HANDLING DISPUTES IN SCOTLAND

A quick guide to **Scottish civil procedure**

SHEPHERD+WEDDERBURN

HANDLING DISPUTES IN SCOTLAND

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A (VERY) SHORT HISTORY OF SCOTS LAW

Wha's like us?

We do things a bit differently north of the border. This is attributable to the unique history of our legal system. It might all have been very different if Alexander III, King of Scots, had not been thrown from his horse down a cliff, on the way from Edinburgh to Fife to visit his young bride on the stormy night of 18 March 1286.

In the 100 years or so up until then, Scotland's legal development followed a path which can fairly be described as converging with that of its larger and richer neighbour, England. Had Alexander had a son to succeed him this path might have continued. But he left no son; instead his heir was his granddaughter the Maid of Norway (three years old) who was sent for but who tragically drowned on the journey. Scotland was left weak and leaderless. The English King Edward I forced an adjudication on who would be King of Scots and the result was Edward Balliol, effectively a vassal of the English monarch. Insurrection raged, led by William Wallace (Braveheart and all that) and Robert the Bruce, with 20 years of Anglo-Scots war, resulting in Bannockburn and independence! Scotland then had to look for a new ally and turned to France and out went Anglo-Norman common law and in came civil law. Over the next couple of hundred years Scotland acquired the rudiments of a civilian legal system and a court structure expressly based on a French model. These fundamentals survived the Union of the Crowns in 1603 and of the two countries in 1707. Although the years since 1707 have ensured that Scotland was again drawn into the common law system and tradition, the civilian roots of Scots law are still evident today.

Statue of Robert the Bruce at Bannockburn battle field

INTRODUCTION

Who we are

We specialise in resolving disputes. Knowledge of the courts and the rules they apply is essential to what we do. The work we do ranges from advising our clients on what is likely to happen if they take a certain course of action, assessing the prospects of their case, negotiating a solution on their behalf and/or representing them in formal mediation, court or arbitration proceedings.

We work in all of the courts in Scotland, appearing ourselves in the Sheriff Courts, instructing **Advocates** and our own Solicitor Advocates to appear in the Court of Session and appearing in the Scottish Land Court and Lands Tribunal for Scotland. The majority of our clients' disputes are heard by the Court of Session and so we focus in this guide on Court of Session procedure and in particular on Commercial Actions.

Having in-house Solicitor Advocates (who have rights of audience in our higher courts) as well as an excellent working relationship with the Scottish Bar, and knowing which **Advocate** to instruct for which piece of work, means optimum representation for our clients.

This guide

In this guide we provide a high-level overview of Scottish civil procedure; essential knowledge in considering how best to handle disputes in Scotland.

Scottish court procedure continues to use a fair amount of Latin and specialist terminology, with which most people are not familiar. Often the English equivalents provide a helpful translation, even for Scottish solicitors who do not practice in the courts. Rather than give equivalent English terminology throughout this guide, we have included a glossary of terms on the final page, with defined terms **highlighted** throughout the document.

Our civil procedure rules are currently under review. The review is ongoing with no precise date set for implementation, however changes may be forthcoming from 2019, particularly in light of the introduction of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 and the Prescription (Scotland) Act 2018, albeit that various secondary legislation and rules changes are awaited in order to bring those Acts' provisions into full force and effect and provide more detail on how they will operate in practice. Please check our website for regular updates on this and all other relevant developments related to Dispute Resolution in Scotland: shepwedd.com/scots-counsel.

In addition to providing an overview of Scottish court procedure, we also cover topics that are relevant to all disputes, including privilege and confidentiality, **prescription**, disclosure, remedies and enforcement – each of which has its own particular Scottish slant.

Who this guide is for

You may be a solicitor in another jurisdiction, familiar with your own court procedure but with a requirement to understand the Scottish system. This guide will provide you with an explanation of our (at times archaic) terminology and our court procedures, which should assist in advising your clients and instructing Scottish solicitors.

If you are an in-house solicitor in a business where you cover a range of legal work, you won't necessarily live and breathe court procedure as we do (lucky you!), but you will likely want a general understanding of the court system and procedure in Scotland. We hope this guide provides a useful overview.

You may be a business that doesn't have an in-house solicitor, in which case you will be managing disputes yourself up to a certain point and then referring them out to your external solicitors. Although you will rely on them for advice, this guide should provide a useful overview of the process.

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We hope you find our guide useful. Please get in touch if you have any questions or if there's anything we can assist with.

SHEPHERD AND WEDDERBURN LLP

THE SCOTTISH COURT SYSTEM

SHERIFF COURT

There are a number of levels in the civil court structure. At the bottom, we have the Sheriff Court, which is broadly comparable to the County Court in England.

There are currently 39 Sheriff Courts in Scotland, split into six areas, for administrative purposes, known as **Sheriffdoms**. Civil cases in the Sheriff Court are heard by a Sheriff sitting alone.

Each **Sheriffdom** has a Sheriff Principal whose role is part judicial and part administrative. The Sheriff Appeal Court (introduced in January 2016) hears appeals from Sheriff Courts throughout Scotland.

The All Scotland Personal Injury Sheriff Court (also introduced in January 2016) sits in Edinburgh.

Since September 2015 disputes of a value of:

- less than £100,000 must be raised in the Sheriff Court; or
- more than £100,000 can be raised in either the Sheriff Court or the Court of Session.

COURT OF SESSION

The Court of Session is Scotland's supreme civil court. It sits in Parliament House in Edinburgh, which was the home of the pre-1707 Parliament. The Court of Session is a court of first instance as well as a court of appeal. It is therefore comparable to the High Court and the Court of Appeal in England.

The Court of Session is divided into the Outer House and the Inner House. The Outer House consists of Lords Ordinary (judges) sitting alone or, in certain cases, with a civil jury.

Designated judges deal with certain specialist matters, and there are special procedures for intellectual property disputes, commercial cases, personal injury cases and family law matters.

The Inner House is in essence the appeal court, although it has a small range of first instance business. It is divided into the First and Second Divisions, of equal authority, and presided over by the Lord President and the Lord Justice Clerk respectively. Each division is made up of six judges, but the quorum is three. Due to pressure of business, an Extra Division of three judges sits frequently nowadays. The Divisions hear cases on appeal from the Outer House, the Sheriff Court Appeal Court and certain tribunals and other bodies. On occasion, if a case is particularly important or difficult, or if it is necessary to overrule a previous binding authority, a larger court of five or more judges may be convened.

SUPREME COURT

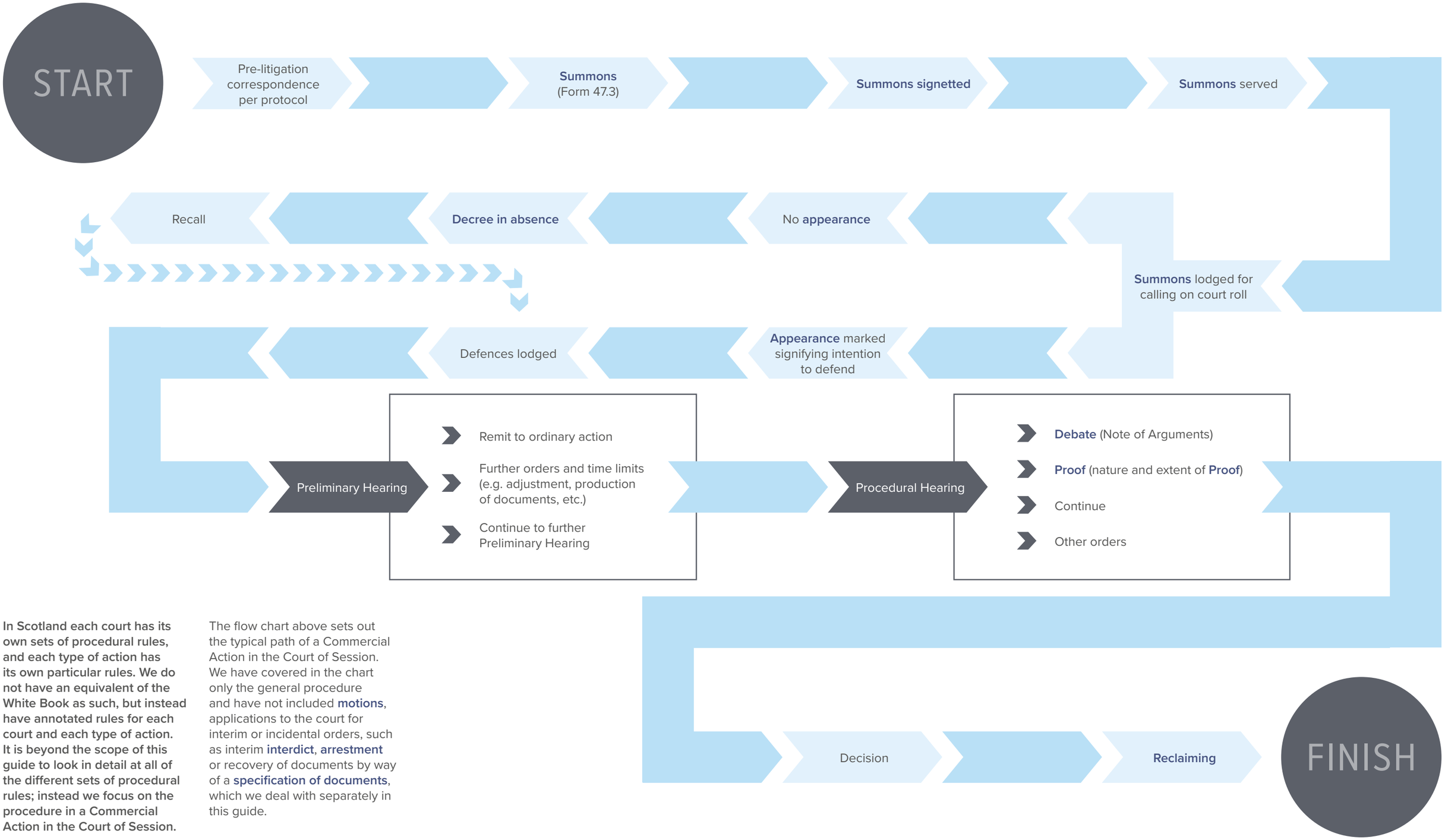
The Supreme Court, as in England and Wales, is the final court of appeal for issues arising out of Scottish civil cases.

