

UK - SCOTLAND

Global litigation guide



About

Welcome to The Global Litigation Guide (the “**Guide**”) which has been prepared by DLA Piper’s civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper’s guide to [Legal Professional Privilege](#) and (coming soon) DLA Piper’s guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

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Overview of court system

The UK, judicially, consists of three jurisdictions:

- England and Wales;
- Scotland; and
- Northern Ireland.

There are important differences between all three jurisdictions. This report exclusively refers to the legal system in Scotland; Scots law.

Scots law is influenced by both civil law and common law, as it has characteristics of both approaches. Scots law consists of four sources of law: legislation, legal precedent, specific academic writings and custom. The doctrine of supremacy of Parliament means that legislation enacted by Parliament takes precedence over case law. However, case-law also interprets the meaning of legislation where it's not clear. Decisions of higher courts are binding on lower courts.

The civil court system in Scotland is split between the Court of Session, Scotland's supreme civil court which sits only in Edinburgh and where the most complex and valuable disputes are heard, and the Sheriff Courts, located in districts throughout Scotland and where lower level claims are determined. There are 39 Sheriff Courts in total.

The Court of Session is split into the Outer House (first instance) and Inner House (appeal) courts. A single judge, known as a Lord Ordinary, usually hears cases in the Outer House and a bench of three judges usually hears Inner House appeals. The Sheriff Courts are Scotland's local courts and are presided over by a single judge called the Sheriff. Appeals from the Sheriff Court are to the Sheriff Appeal Court or to the Inner House, with permission of the Sheriff Appeal Court. A final appeal is available from the Inner House to the UK Supreme Court.

Court proceedings are conducted in the English language, but litigants can ask the court to use Scots Gaelic, either to give evidence or make submissions. If the application is granted an interpreter will be provided by the court.

Disputes with a total value of over GBP100,000 may be started in either the Court of Session or the Sheriff Court. Disputes with a total value of up to GBP100,000 may only be commenced in the Sheriff Court.

Limitation

The prescriptive (limitation) period for contractual and tortious claims in Scotland is five years. For personal injury claims it is three years. In both cases the prescriptive period runs from the date the loss, injury or damage occurs, although commencement can be delayed where the defender doesn't know a loss has occurred, and a claim must be raised and served on the other party within this period. After the time period has expired, the claim is said to have prescribed and the right to enforce is lost.

Procedural steps and timing

In Scotland natural parties can represent themselves at all stages of court proceedings. Corporate entities must ask the court for permission for a director or partner to represent them. If permission is refused, then the entity would require to be represented by a solicitor.

The main procedural steps in ordinary procedure are similar in the Court of Session and the Sheriff Court. In the Court of Session, the pursuer (claimant) commences the claim by preparing a summons. In the Sheriff Court, the initiating document is the initial writ. An individual may act as a litigant in person in either court. However, companies and other business vehicles must obtain permission from the court to be represented by a lay representative (such as a director).

The summons or initial writ is lodged with the court in order to obtain a warrant to serve. A warrant to serve is the court's authority to commence proceedings. Once the authority is obtained the initiating document is served by the pursuer on the defender (respondent). The defender has 21 days (42 days if outside the EU) to consider the claim. If the defender intends to defend the claim it must then lodge defences within either 7 or 14 days.

An adjustment period of approximately eight weeks usually follows where the pursuer and defender refine their respective pleadings. The case then calls in court for a procedural hearing. At that hearing, the judge reviews the pleadings and decides how the dispute is to be resolved.

Usually this is by either:

- the fixing of a proof, a trial on the facts of the case; or
- the fixing of a debate, a hearing on a point of law which may require to be determined before evidence can be led.

Timeframes for actions vary greatly depending on the complexity of the case. undefended actions are generally determined within a month, whereas complex defended cases can take 18 months or more.

A fast-track, judge-managed procedure is available for commercial disputes in the Court of Session and in some Sheriff Courts.

In the vast majority of cases, judgments are in writing and are generally delivered within around three months of any substantive hearing.

Disclosure and discovery

There is no obligatory disclosure of documents in court proceedings in Scotland. Litigants need only disclose documents that they seek to rely on to prove their case. The court also has the discretion to order a party to submit certain additional evidence.

Parties seeking further documents held by the other side or by any third party must apply to the court for a disclosure order specifying the document or category of documents that they require. The order will only be granted if the documents specified are relevant to the case. Legal professional privilege can be claimed by a client to avoid disclosure of documents. Furthermore requests for disclosure that amount to fishing for evidence are not permitted.

A party contemplating litigation in Scotland may want to see, or at least preserve, relevant information that will be of assistance in pursuing a claim before commencing proceedings. A statutory procedure exists to apply for disclosure of documentation before proceedings are commenced. In order to obtain such material, an applicant must satisfy the court that it has a prima facie case, proceedings are likely to be commenced, and the documents that are pursued will assist in further specifying or detailing the pleadings.

