Scotland.

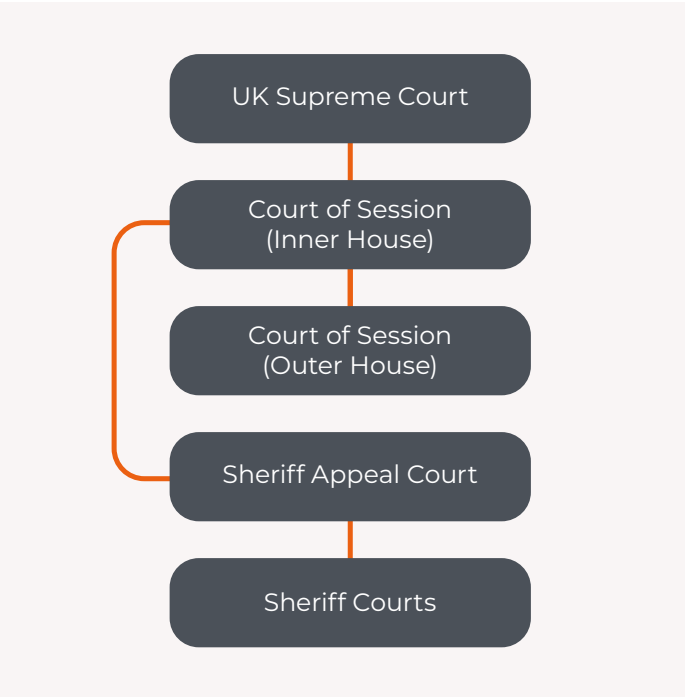
1. Court Structure

The Court of Session is Scotland's supreme civil court – equivalent to the High Court in England. It sits in Edinburgh and hears a wide range of cases including high value claims (upwards of £100,000). The Court of Session has a specialist Commercial Court which allows transactions or disputes of a commercial or business nature to be handled more quickly and flexibly, and to be heard by judges with commercial expertise.

The Court of Session is comprised of the Outer House and Inner House. The Outer House hears civil cases when they first come to court, usually presided over by a single judge called the Lord Ordinary. The Inner House is primarily an appeal court, reviewing decisions from the Outer House, sheriff courts, and other tribunals. Decisions of the Inner House can be appealed to the UK Supreme Court.

The Sheriff Courts are akin to the English County Courts. Sheriff Courts sit in towns and cities across Scotland. They have exclusive jurisdiction over disputes worth less than £100,000.

In light of the COVID-19 pandemic, courts in Scotland are seeking to maximise the opportunities for digital and remote business solutions. In the Court of Session the Inner House is sitting as an online court for appeal hearings. Procedural business in the Outer House is being conducted by telephone hearing or written submissions, and substantive hearings conducted by video conference or telephone hearing.



1 The Laird of Logan, *Anecdotes and Tales Illustrative of the Wit and Humour of Scotland* (1863)

2. Prescription and limitation

In Scotland, claims for negligence or breach of contract must be brought within five years. After this time, the parties' rights and obligations will be extinguished – i.e. they will cease to exist. There are some exceptions to the 5 year period. These are limitation periods, within which actions must be raised:

- Personal Injury: 3 years
- Defamation: 3 years
- Harassment: 3 years
- Product Liability: 10 years

Standstill Agreements are relatively common in England and Wales. They allow parties to agree to suspend the operation of prescription and limitation, and therefore the period for commencing litigation.

In Scotland, however, it is not possible to contract out of prescription[2], so Standstill Agreements are of no effect.

The law in this area is due to change. The Prescription (Scotland) Act 2018 makes important changes regarding when 5 year prescriptive periods start to run, including in relation to cases involving latent defects. It will also allow parties to enter into a Standstill Agreement to extend prescriptive periods by up to a year in certain circumstances. At the date of writing, however, the new Act remains largely unimplemented.

3. Pre-action conduct

In England and Wales, parties must comply with Pre-Action Protocols and Practice Directions before commencing litigation. This prescriptive approach means that costs can be front-loaded. Matters are compounded by the fact that if parties fail to comply with the Protocols, judges can impose costs penalties.