The Supreme Court has a right of review of 'devolution issues' under the Scotland Act 1998, including whether acts of the Scottish Parliament or Government are within their devolved competence and if those acts comply with EU law or the European Convention on Human Rights.

An appeal from the Court of Session to the Supreme Court requires permission, either from the Inner House or from the Supreme Court itself. Until 2015 there was a right of appeal, subject only to certification by two **Advocates** that the appeal was reasonable.

There are currently two Scottish Justices of the Supreme Court, Lord Reed and Lord Hodge, in line with a longstanding convention that there be at least two.

STEP-BY-STEP GUIDE TO A COMMERCIAL COURT ACTION IN SCOTLAND



In Scotland each court has its own sets of procedural rules, and each type of action has its own particular rules. We do not have an equivalent of the White Book as such, but instead have annotated rules for each court and each type of action. It is beyond the scope of this guide to look in detail at all of the different sets of procedural rules; instead we focus on the procedure in a Commercial Action in the Court of Session.

The flow chart above sets out the typical path of a Commercial Action in the Court of Session. We have covered in the chart only the general procedure and have not included **motions**, applications to the court for interim or incidental orders, such as interim **interdict**, **arrestment** or recovery of documents by way of a **specification of documents**, which we deal with separately in this guide.

Pre-action Protocol

At present, this is only required in Commercial Court actions but is a practice utilised in Asylum and Immigration cases as well as Personal Injury cases. A practice note directs that there should be an exchange of correspondence in which the parties set out their positions in full and produce any relevant documentation prior to an action being raised. If the claim is one where an expert report will be required to be relied upon then it should be intimated during the pre-action correspondence.

Commencement

In the Court of Session, the action is commenced by way of a Summons or Petition. A Summons is used where a Pursuer is seeking to establish and enforce a right against a Defender. A Petition is used when the authority of the court is required to do something. In the Sheriff Court, the action is commenced by way of Initial Writ or, in some cases, Summary Application.

- **Summonses** run in the name of the sovereign and are **signetted** with the royal seal, meaning that they are sealed with the authority of the court which entitles the **Pursuer** to proceed.
- A case is not in dependence until it has been served and therefore service on the **Defender** is necessary to stop the 'prescriptive clock' running. We do not have standstill agreements in Scotland (although a form of this may soon become law – see Section 7 of this guide). Therefore effective service is essential to avoid losing a claim.
- A **Summons** must be served within a year and a day after **signetting** unless it is a personal injury action, which must be served within 3 months and a day. If it is not served in time the 'instance will fall', meaning that the authority of the court is lost and the **Pursuer** cannot proceed.

Service

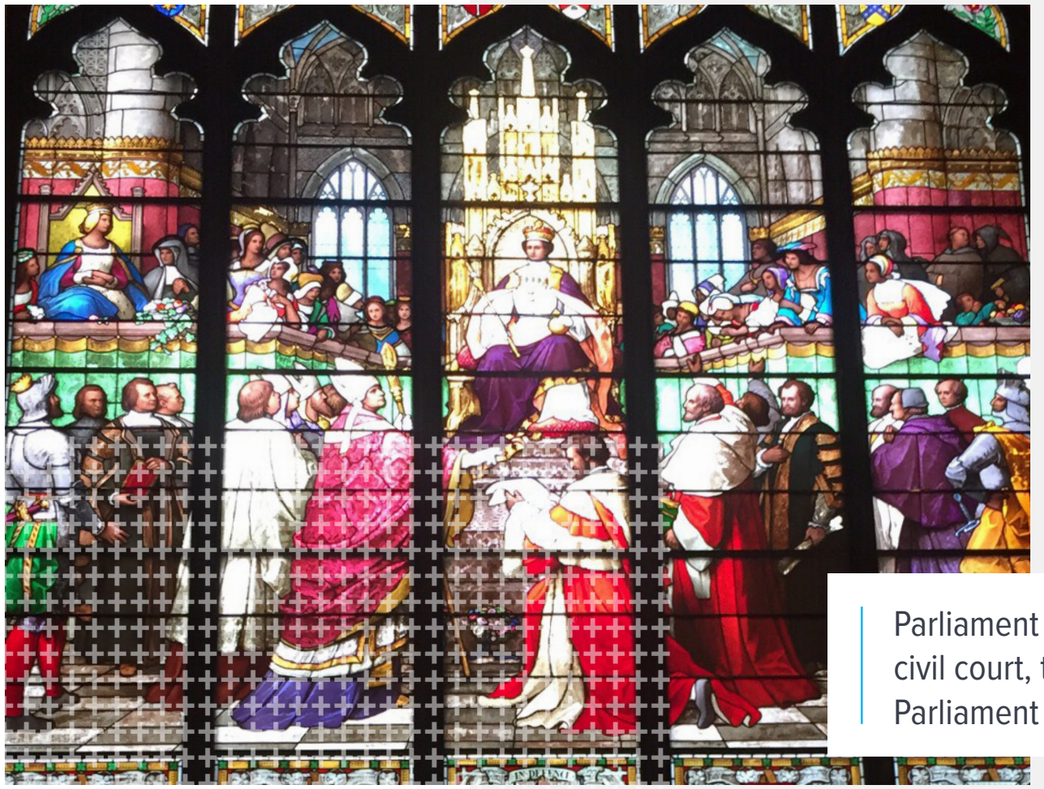
Service of a Summons can be made in a variety of ways. Usually service is made by registered post or by personal service at the hands of Sheriff Officers for Sheriff Court or Messengers at Arms for Court of Session.

- If the **Defender** is in Europe the period of notice given is 21 days.
- If further afield, the period is 42 days.

Unlike in England and Wales, service by ordinary post is not effective.

Pleadings

Whether Court of Session or Sheriff Court, written pleadings are required. Each court has its own Rules of Court but the procedural flow is similar. We continue to use quite technical pleadings in Scotland, although the position is more relaxed in the Commercial Court.



Painted glass window in Parliament Hall, Edinburgh, depicting the coronation of James VI and I

Procedure

In the Court of Session, after the period of notice has expired following successful service, the Summons is lodged for 'calling'. This involves the case appearing in the formal rolls of court, which formally brings the case into court.

Defences will be lodged in respect of **Summonses** and **Answers** lodged to **Petitions**.

A period of adjustment to answer in writing the **averments** of the other party and to alter or expand the case pled is permitted.

Ordinarily the case will arrive at a point where there will either be a legal **debate** or a **proof**. In Commercial actions, as can be seen from the diagram on pages eight and nine, there will be preliminary and procedural hearings along the way, with active case management.