It is possible to obtain an order for recovery of documents and/or property without the knowledge of the party holding the material – often by way of undertaking a dawn raid – where there is a risk that prior warning would cause documents or property to be destroyed or amended, raising concerns as to whether recovery could be made.

Default judgment

Decree by default is available in Scotland at the request of a party where the opposing party fails to comply with a procedural requirement such as failing to attend at a hearing. Decree in absence is available where the defender fails to indicate an intention to defend the claim in a timely manner. In considering any application for decree by default the court will usually exercise its discretion to ensure that the interests of justice are met. Decree will therefore not usually be granted against a defaulting party where there is a reasonable explanation for the default and there is a proper claim or defence. A decree by default may be appealed within 21 or 28 days

using the reclaiming procedure in the Court of Session or the appeals procedure in the Sheriff Court. A defender can seek to have a decree in absence recalled (withdrawn) within seven days of the decree being granted in the Court of Session or prior to the decree being implemented in the Sheriff Court.

Appeals

Judgments of civil courts in Scotland can be appealed to a superior court. Appeals from the Sheriff Court are to the Sheriff Appeal Court. Appeals from the Outer House are to the Inner House and from the Inner House there is the right to request that the Inner House allow the appellant to make a further appeal to the UK Supreme Court in London. In the event such a request is refused, a party can ask the Supreme Court directly for permission to appeal. Such permission will normally only be given if the appeal raises a point of general public importance.

The time period in which an appeal can be made in the Sheriff Court is 28 days, although in cases where leave is required, permission to appeal must be obtained within seven days. Appeals from the Sheriff Appeal Court to the Inner House of the Court of Session can only be made with the permission of either court. Appeals from the Outer House to the Inner House in respect of a final decision must be made within 21 days and appeals from the Inner House to the UK Supreme Court require an application for leave to be made within 28 days of the decision being appealed against being made. Generally, the UK Supreme Court will hear an appeal within 12-15 months of permission being granted, and the judgment follows usually within 12 weeks of the hearing.

The lodging of an appeal in a case has the effect of opening-up all prior decisions of the court for review. In most cases, an appeal will be on a point of law and evidence will not be heard again. In certain circumstances, the court can order additional evidence to be heard to supplement the case. Once a judgment is appealed it can no longer be enforced subject to limited exceptions. Appeals can be upheld or refused, and the court's reasoning will be detailed in the judgment.

Interim relief proceedings

In Scotland, interim relief proceedings are subject to statutory and court rules. The relevant court procedure depends on the type of relief sought and the court in which the application is made. Both the Court of Session and the sheriff court may grant interim relief.

In Scotland, there are four broad categories of interim relief available:

- measures to preserve evidence (for further details on preservation of documents, see Disclosure and discovery);
- measures to secure assets in relation to money claims (for further details see Prejudgment attachments and freezing orders);
- preservation of assets in the event of insolvency; and
- measures to protect a party's right against a wrongdoing (also referred to as interim interdict).

Remedies in respect of interim relief decisions, including appeal processes, are available but they vary depending on the category of interim relief involved and the court making the decision

Natural parties can represent themselves in interim relief proceedings (and other proceedings). Corporate entities must ask the court for permission for a director or partner to represent them. If permission is refused, then the entity would require to be represented by a solicitor.

Preservation of assets in the event of insolvency

An ex parte (i.e. without notice) application may be made as part of insolvency proceedings for an interim order to appoint an insolvency practitioner to preserve assets pending a formal appointment being concluded. This measure is only available where there is a risk that those in control of the company or organization concerned may dissipate assets if they are given advance notice of the insolvency proceedings. The procedural requirements vary depending on the insolvency process being pursued and the court in which the application is being made.

Interim interdict

An interim interdict is a court order requiring a person not to do something pending the resolution of a claim for interdict. It is the equivalent of an interim injunction in England.

The party seeking an interim interdict must demonstrate to the court that there is a prima facie case and that "the balance of convenience" favors the granting of the order. The order can be sought and obtained on an urgent basis by making an application to the court. If an order is sought urgently, these can usually be heard by the court within 24 hours. It can also be granted without notice.

However, if the defender to an interim interdict application has lodged a caveat at court (effectively an early warning device) the court will require that the defender be made aware of the application and be given a right to be heard by the court before the order is granted.

If the order is granted ex parte, then the defender may apply at anytime to have the order recalled (withdrawn). If the order is granted with both parties in attendance at the hearing, the defender must show a material change in circumstances to have the order recalled. If the defender wishes to appeal, on the facts or the law, then the timeframe is within 14 days of the decision.

It is not necessary for a party to be represented by a solicitor at interim relief proceedings, but given the legal arguments necessary, legal representation is normal. Individuals can represent themselves and companies and other business vehicles can apply for permission to be represented by a lay representative (such as a director).