This is not generally required in Scotland, except in relation to personal injury or professional negligence claims, where voluntary pre-action protocols are available. In addition, in Commercial Actions in the Court of Session, prior to commencing litigation, matters in dispute must be discussed and focused between the parties, the nature of the claim must be set out, and documents and expert evidence provided.

4. Caveats

All businesses with interests in Scotland should consider lodging caveats. They are inexpensive to obtain, but valuable to have in place.

Caveats can be lodged at the Court of Session, and any relevant Sheriff Courts in Scotland. Once lodged, the Court must give your solicitors prior notice if an application for an interim interdict[3], an interim winding up order or bankruptcy order is made against you or your business.

Without a caveat, the Court is not obliged to inform defenders that an application for interim interdict has been made against them, so the order could be granted without notice or attendance.

If a caveat has been lodged, prior notice of the application is given. This may buy time for negotiation, ordering of affairs and attendance at any hearing to oppose the application.

5. Case management and costs

In the Commercial Court in Scotland, wherever possible, the same judge will hear all stages of an action, and is encouraged to take a proactive approach towards case management. The court is also required to actively manage cases in personal injury claims. But otherwise, Scottish judges are less hands on and interventionist than in England, where the courts have wide ranging powers to manage cases and party behaviours, backed with the threat of costs penalties.

In England, the courts are required to actively manage cases to give effect to the overriding objective of dealing with them justly and at proportionate cost. This requires active cost budgeting and management by the court and the parties. There is no equivalent in Scotland.

Court fees in Scotland tend to be considerably lower than in England, which can impact the overall cost of the litigation. For example, the court fee for issuing proceedings in England can be up to £10,000, depending on the value of the claim. In Scotland a flat fee of £319 is payable[4].

As in England, the courts have discretion to decide which party should bear the costs of the proceedings. Generally, the unsuccessful party will have to pay a portion of the successful party's costs, although the court will also consider other factors such as the facts of the case and the conduct of the parties both pre-action and during proceedings.

Once the court has decided which party will be liable for costs and in what portion, the precise amount payable will be calculated by an auditor (an officer of the court) in a process called taxation. The auditor will only allow amounts that are reasonable for conducting the proceedings in a proper manner to be recovered. New rules were introduced in April 2019. These provided that costs would be recovered based on time spent on the matter, applying standard rates. Previously, block fees were recoverable for specific activities.

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 paved the way for a range of alternative methods of funding litigation in Scotland. A number of the key provisions relating to alternative funding sources are not yet in force and secondary legislation will be required to implement these. However, from April 2020, damages based agreements will be permissible in certain Scottish proceedings. These will include partial damages based agreements (described colloquially as *"no win, lower fee"*), which are not available in England.

2 Prescription and Limitation (Scotland) Act 1973, Section 13

3 Interim interdicts are temporary court orders. They can cover a range of issues, including financial, employment or property matters.

4 Court fees are reviewed annually. The figure stated is correct from 1 April 2020.

6. Diligence on the dependence and caution for expenses

Procedures exist in Scotland to enable a pursuer (claimant) in Scotland to preserve a defender's assets pending the outcome of a case. An arrestment freezes money or goods which are owned by the defender, but held by a third party (e.g. banks). Inhibitions on the dependence prevent defenders from transferring or otherwise dealing with heritable property (land and buildings). The pursuer must persuade the court that it has a prima facie case, and that there is justification for the diligence. Such measures can have major impacts on financing arrangements, sales and cashflow of businesses.

In England, there is no general right to diligence on the dependence. The closest equivalent is a freezing order which might be obtained (a) if there is a strong case that assets are being dissipated, and (b) if undertakings are given in relation to costs of third parties, and damages if the court subsequently finds the applicant was not entitled to the injunction.

Conversely, it is possible for a defender (defendant) in Scotland to seek security for its costs, called "caution for expenses". This security will be granted where the defender can demonstrate that there are reasonable grounds to believe the pursuer could not, if required, meet the defender's expenses of the claim. If granted, the pursuer must provide the caution or security (usually money or a bond deposited with the court) within a specified time period. Failure to do so allows the defender to apply for the case to be dismissed. The amount of security and the time-period are set by the court. The amount will usually reflect a reasonable estimate of the defender's expenses from the date of its application (motion) for caution for expenses to the end of the proceedings.