- **Debate**: This is where preliminary legal issues are argued without evidence. Thus there may be an argument that, even if all that is pled by one party is correct, it is insufficient in law to support their position. We do not have a strike out procedure as such. A Summary **Decree** may be sought at an earlier stage where the **Defender** does not disclose a defence. In the Sheriff Court, both **Pursuer** and **Defender** can apply for Summary **Decree** on the grounds that an opposing party's case (or part of it) has no real prospect of success and there are no compelling reasons why Summary **Decree** should not be granted at that stage.
- Proof before Answer: Sometimes such legal arguments require the facts to be established first before questions of law can be answered so a Proof before Answer will be fixed.
- **Proof**: A **Proof** is the equivalent to an English trial where there is a full hearing on the facts of the case.

Evidence

- Evidence is given orally on oath although in some types of case, particularly in the Commercial Court, the practice has recently grown of requiring the lodging of written witness statements. These are generally regarded as the witnesses' evidence in chief.
- These statements should not be confused with **precognitions** which are private statements of the witness taken by the solicitor for the purpose of recording the witness' evidence. They are inadmissible as evidence and cannot be made to be disclosed.

Expert Evidence

- Unlike the position in England and Wales, the Scottish Court currently exercises very little judicial control over expert evidence. There is currently no code of conduct or guidance on the form of or information to be contained in expert reports. However, as part of the recent civil courts review, which is designed to create a modern and more efficient court structure in Scotland, we may expect to see some expert code of conduct introduced.
- There is no requirement for permission from the court to instruct an expert. The Court must certify a witness as skilled in order to be able to recover the cost from the other side if successful. There is no presumption that joint experts be instructed but in managed cases the court may order that if appropriate.
- It is necessary to have an expert report before commencing any action claiming negligence.

Our civil procedure rules are currently under review; please check our website for regular updates: shepwedd.com/scots-counsel.

Parliament House in Edinburgh is home to Scotland's supreme civil court, the Court of Session. Originally the pre Union (1707) Parliament of Scotland sat in its magnificent Parliament Hall.

PRIVILEGE AND CONFIDENTIALITY

Confidentiality

Court hearings in Scotland are normally held in public. Written pleadings and documentary evidence lodged are only available to the parties.

As in England and Wales, communications can be treated as confidential on two grounds:

- Legal advice privilege
- Litigation privilege

The importance of establishing that privilege exists over key documents is that it allows an organisation to maintain a degree of control over the information that is passed to third parties and to the court.

Legal advice privilege

Legal advice privilege (or legal professional privilege) is given to communications between a legal advisor and client. The purpose of legal advice privilege is to enable a client to place unrestricted confidence in his lawyer.

- It applies in both litigious and non-litigious contexts.
- Communications with third parties (e.g. external experts or witnesses) are not covered by legal advice privilege.
- It is only in very limited circumstances that the courts will order disclosure of privileged communications passing between a solicitor and a client; either when the client waives the privilege or where the communications concern an illegal act where the solicitor is directly concerned in the illegality.
- The types of communication to which legal advice privilege applies are those which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context.
- Advice cannot be pure business advice so, for example, strategic or commercial advice will not be covered, as it lacks the relevant legal context.

Litigation privilege

Litigation privilege is a wider type of privilege and protects confidential material that a party has made in contemplation of litigation, where the material was necessary for the sole or dominant purpose of the litigation.

- Privilege attaches as soon as litigation is reasonably contemplated. Here the Scottish courts take a broad view as to when litigation is reasonably contemplated and this may be wider than the approach taken by the English courts.
- In Scotland, proceedings do not have to have commenced formally for the privilege to apply, although litigation must be a real likelihood rather than a mere possibility.

Unlike legal advice privilege, litigation privilege extends to communications with third parties, such as external experts.

Publication of judgments in Scotland

As in England, the starting point in Scotland is that the court process is open. The court rolls are published daily and found on the Scottish Courts website: scotcourts.gov.uk.

- Most hearings in the Court of Session and in the Sheriff Courts are open to members of the public.
- Judgments of the High Court of Justiciary, Court of Session and the Sheriff Courts, as well as of Fatal Accident Inquiries, are published on the Scottish Court website—scotcourts.gov.uk/search-judgments—if they are of particular public interest or decide a significant point of law.

As in England, a wider range of judgments, including earlier decisions, can be found in court reports and are accessible using services such as Westlaw and Lexis Library.

Parties' names are anonymised only in family actions involving children and in some arbitration appeals.

WITHOUT PREJUDICE

The underlying reason for using these words in Scotland, England and Wales is the same – to encourage parties to resolve matters out of court and to prevent statements made in a genuine attempt to settle from being put to the court as evidence of an admission against the interests of the party that made them.

However, the Scottish courts take a different approach to the concept of an 'admission' to that taken by the courts of England and Wales. In England and Wales the courts have given the word a wide meaning, in the sense that it effectively includes all matters disclosed or discussed in without prejudice communications.

The rationale for this seems to be that dissecting out identifiable admissions and withholding protection from the rest of without prejudice communications would create huge practical difficulties, as well as being contrary to the underlying objective of encouraging parties to speak freely when seeking to settle litigation. Without prejudice correspondence in England seems therefore sacrosanct save in the face of a compelling policy reason.

In Scotland, however, there is a distinction between:

- statements made in an attempt to achieve extra-judicial settlement; and
- admissions of fact made within the context of privileged communications.

The privilege only attaches to the former, not to the latter. This demonstrates the different approaches taken north and south of the border, where the English approach appears to be context based whereas the Scottish approach is content based.

- In Scotland, the words 'without prejudice' do not themselves give protection.
- One has to consider the content of the communication.
- If, for instance, there is a clear acknowledgement that liability is accepted, the addition of the words 'without prejudice' will not necessarily prevent the statement being founded upon.
- If a statement of fact is not later to be used against a party, it must be clear that it is a proposition made for the sake of settlement, and not an unequivocal admission of fact.

Using the words 'without prejudice' does not automatically prevent the communication from being admissible in the Scottish courts.

Royal Highland Fusiliers homecoming parade along Union Street in Aberdeen

DISCLOSURE

Disclosure of documents in litigation is another area where the approach taken in Scotland differs greatly from that in England and Wales.

- There is no general obligation to disclose in Scotland.
- If it emerges during a dispute that another party (including a third party) may be in possession of relevant information, it may be possible to recover that from the other party by agreement.
- If the information is not disclosed voluntarily then an application may be made to the court to compel the party holding the documents to disclose them.

The method for asking a court to order disclosure of documents depends whether court proceedings have been raised or not. Parties contemplating litigation may want to see documents relevant to their case as part of their pre-action preparation. The only way to achieve disclosure of documents before formal proceedings have commenced (and in the absence of voluntary disclosure) is by way of a **Section 1 Order**.

Section 1 Orders & dawn raids

A Section 1 Order is so called because it stems from Section 1 of the Administration of Justice (Scotland) Act 1972.

- The party making the application must have a 'prima facie' case (i.e. an arguable case) that the documents exist and that they may be relevant to later court proceedings that are likely to be brought.
- Fishing expeditions, where applications are made on the off chance that there may be relevant documents, are not allowed.

There may be circumstances when there is a suspicion that a party holding documents that may be relevant to your case may conceal or destroy the documents if they are made aware that you are seeking to recover them. In these circumstances, a **Section 1 Order** can be sought 'ex parte' – i.e. without giving notice to the other party.

- The test for an ex parte **Section 1 Order** is very stringent, and there must be a real risk that evidence relevant to contemplated court proceedings is likely to be concealed or destroyed.

If a **Section 1 Order** is granted, a Commissioner, usually a senior member of the Scottish Bar, is appointed. In the case of a dawn raid, power will be given to the Commissioner:

- to remove documents or property and to employ such persons as he or she considers appropriate to assist in the inspection and removal of documents; and
- to enter into premises where it is thought the documentation may be located, and to search for and open lockfast premises.

The Commissioner will be accompanied by a shorthand writer who acts as a clerk. Sometimes the court permits the Petitioner to accompany the Commissioner in order to identify property.

Recovery of documents during a court action

The rules for recovering documents during the dependence of an action are governed by the relevant court rules.

- The court will only order the production of documents bearing upon the issues of fact that have to be determined. Accordingly, there have to be relevant written pleadings to support the call for production of the relevant documents.
- The call for production is framed as a **specification of documents** which requires the approval of the court. A specification expressed in too wide terms and without reference to issues of fact will not be granted. It may also be refused if the terms are too vague. There is a fine line between the need for evidence to elaborate an existing and known case and a 'fishing' diligence where one might be hoping to find something that would support a case that without it cannot be made.

The solicitor seeking recovery has a choice as to the procedure to be adopted.