Prejudgment attachments and freezing orders

Interim attachment is a type of interim relief measure. It is a remedy available in Scotland to freeze a party's corporeal moveable assets (with certain exceptions) pending the outcome of legal proceedings. To obtain the remedy the applicant is required to demonstrate, on the balance of probabilities:

- a prima facie case on the merits;
- that there is a real and substantial risk that any judgment in favor of the applicant would be defeated or prejudiced by the debtor's insolvency, or the debtor disposing of the assets in some manner; and
- that the order is reasonable in the circumstances.

The remedy can be applied for at any time during the progress of a court action or shortly before one commences. The order can be obtained without notifying the other party in advance (ex parte), but in such circumstances a subsequent hearing is fixed to enable the other party to be heard. If an interim attachment order is executed wrongfully the creditor can be held liable in damages to the debtor.

Please note that only corporeal moveable property may be subject to an interim attachment order. Bank accounts and funds in the hands of a third party may be subject to an arrestment on the dependence of an action. Arrestment prevents the debtor from disposing of funds or goods held by a third party. Inhibition prohibits the debtor from disposing of, or otherwise transacting with, heritable property (real estate), pending the outcome of a court action. The criteria for obtaining an arrestment or inhibition on the dependence of the action are the same as those for interim attachment.

These remedies are available in both the Court of Session and the Sheriff Court. The application must be made in the same court in which the action has been (or is being) commenced. The application is made as part of a claim on the merits, either when warrant (or authorization) to serve the claim is applied for or during the progress of the action through the court. Where the application is made and granted before the claim is served then service of the claim will follow immediately and a hearing will be fixed for the respondent to address the court.

Pre-judgment attachments are generally enforced by the creditor serving a copy of the order on the debtor and/or any relevant third party such as the debtor's bank. This has the effect of imposing limitations on what the debtor can do with their funds, property or other valuable assets pending the outcome of the case. Where an interim attachment order is executed wrongfully, the creditor can be held liable in damages to the debtor.

Costs

Costs are called expenses in Scotland. Expenses are awarded at the court's discretion, although the general rule is that they follow success. The unsuccessful party will ordinarily have to pay the successful party's costs.

Expenses recoverable in the Scottish system are determined by reference to a statutory Table of Fees. This allows a block fee to be claimed for each element of the legal work undertaken in the case or the charging of a lawyer's time by reference to a fixed rate.

Generally, the Table of Fees allows the successful party to recover up to 60-65% of their actual costs, although in commercial cases it is often less than that. To compensate for this deficit, enhanced costs can be awarded in complex cases via an additional fee procedure.

The level of court fees depends upon the court in which the action is raised. The Court of Session, as the superior court, incurs higher fees than the Sheriff Court. Fees are generally payable by each party to the action. The fees are set out in Scottish Statutory Instruments (referred to as a Fee Orders). These are regularly updated by Fee Amendment Orders.

Class actions

A Scottish class action procedure, known as 'group procedure', was introduced on 31 July 2020. The procedure is an opt-in procedure and is only available in the Court of Session. It is governed by chapter 26A of the Court Rules. It allows two or more parties to bring joint proceedings if their claims raise issues of either fact or law which are the same as, similar, or related to one another.

Group proceedings are commenced by the preparation and service upon the defender of:

- a Summons (the initiating document setting out the claim);
- a Group Register identifying the claimants; and
- applications to the court for permission to bring group proceedings and for one of the claimants to be the representative party.

Service of the Group Register on the defender stops the clock in terms of time bar. However, certification of the action as a group action and certification of the representative party by the court are required to commence the action at court.

There are no restrictions as to the:

- Type of conduct or cause of action as grounds for group proceedings;
- Type of civil claim which may be brought under group procedure, although to date the procedure has been used to litigate ESG related claims, consumer rights claims and personal injury claims;
- Type of remedies available to claimants, although damages has been the most prevalent remedy sought so far; or
- Nationality or domicile of claimants. The same rules on jurisdiction will be applied as in regular Scottish court proceedings.

However, jury trials and punitive or exemplary damages are not available for group proceedings in Scotland.

Once a group action has been commenced a designated judge will be appointed. He or she will manage the case and have considerable discretion as to the best way of progressing it to a final hearing.

The Rules allow additional members to be added to the Group Register once the action is underway. A revised Group register must be lodged at Court and served on the defender, and notification of the changes given to all existing members, within 21 days.

In terms of settlement the Rules require that the representative party must "consult with" group members on the terms of any proposed settlement. However, in practice there is likely to be a contract in place between group members and the representative party which details how settlement decisions are to be taken.

Appeals can be made against any final order made by the court to the Inner House. The decision whether to appeal a final order or not is likely to be made on a collective basis for the reason outlined in the preceding paragraph.

Finally, the normal rules on costs apply to group proceedings in Scotland. Expenses typically follow success except in personal injury and fatal claims, where qualified one-way cost-shifting applies (the court will not make an award of costs against an unsuccessful claimant unless the litigation has been conducted inappropriately).

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