7. Disclosure

Parties to litigation in England will have extensive disclosure obligations to search for and disclose all documents in their possession, whether supportive or not to their case. This can be a costly and time-consuming exercise.

General disclosure of this nature does not exist in Scottish litigation, where parties need only disclose the documents upon which they rely in pleadings.

If a party wants to obtain evidence in Scotland, it applies to the court for an order for commission and diligence. This process allows for recovery of evidence from other parties to the court action or from third parties. The application for commission and diligence is accompanied by a Specification of Documents, which requests particular documents or categories of document. The Specification must relate to matters of fact that have already been referred to in the pleadings: fishing trips for evidence will not be permitted. Documents that are privileged do not have to be disclosed.

While the Scottish process is certainly less burdensome, it has its limitations. Parties will not necessarily see all documentation relevant to a case, and will only be able to recover types of document which are known to exist. This more restrictive approach to disclosure may impact settlement prospects.

8. Witness statements and expert reports

Witness Statements are not used as a matter of course in Scotland.

The exception is the Commercial Court, where witness statements are exchanged prior to proof (trial), and the judge may direct that such witness statements will stand as the witnesses' evidence in chief.

Otherwise, precognitions (equivalent to proofs of evidence) will be taken to ascertain the evidence a witness is likely to give in Court, but they are not generally admissible as evidence, and do not usually have to be disclosed to opponents.

The benefit is that the cost and time which may be associated with preparation of witness statements can be avoided. The downside, however, is that there is more scope for witnesses to go off piste in court.

There are far fewer formal rules relating to the appointment of expert witnesses in Scotland than in England. If a party does seek to rely on an expert report, the party must disclose it as with any other document that it seeks to rely on. In commercial actions, the timing of disclosure of any expert report is likely to be more strictly regulated. As explained above, a party seeking to rely on an expert report should disclose this in pre-action correspondence. The Court is also likely to exercise its case management responsibilities to direct when expert reports are disclosed, if they have not been disclosed in pre-action correspondence.

9. Hearings

In Scotland, a substantive hearing on the evidence is called a "proof" (equivalent to a trial in England). A case will go to proof where there is a factual dispute between the parties.

A "debate" is a hearing on legal arguments. It can be used to determine all or part of a case without the need to lead evidence. It is similar to a summary judgment or trial of a preliminary issue in England.

"Proofs before answer" are hearings on both factual and legal issues. Proofs before answer are appropriate where the court needs to hear factual evidence before it can determine a legal question.

Jury trials are very rarely used in Scotland, and only in personal injury cases in the Court of Session or the Sheriff Personal Injury Court in Edinburgh.

Aside from jury trails, all substantive hearings in Scotland are heard by a single judge. Solicitors can represent

clients in the Sheriff Courts, but only Advocates (Scottish barristers) or solicitor-advocates have rights of audience in the Court of Session[5].

10. Enforcement

At the time of writing, the decisions of the Scottish courts can be enforced in other EU Members States (and vice-versa) via the Recast Brussels Regulation. This regulation will cease to have effect in the UK at the end of the Brexit transition period on 31 December 2020. At present, it is not clear what measures will be implemented after that date.

Judgments of the Scottish courts can be enforced in the UK's other jurisdictions (and vice-versa) via the Civil Jurisdiction and Judgments Act 1982.

Here to help

At HFW we employ a number of Scots qualified lawyers who can advise you on disputes in Scotland. We have good relationships with a number of Scottish Advocates and Edinburgh agents to assist with court business. We have been instructed in some of the most technically and procedurally complex cases to ever come before the Court of Session on disputes regarding renewables, engineering and professional negligence. We are also regularly instructed on Alternative Dispute Resolution in Scotland including mediation, adjudication and arbitration.

Holman Fenwick Willan LLP is a limited liability partnership registered in England and Wales (with registered number OC343361) and is authorised and regulated by the Solicitors Regulation Authority. We retain local lawyers to assist where required by local regulatory requirements.

5 English qualified barristers do not have rights of audience in the Court of Session

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