- He may use the Optional Procedure which entails the serving of an order on the person believed to hold the documents who is requested to produce them voluntarily.
- In Scotland the holder of a document is called a 'haver'. A haver may claim confidentiality in which case the documents they produce must be placed in a confidential envelope and returned to the court rather than to the party who served the order. The court's authority will be required before the envelope is opened.
- Alternatively, the party seeking recovery can go straight to the execution of an open commission. A **diet** for the commission will be fixed and havers cited to attend.
- A Commissioner is appointed to preside over the commission. The haver will be asked if they have any of the documents referred to in the **specification of documents** and, if not, did they ever and what has happened to them etc. A haver is entitled to be represented at the commission. A haver is also entitled to a fee for their trouble in searching out documents called for.

Difficulties arise where documents sought to be recovered are outside Scotland. There are no means of enforcing an order for production of documents and Letters of Request addressed to the appropriate foreign court would be required. However, if the documents are outwith Scotland but in the hands of one of the parties to the action, the court will expect them to be produced.

Letters of Request

The Evidence (Proceedings in Other Jurisdictions) Act 1975 makes provision enabling the Court of Session to assist in obtaining evidence required for the purposes of proceedings in other jurisdictions.

The application is made by **Petition** but the usual rules applying to **Petitions** do not apply and there is no order for intimation and service and no requirement for **answers**.

The **Petition** is required to refer to the request (the Letters of Request usually accompany the **Petition**). The **Petition** should state that, where oral evidence is required, it is for use in a trial or **proof** of fact in civil proceedings before the requesting court.

Where documentary evidence is sought, the Court of Session must be satisfied that such documents would be recoverable if a similar situation arose before the court. The usual form of call used in Scottish procedure for 'all documents showing or tending to show etc.' is thought in England to be too wide ranging to comply with the particular provisions of the 1975 Act, but whilst the Scottish court will not allow a fishing exercise, it does not seem to interpret S2(4) of the 1975 Act restrictively. If the recovery would be permitted under Scots procedure, Letters of Request should generally be given effect.

The court may therefore:

- Appoint a Commissioner (usually a member of the Scottish Bar) for the taking of evidence and/or for the recovery of documents;
- Ordain any witness to attend to give evidence;
- Grant warrant to **Messengers-at-Arms** to cite the witness to appear on the date and at the place fixed;
- Authorise a Scottish solicitor or **Advocate** or any similar person representing the Petitioner in the foreign jurisdiction to examine the witness; and/or
- Authorise a court reporter and/or videographer to be present at the examination of the witness.

E-disclosure

The growth of technology means that electronic data is now perhaps the dominant form of document disclosure in the courts of England and Wales. E-disclosure has begun to be used in Scotland in certain cases but not with the same frequency as in England because of the different disclosure rules.

Solicitors' Rights of Audience

- We appear in all of the civil courts in Scotland including the Sheriff Court, Land Court and Lands Tribunal, although the majority of our cases are heard in the Court of Session and principally the Commercial Court of the Court of Session. Commercial actions are heard by specialist commercial law judges, who have a far greater case management role than is the case in our ordinary procedure. There are four specialist Commercial Judges.
- All of our litigation solicitors can appear in the Sheriff Court, while our Solicitor Advocates can also appear in the Court of Session.

PRESCRIPTION AND LIMITATION

Prescription and limitation is regulated in Scotland by the Prescription and Limitation (Scotland) Act 1973. The 1973 Act applies to all claims where the underlying obligation is governed by Scots law.

Law Reform

Following the decision in ICL (see below) The Scottish Law Commission was asked to consider the area anew in its next programme of law reform. The Prescription (Scotland) Act 2018 obtained Royal Assent on 18 December 2018 and includes a number of the Commission's recommendations. At the time of writing the substantive provisions of the Prescription (Scotland) Act 2018 are not yet in force. Delegated legislation will be required, which will also include transitional provisions. Please check our website for any further update.

- Prescription has the effect of extinguishing a right or obligation completely after a period of time has passed. This is a matter of substantive Scots law and is applicable wherever litigated.
- Limitation, on the other hand, does not extinguish rights or obligations but introduces a procedural bar on raising legal proceedings.
- There is no concept of Primary and Secondary Prescription as in England and Wales.
- It is date of service of the writ that stops the clock.
- There is a 20 year-longstop.

Prescriptive periods

- For a claim to pay money or compensation in contract or in **delict** (tort), the prescriptive period is five years from the date of breach of contract or breach of duty (subject to rules as to when the clock starts ticking).
- For certain claims relating to property, the prescriptive period is 20 years.
- In relation to personal injury actions, claims are limited after three years but the Limitation (Childhood Abuse) (Scotland) Act, which received Royal Assent on 28 July 2017, removed limitation for any historic child abuse that took place after 26 September 1964.
- For claims of defamation, the period is three years.
- For claims of harassment, the period is three years.
- For product liability claims, the period is 10 years.

Standstill Agreements

Until the 2018 Act comes fully into force, standstill agreements have no effect in Scotland. It is not possible to contract to disapply the statutory period. The only way to avoid the claim being lost through prescription or limitation is to effectively serve proceedings on the Defender.

The lack of standstill agreements in Scotland has been considered to not only hinder parties seeking to negotiate claims but also to lead to the unnecessary cost of protective proceedings. A limited form of standstill agreement will be possible once the 2018 Act comes into force.

Standstills will only available:

- once the prescriptive period has started to run;
- for a maximum period of one year; and
- only one standstill will be permitted.

For now, however, there are no standstill agreements in Scotland. Please check our website for regular updates: shepwedd.com/scots-counsel.

When does the clock start ticking?

The decision of the Supreme Court in the case of *David T Morrison and Co Ltd v ICL Plastics Ltd [2014] UKSC 48, 2014 SC (UKSC) 222* held that the way in which the Scottish courts had, for 30 years, interpreted prescription as giving creditors five years to raise actions from the date they first knew, or should have known, of both the loss and the negligence was wrong.

The Supreme Court has held that the five-year period runs from the date of knowledge of loss, injury or damage or the date on which, with reasonable diligence, you could have known about loss, injury or damage. There is no need for awareness of the existence of a claim.

A view of the Balmoral Hotel from Leith Street in Edinburgh

It is irrelevant that the creditor might not know the cause of his loss or the identity of the **Defender** before the five-year period starts to run.

New discoverability test

This decision has caused serious concern and is regarded by many as being unfair. A new discoverability test was proposed by the Law Commission and has been enacted under the 2018 Act. This new test has been devised to address the possible harsh effect on claimants following the decision in ICL. It does not, however, reinstate the law as it was previously understood in Scotland prior to ICL. Whether the claimant is aware that the act or omission that caused the loss, injury or damage is actionable in law will continue to be irrelevant to the triggering of the prescriptive period.

The new test in the Act has three strands.

The claimant must be aware:

- that loss, injury or damage has occurred;
- that the loss, injury or damage was caused by a person's act or omission; and
- of the identity of that person. Until then, the obligation to make reparation is extinguished after five years of knowledge of loss or when the loss might reasonably have been ascertained.

Fraud, concealment and error

Section 6(4) of the 1973 Act provides a defence to a creditor who failed to take action within the five-year period:

- The five-year period is frozen during any period during which the creditor was induced to refrain from making a relevant claim by reason of:
  - fraud on the part of the debtor or any person acting on his behalf; or
  - error induced by words or conduct of the debtor or any person acting on his behalf.
- This does not include any time after which the creditor could, with reasonable diligence, have discovered the fraud or error.

The 2018 Act will also make changes to S6(4), simplifying it to cases where, by reason of fraud or error, a Pursuer failed to make a claim. For now, however, the matter of computation of the relevant period requires careful consideration.

20-year prescription period (longstop)

A 20-year prescription period is applied as a longstop. An obligation will thus expire if, after 20 years, no relevant claim has been made and the subsistence of the obligation has not been acknowledged. This is a 'catch all' provision that applies to all obligations. It is designed to impose an absolute time limit on obligations being enforceable. Unlike the five-year period, the 20-year period cannot be extended on the basis of a lack of awareness by the Pursuer.

Under the 1973 Act, the 20-year period runs from the date on which an obligation becomes enforceable. For obligations to pay damages, this is the date on which loss, injury or damage flowing from the act, neglect or default in question was incurred. Depending on the circumstances, loss, injury or damage might be incurred many years after the wrongful act or omission in question. As a result of this disjoint between the wrong and the resultant loss, it is possible for a long period to pass before the prescriptive period will start. This was seen to undermine one of the key aims of the rules on time bar, which is to prevent stale claims and the considerable practical issues for parties in terms of pursuing or defending such claims. Under the new rules, the 20-year prescriptive period will begin on the date of the act or omission giving rise to the claim and not when loss, injury or damage occurs, ensuring that it is indeed a longstop in name and effect.

Please check our website for regular updates on the progress of the Prescription (Scotland) Act 2018: shepwedd.com/scots-counsel.

JURISDICTION AND CHOICE OF LAW

Jurisdiction in Scotland

The parties' choice of jurisdiction will generally be upheld by the Scottish courts if it is stated clearly in writing. If the parties to a contract have agreed that the Scottish courts shall have jurisdiction over their disputes (whether exclusive jurisdiction or along with another jurisdiction), the Scottish courts will give recognition to that.

If the parties have not agreed in their contract that the Scottish courts will have jurisdiction, the Scottish courts will determine jurisdiction by applying the rules set out in the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act) (which also applies in England & Wales and Northern Ireland). The 1982 Act implements European rules (the Brussels Regulation), and so the rules are very similar to those found in other European states.

The general rule is that a **Defender** must be sued in the state in which they are domiciled, with alternative bases for jurisdiction depending on the type of dispute as follows:

- the place of performance of the obligation at issue is an alternative basis for jurisdiction in a contractual dispute; or
- the location of the harmful event is an alternative basis for jurisdiction in a delictual claim (tort).

There are also special rules for particular types of disputes, such as those involving property, and it is possible to found jurisdiction based on the location of moveable property which has been arrested.

Domicile for an individual depends on where they reside. If they have resided in a certain location for at least the previous three months, they will be presumed to be domiciled there.

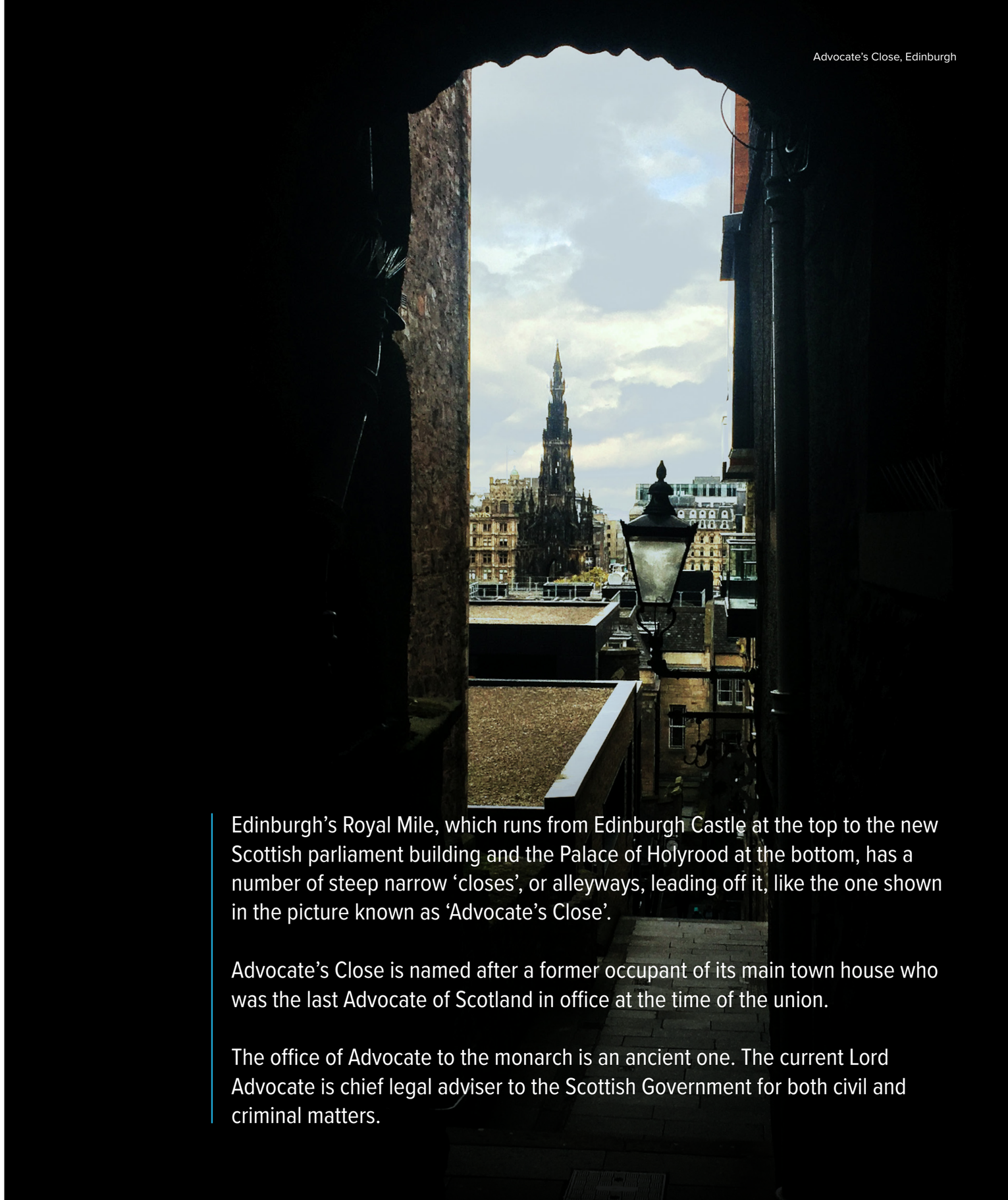
The rules for determining jurisdiction intra-UK and as between the UK and another state are very similar. One important difference is that for the purpose of determining which state has jurisdiction as between the UK and another state, the domicile of a company is the location of its headquarters, whereas in determining which UK state has jurisdiction the domicile of the company is the location of any place of business. Therefore, if a company is headquartered in England but has a place of business in Scotland, they may be sued by a UK-based **Pursuer** in Scotland or England.

It should be noted that we do not at this point know what the effect of Brexit will be on these rules. Please check our website for regular updates: shepwedd.com/scots-counsel.

Choice of law

The Scottish courts will recognise a contractual provision on the governing law of the contract. They are currently required to do so in terms of the Rome Regulation. Post-Brexit it is highly likely that they will continue to do so, whatever the terms of any agreement between the UK and Europe.

When considering a matter governed by a law other than the law of Scotland, the Scottish courts will apply the presumption that the law of that country is the same as the law of Scotland; it is for the party seeking to apply the foreign law to rebut that presumption by, firstly, setting out in their written pleadings in what respects the law is different, and then by proving that the law of that country is what they say it is, by way of expert evidence. This evidence would ordinarily be given orally by an expert physically present in court (often speaking to a written report lodged in advance of the hearing), but an application can be made to the court for permission for the expert to give evidence via video link. The specifics of the applicable law may be disputed by the other party, in which case they may bring their own expert evidence and it will be for the court to decide what the applicable law provides before applying that law to the issues in dispute.



Advocate's Close, Edinburgh

Edinburgh's Royal Mile, which runs from Edinburgh Castle at the top to the new Scottish parliament building and the Palace of Holyrood at the bottom, has a number of steep narrow 'closes', or alleyways, leading off it, like the one shown in the picture known as 'Advocate's Close'.

Advocate's Close is named after a former occupant of its main town house who was the last Advocate of Scotland in office at the time of the union.

The office of Advocate to the monarch is an ancient one. The current Lord Advocate is chief legal adviser to the Scottish Government for both civil and criminal matters.

REMEDIES

Broadly speaking there are five main remedies available: decrees for payment or for damages; decrees declaring a factual and legal position; decrees reducing contracts/deeds; decrees interdicting something from being done and decrees of specific implement.

PAYMENT

- **Decree** for payment is for the payment of a sum of money due under a contract.

DAMAGES

- Damages can relate to both contractual and delictual obligations. These are purely compensatory; punitive damages are only available where specifically allowed under statute.

DECLARATOR

- A **decree** of declarator is a judicial decision as to the factual and legal position in the case.
- An example is a **decree** of declarator that a party is under a contractual obligation to do something.
- This is normally combined with another remedy but it does not have to be.

REDUCTION

- A **decree** of reduction has the effect of annulling a deed or writing.
- An alternative to seeking reduction is to ask the court to set the document aside **ope exceptionis**, as part of a broader action, in which case the invalidity of the document has no effect beyond the particular litigation.

INTERDICT

- **Interdict** is the Scottish equivalent of injunction.
- It is a remedy granted by the court either against a wrong that is in progress or one that is reasonably apprehended.
- Where a case has been fully considered at **proof** and the **Defender's** actions have been found to be unlawful, the **Pursuer** is entitled to **interdict** alongside whichever other remedy is sought.
- If an interdicted party fails to observe the **interdict** he is liable to punishment by fine or imprisonment.

INTERIM INTERDICT

- Interim **interdict** can be granted on a temporary basis to prevent an imminent wrong.
- Before it will grant interim **interdict**, the court must be satisfied that the party has made out a prima facie case and that the balance of convenience favours granting the interim **interdict.**
- Interim **interdict** is granted at the risk that damages will be awarded against the **Pursuer** should the interim **interdict** be recalled or perpetual **interdict** refused and the **Defender** has suffered a loss as a result of the interim **interdict**.

SPECIFIC IMPLEMENT

- A **decree ad factum praestandum** is an order to do or perform some act which the **Defender** is under a legal duty to do. Specific implement of obligations under a contact is one such order.
- The **decree** sought must be specific and performance possible.

INTERIM SPECIFIC IMPLEMENT

- Interim specific implement can be sought on the dependence of the court action.
- As with interim **interdict**, the court has to be satisfied that there is a prima facie case that the obligation sought to be implemented exists and that the balance of convenience favours the granting of the interim order.

OTHER INTERIM ORDERS

- Other interim orders require the court to be satisfied that there is a prima facie case on the merits, that there is a real and substantial risk that any **decree** in favour of the party bringing the action would be defeated or prejudiced in some way by the debtor's insolvency or the debtor disposing of the assets in some manner and that in those circumstances the order is reasonable.

> Scotland retains the 'not proven' verdict as a third verdict in criminal cases. Where a verdict of 'not proven' is given, the accused is acquitted. Such a verdict is returned when the jury considers there is evidence against the accused but not sufficient to convict. The test for conviction is beyond all reasonable doubt. This third verdict survives notwithstanding Holyrood's Justice Committee recently recommending it be removed.

CAVEATS

A caveat is a document lodged in court by a party in order that they are given notice of preliminary applications seeking:

- interim **interdict**;
- certain other interim orders;
- winding up; or
- appointment of an Administrator.

Caveats are not directed to a particular party; they will catch any application made by anyone seeking such interim orders against the caveator (party who lodged the **caveat**). The court is required to notify the caveator or his representative that an application caught by his **caveat** has been lodged. The caveator is then given an opportunity to appear at the hearing for such interim orders. Generally the hearing will be fixed within 24-48 hours, giving the caveator time to prepare and be represented.

It is regarded as prudent for commercial entities to maintain **caveats** in the courts which may have jurisdiction over them. **Caveats** may be lodged in multiple Sheriff Courts and in the Court of Session. **Caveats** may also be lodged in anticipation that someone may seek interim orders over you.

Caveats last for one year at a time and require to be renewed to continue protection.

Scotland's lower court judges are known as 'Sheriffs'. Originally Sheriffs were appointed by the monarchy as the local representative of the King, overseeing judicial and administrative matters in their area on his behalf. It later evolved into a professional appointment. To be appointed they must have been qualified as a solicitor or **advocate** for at least ten years and are approved by the Queen on the recommendation of the First Minister.

The Unicorn is Scotland's national animal and has been used as a Scottish heraldic symbol since the 12th century

ENFORCEMENT OF DEBT

Below is an overview of the enforcement methods available to a creditor against debtors or assets situated in Scotland. These methods of debt enforcement are termed 'diligence'.

There are other, lesser used, forms of diligence, such as Admiralty Arrestment which covers ships and cargo on board ships.

What the creditor needs to recover a debt

A creditor must first have either:

- an Extract court decree;
- a judgment from a foreign court or tribunal recognised in Scotland which acts as proper authority for diligence to be carried out by the creditor; or
- a registered Document of Debt.
  - A Document of Debt permits summary diligence to be carried out; this is the enforcement of contractual obligations without the need to apply to the court for a decree.
  - A Document of Debt is a deed which the contracting parties have agreed can be registered in the official Register of Deeds and Probative Writs known as The Books of Council and Session. The deed includes a special contractual warrant to execute all competent diligence. As a result of this warrant, an official Extract of the deed can be enforced in the same way as a court decree.

INHIBITION

- Form of protective measure to preserve assets.
- Blanket measure; covers all of the debtor's heritable property in Scotland.
- Debtor cannot voluntarily dispose of, or burden, heritable property.
- Unlike a Charging Order in England, an **inhibition** does not create a security or preference over heritable property.
- Very useful negotiating tool.
- Lasts for five years.
- On cause shown, an order can be granted by the court on the dependence at the start of a court action, or whilst it is ongoing, but before being finally disposed of.

ARRESTMENT

- Seizes the obligation to account to the debtor for goods or funds.
- Covers goods held by third parties to the order of debtor.
- Covers obligations to account to the debtor such as contractual payments due and payable.
- Typically only effective at the time of service.
- Timing is critical.
- On cause shown, an order can be granted by the court on the dependence.

BANK ARRESTMENT

- Seizes the Bank's obligation to account to the debtor for funds held on account.
- Effective only at the time of service.
- Effective only on Scottish accounts.
- Timing is critical.
- Subject to the Bank's rights of set-off.
- If the creditor is unaware of the creditor's bank, speculative **arrestments** can be served on the main Scottish banks.
- On cause shown, an order can be granted by the court on the dependence.

INTERIM ATTACHMENT

- Special form of protective measure granted on cause shown to preserve assets pending outcome of legal proceedings.
- Restricts debtor's ability to deal with moveable property.
- Prevents the debtor from removing or selling the attached items.
- Statutory list of excluded items including essential goods to prevent hardship, perishables and goods required for the debtor's dwellinghouse.

ATTACHMENT

- Requires prior service of 14-day Charge for Payment.
- Does not cover goods held in debtor's dwellinghouse.
- List of exempt goods to prevent hardship including tools of the trade, and vehicles reasonably required by the debtor.
- An inventory of attached goods is prepared by **Sheriff Officers** and sent to the Sheriff Court.
- Goods are sold at auction to repay the debt with any surplus funds returned to the debtor.
- Not available on the dependence (see interim attachment).

EXCEPTIONAL ATTACHMENT

- Requires prior service of 14-day Charge for Payment.
- Can be used against individual debtors where non-essential assets are held in the debtor's dwellinghouse.
- Requires court authority and only granted in exceptional circumstances.
- Goods are removed immediately and cannot be auctioned until at least seven days have passed to allow the debtor to challenge the validity of the order or challenge the order as unduly harsh.
- Not available on the dependence.

MONEY ATTACHMENT

- Requires prior service of 14-day Charge for Payment.
- Covers cash (including coins and banknotes in foreign currency) as well as postal orders and other banking instruments held on the debtor's premises.
- For individual debtors, money in the debtor's home cannot be attached to prevent hardship.
- Not available on the dependence.

EARNINGS ARRESTMENT

- Requires prior service of 14-day Charge for Payment.
- Form of order which can be used against individual debtors in employment.
- Level of deduction from earnings on a statutory scale to prevent hardship.
- Employer makes payment to the creditor of the sums deducted.
- Not available on the dependence.

Charge for payment

- As can be seen from the overview on page 25, certain forms of diligence require the prior service of a Charge for Payment (they are attachments, earning **arrestments** and money attachments). The Charge is a formal demand for payment served by **Sheriff Officers** or Messengers-at-Arms.
- The Charge gives the debtor 14 days to make payment.
- The Charge lasts for a period of two years.

If the debtor fails to make full payment within the fourteen day period (the days of charge) the creditor can instruct **Sheriff Officers** or Messengers-at-Arms to carry out diligence on their behalf to try to recover the sums due.

Diligence on the dependence

Where a creditor does not have the benefit of a Document of Debt they may have to wait a considerable period of time before obtaining the necessary court decree to enforce. This gives rise to the danger of assets being disposed of during the intervening period.

In certain circumstances it is possible to obtain the court's authority to carry out diligence on the dependence of the action (as opposed to diligence in execution), as a provisional or protective measure to preserve a debtor's assets.

The creditor must satisfy a statutory test and demonstrate to the court that there are sufficient grounds to merit diligence being permitted on the dependence.

A creditor must show that:

- they have a prima facie case;
- there is a real and substantial risk that judgment in the action in their favour would be defeated or prejudiced by reason of:
  - the debtor being insolvent or verging on insolvency; and
  - the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of their assets, were the order not granted.
- that it is reasonable in all the circumstances.

The court may grant warrant for diligence on the dependence without a hearing on the application if satisfied that the above requirements are met but will fix a hearing thereafter so that the debtor or any other person having an interest may be heard.

Where the court refuses warrant for diligence on the dependence it may nonetheless impose conditions requiring the debtor to:

- consign into court such sums; or
- find **caution** or give such other security as the court thinks fit.

Where warrant for diligence on the dependence is granted, a debtor and any person having an interest may apply to the court for:

- recall; or
- restriction.

In the Court of Session judges wear a crimson robe with dark red crosses symbolising the ribbons which would have held the original robes together. For criminal matters in the High Court of Justiciary they wear a white robe with red crosses (seen above). They retain the wearing of a short white wig in court and wear the long wig only for ceremonial occasions when they carry the black hat that was worn historically when sentencing someone to death.

APPEALS

Sheriff Court appeals

Previously, appeals from the Sheriff Court could be made to the Sheriff Principal, head of the Sheriff Courts for that Sheriffdom. Alternatively, an appeal could be made directly to the Inner House of the Court of Session. As of 1 January 2016, this is no longer the case.

- An appeal made against the decision of a Sheriff will be heard by the Sheriff Appeals Court, which is based in Edinburgh. Where the decision of the Sheriff is a final disposal of the case, whether after a **Proof** or at a procedural hearing, appeal is without the leave of the Sheriff who made the decision.
- An appeal must be made within 28 days after the date on which the decision appealed against was given, subject to any specific statutory requirements that may exist for certain types of case.
- A note of the reasons for the decision from the Sheriff whose decision is being appealed must be obtained.
- Once intimated to the other parties and sent to the Sheriff Appeals Court, the clerk of the court will issue a timetable setting out the procedure to be followed before a hearing of the appeal.
- The hearing will take place before three Appeal Sheriffs. If it is a routine appeal, an appeal from a Small Claim or Summary Cause action (civil actions of less than £3000 and £5000 respectively) then it may be heard in front of a single Appeal Sheriff sitting in the local **Sheriffdom**.
- Appeals beyond the Sheriff Appeals Court will require the leave of either the Sheriff Appeal Court or the Inner House of the Court of Session.

Court of Session appeals

Where the court of first instance is the Outer House of the Court of Session, the appeal is to the Inner House. As mentioned, this is primarily an appeal court and will sit as a panel of three or, in more important cases, five judges. An appeal to the Inner House is known as **reclaiming** and is in the form of a reclaiming motion. It can be made by any party to a cause who is dissatisfied with the **interlocutor** pronounced by the Lord Ordinary (the judge at first instance). There are three general time limits:

- **Interlocutors** disposing of the whole case or the whole merits do not require leave of the court and may be **reclaimed** within 21 days after the date on which the **interlocutor** was pronounced.
- Certain other **interlocutors** that do not dispose of the whole case may also be **reclaimed** without leave but within 14 days. These include **interlocutors** granting or refusing interim **interdict** and **interlocutors** disposing of part of the merits of the case.
- Where leave is required, the reclaiming motion must still be made within 14 days so leave must be obtained within those 14 days.

Once the **reclaiming** procedure is underway, the court will issue a timetable specifying various procedural steps such as the lodging of grounds of appeal and **answers**, notes of argument and any appendices containing material to be relied on.

Like in England, new evidence can only be submitted if it could not, with reasonable diligence, have been available during the original hearing and is relevant to the matters at hand.

Appeals to the Supreme Court

An appeal to the Supreme Court from the Inner House requires the permission of the Inner House. Application for permission must be made within 28 days beginning with the date of the decision. If the Inner House refuses permission a party can ask the Supreme Court directly.

JUDICIAL REVIEW

In 2015, the procedure in Scotland for judicial review changed, bringing it much closer to that in England and Wales.

- Proceedings must be brought within three months from the date when the grounds giving rise to the application for judicial review arose (usually the decision date).
- There is a preliminary stage at which permission to proceed to judicial review is granted or refused. A judge will consider whether the applicant has sufficient interest in the subject matter; and has a 'real prospect of success'.
- The judge will ordinarily order an oral hearing if considering refusing permission.
- Upon granting permission, there is then an element of case management with a timetable for adjustments of pleadings, lodging documents and notes of argument. This follows a Practice Note, No 3 of 2017, which may be disapplied on the **motion** of any party or of the judge's own accord in respect of any particular case.

CLASS ACTIONS

At present, there is no multi-party action procedure in Scotland. However, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 introduces a new Group Procedure in the Court of Session allowing group proceedings to be brought by a representative party on behalf of two or more persons, each of whom having a separate claim, with the permission of the court.

Such proceedings may be "opt in" or "opt out", but we await the necessary secondary legislation and rules changes to bring these provisions into full force and effect and to provide more detail, including the types of claim that may be subject to group proceedings, the means by which persons may give or refuse consent to their claim being brought in the group proceedings and who may be authorised to bring group proceedings as a representative party.

For now, however, the usual approach where there are a number of cases relating to the same subject matter is to avoid duplication and multiple cases by agreeing to have one test case proceed while the others remain pending, or are **sisted** (stayed) pending the outcome of the test case.

Cases can also be formally conjoined, which combines the processes into one. Parties need not be the same, but conjunction should only be used when the different actions raise the same issue, the determination of which will settle all of the actions.

The process of developing the procedure is ongoing, so watch this space. Please check our website for regular updates: shepwedd.com/scots-counsel.

FEES AND FUNDING

The funding landscape in England changed significantly in April 2013. The Jackson reforms saw the introduction of damages based agreements (DBAs) and led to success fees and insurance premiums no longer being recoverable from the other side.

These reforms do not apply to Scotland, although the Civil Litigation (**Expenses** and Group Proceedings) (Scotland) Act 2018 now makes provision for success fee arrangements, including making damages-based agreements for solicitors enforceable for the first time in Scotland. The Act also provides for a restriction on a **Pursuer's** liability for **expenses** in personal injury claims (sometimes known as qualified one-way costs shifting (QOCS)), but again we await the necessary secondary legislation and rules changes to bring these provisions into full force and effect, and to provide more detail on how they will operate in practice.

In relation to funding, the Act provides that, in cases where there is third-party funding, that information must be disclosed and the court will have the power to make an award against the funder and any intermediary. After the event insurance is available, but as in England, the premium is not recoverable from the other side.

Please check our website for regular updates on these proposed changes shepwedd.com/scots-counsel.

Security for costs

The courts in Scotland can make an order that a party must put up security for the costs of an action (including the other side's costs). This is known as 'caution'.

- This order can only be made on application by **motion** by one of the parties.
- Either of the parties can also enrol a **motion** seeking to have the order varied or recalled.
- Any such **motion** has to set out the grounds of the application.

The court has discretion whether to order **caution**. Factors that a judge would take into account in deciding whether to exercise his or her discretion to grant an order include:

- if the nature and scale of the litigation is likely to mean costs are particularly high;
- if the party against whom **caution** is sought has been refused legal aid and the reasons for that;
- the financial circumstances of the party against whom **caution** is sought;
- whether the case is being brought by that party in their own interests or whether they are being used as a front for a wider interest;
- the value of the claim; and
- the likelihood of success.

An order for **caution** or other security will specify the period by which **caution** or security must be found:

- by obtaining a bond of **caution** (such as from an insurer); or
- by lodging a sum of money with the Accountant of Court.

The court may also approve other methods of security, in particular a combination of the two methods above.

If a party is required by the court to obtain **caution** and fails to do so, the other party can apply by **motion** for **decree** of **absolvitor** (if the party in default is the **Pursuer**); **decree by default** (if the party in default is the **Defender**) or such other order as the court thinks fit.

Funding

Whilst we make every effort to resolve disputes in the most economical way possible for all our clients, we acknowledge that disputes can be expensive. We can offer advice on third-party funding and after the event insurance products, to assist our clients with meeting the costs of disputes.

EXPENSES

Recovery and liability of expenses

Expenses generally follow success but the question is always one of equity. When an order of **expenses** is made by the court, or an action is settled out of court and the losing side agrees to pay its opponent's **expenses**, the successful party prepares a Judicial Account of **Expenses**. Often, a specialist law accountant (costs draftsman) will be instructed to prepare the account.

The account is based on a table of fees, prescribed by statute, which provides for two bases on which **expenses** can be recovered – detailed charges or inclusive fees.

The table of fees is not generous and does not go any way to indemnify the party of his costs.

In particular cases, the successful party can request that the court awards an uplift in its **expenses**, and this often happens in complex, higher value litigation involving high volumes of documents and specialist knowledge.

The Account of **Expenses** will be considered by the paying party and, if no agreement is reached, it will be submitted to the Auditor of the court to tax and report.

There are strict time periods for lodging accounts for **taxation**.

As mentioned, the Civil Litigation (**Expenses** and Group Proceedings) (Scotland) Act 2018, proposes that unsuccessful **Pursuers** in Personal Injury cases may not be liable in respect of any **expenses** that relate to a claim or any appeal, but that provision of the Act has not yet come into force. Please check our website for regular updates on this: shepwedd.com/scots-counsel.

Counsel's fees and expert witness fees

Counsel's fees are almost always recoverable in the Court of Session (although it is open to a party to argue that the case should never have been raised in the Court of Session and therefore Counsel's fees should not be recoverable or to take issue with the leaven of fee).

In the Sheriff Court, the court must sanction the involvement of Counsel, and will usually do so in difficult or complex cases. It is possible to apply for sanction in advance.

The involvement of an expert witness must be certified by the court as reasonable; the costs are recoverable from the losing party only if certification is obtained.

In-house lawyers' fees

In principle, it is possible for in-house lawyers to recover their **expenses** in Scottish litigation. Although there is no real judicial guidance on the point, it is important that in-house lawyers keep a fully itemised breakdown of the time they spend on a dispute and the work undertaken if it is thought there is a real prospect of recovery.

Duplication of work with the instructed solicitor will not be permitted, as the account is prepared as though only one solicitor was involved.

Solicitors' fees

There are two scales on which an account can be prepared and taxed:

- between party and party; or
- between solicitor and client.

The usual finding of **expenses** is on a party and party basis.

The account is taxed as if only one solicitor had performed the work and only **expenses** reasonable for conducting the litigation are recoverable.

Liability of funders

The Civil Litigation (**Expenses** and Group Proceedings) (Scotland) Act 2018, referred to above provides that the court will have the power to make an award against the funder and any intermediary, but again this provision of the Act has not yet come into force.

Please check our website for regular updates on this: shepwedd.com/scots-counsel.

TENDERS

We do not have Part 36 orders in Scotland. Founding letters can be written that can be referred to in arguments in relation to expenses. A formal settlement offer can be made by way of tender:

- A **tender** is an explicit unqualified and unconditional offer made either by the **Pursuer** or the **Defender** in an action to accept a specified amount or to pay, in settlement, a specified amount.
- It carries with it the judicial **expenses** to the date the **tender** ought reasonably to be accepted.
- It will be inclusive of interest.
- It is lodged in court but not available to the judge.
- In the event that it is not accepted but ultimately the **Pursuer** fails to obtain a **decree** for an amount more than that **tendered**, the **Pursuer** can recover only the sum awarded by the court plus **expenses** up to the date the **tender** ought to have been accepted. The Pursuer will be liable to the **Defender** in their **expenses** for the period after they ought to have accepted the **tender** up to **decree**.
- If a **Pursuer's tender** is not accepted and ultimately the court awards at least the same as the offer (excluding interest awarded after the offer), if the offer had been a genuine attempt to settle proceedings the **Pursuer** may receive a 50% uplift on his **expenses**.
- It is open for the **Defender** to argue that an additional uplift should not apply on cause shown.

One of the proposals under consideration in the review of Scotland's civil procedures is the introduction of blind online bidding, whereby parties lodge a confidential document specifying the amount they would settle for, which is only revealed to the other side if it is within a specified range of the amount they said they would agree to. Please check our website for regular updates on the progress of these proposals: shepwedd.com/scots-counsel.

CROSS BORDER ASSISTANCE

Under S27(1) of the Civil Jurisdiction and Judgments Act 1982 the Court of Session has discretionary power to grant a number of interim protective measures where proceedings have been commenced but not concluded in a foreign jurisdiction, including in another parts of the UK. This includes an order for arrestment of any assets in Scotland, inhibition orders over any heritable property in Scotland, interim attachment orders and interim interdict.

These orders can be hugely important to Claimants to ensure that assets in Scotland are safeguarded and not disposed of while the foreign proceedings are progressed, especially if it is likely to be some time before final judgment will be obtained in the foreign court.

The Court of Session also has power to grant interim **interdict** (i.e. interim injunctive relief) where proceedings have not yet commenced in the foreign jurisdiction.

Given the wide scope of these discretionary powers, the possibility of the Defendant having Scottish assets should be considered as soon as possible.

ENFORCEMENT OF JUDGMENTS

Under the 1982 Act the Court of Session can also give effect to foreign judgments for the purpose of enforcement against Scottish assets.

An application to the court is not required for UK judgments related to the payment of a sum of money; for those judgments a certificate from an officer of the court that issued the judgment is registered in the Books of Council and Session, which gives it the status of a judgment of the Court of Session. For all other judgments, an application must be made to the Court of Session in order to obtain a **decree** in Scots form. This is done using a simple **Petition** procedure and providing the court with certain documentation. Once the Scots form **decree** is obtained, it can then be enforced in the usual way in relation to Scottish assets, as discussed above.

We are regularly instructed by solicitors in other parts of the UK to obtain protective orders against assets located in Scotland and to enforce judgments in relation to Scottish assets. Please check our website for more information: shepwedd.com/scots-counsel.

The Faculty of **Advocates** is Scotland's independent referral bar. Each **advocate** is an independent sole practitioner. They specialise in advocacy and provide objective legal advice. **Advocates** organise themselves in to 'Stables'. Each stable has an **Advocates'** Clerk and its own website similar to the English system of Chambers.

Advocates at Parliament Hall, Edinburgh

Picture courtesy of the Scottish Courts and Tribunals Service

GLOSSARY OF SCOTS LEGAL (AND OTHER USEFUL) TERMS

Scottish Term	Meaning
Abandonment	Discontinuance
Absolvitor	A judgment pronounced when the court finds in favour of the Defender – has res judicata effect i.e. the same claim cannot be raised again
Ad factum praestandum	With reference to a court order, decree, etc.
Advocate	A member of the Scottish Bar – equivalent of a Barrister
"Ah dinnae ken"	I don't understand.
Answers	Statement of defences
Appearance	Where a Defender intimates his intention to defend
Arrestment	Attachment/freezing money or moveable property
Assignation	Assignment
Articles of Condescendence	Numbered paragraphs in Summons or Writ setting out case
Aver	To state in written pleadings
Avizandum	Literally, 'to be considered'. An oral or written decision will be issued by the court following deliberation
"Aye, right!"	I don't believe you
Brevitatis causa	For the sake of brevity
Braw	Excellent
Caution (rhymes with "station")	Security against the occurrence of a certain event e.g. for expenses/costs
Caveat	A legal document lodged so that warning will be given to a party before any interim order is granted
Conclusion	Statement of precise order sought in Court of Session
Crave	Prayer for relief (Sheriff Court)
Debate	Hearing (legal argument)
Decern	To make a final finding
Decree	Final judgment
Decree by Default	A final judgment, issued where one party fails to do something required by the court – no res judicata effect, i.e. same claim can be made again subject to prescription
Decree in Absence	A final judgment, issued where a Defender has not lodged a notice of intention to defend or has not lodged defences.
Defender	Defendant
Delict	Tort
Diet	A hearing date
Expenses	Costs
Extract Decree	A written form of decree signed by a clerk of court which can be enforced
"Gie it laldy"	To do something with gusto
"Ginger" (part. West of Scotland)	Fizzy juice

Scottish Term	Meaning
"Haud yer wheesht"	Please be quiet
Inhibition	A procedure which prohibits a debtor burdening or disposing of heritable property
Initial Writ	The document by which proceedings in the Sheriff Court are initiated
In meditatione fugae	About to leave the country
Interdict	Injunction
Interlocutor	Order of the court
"Keep the heid"	Stay calm, don't get upset.
Messenger-at-Arms (Court of Session) and Sheriff Officers (Sheriff Court)	Officers of the court whose function is to execute civil warrants (like process servers)
Motion	Application
"Nae chance"	Little to no prospect of success
Ope exceptionis	By way of exception
Parole Evidence	Oral evidence of a witness, the usual method of presenting evidence in Scottish courts (as opposed to by witness statement)
Petition	Court document initiating civil action in Court of Session where an administrative order is sought as opposed to seeking to enforce a right against a Defender
Petition for Directions	Trustees can ask the Court of Session to consider specific legal questions related to the trust, like a Part 8 Application
Precognition	A formal statement taken by another person – not for lodging in court
Preliminary Plea	A legal issue that could result in dismissal of proceedings
Prescription	Extinguishes a right or obligation completely after a period of time has passed
Proof	Trial
Pursuer	Claimant/Plaintiff
Reclaim	Appeal
Record (emphasis on second syllable)	The combined written pleadings of both parties
Section 1 Order	Order for pre-litigation recovery of documents or other physical evidence (covers dawn raids)
Sheriffdom	A judicial district
Signet	Seal of the Sovereign which must be embossed upon a Summons by the clerk of the Court of Session before it can be served on the Defender
Sist	Stay
Special Case	Alternative to a Petition for Directions, where Court of Session is asked to consider specific legal questions
Specification of Documents	Accompanies a motion for recovery of documents; lists the specific categories of documents sought
Stated Case	Appeal procedure involving original decision maker providing appeal court with a summary of the evidence and findings
Summons	Court document initiating civil action in Court of Session
Taxation	Assessment of costs/expenses
Tender	Part 36 offer to settle, but lodged with the court