

ASSISTING FRAUD VICTIMS IN SCOTLAND IN TIMES OF COVID-19

1 The most critical phase of the crisis

As long as measures to prevent the spread of Covid-19 restrict freedom of movement: What are the effects of the Covid-19 crisis on civil justice?

- Is there special legislation on the effects of the crisis on civil justice?

Scotland has a separate legal system to England and Wales. The Scottish Parliament has passed the Coronavirus (Scotland) Act 2020 which makes some limited changes to civil justice in Scotland. It enables electronic signature and electronic transmission of court documents but only if the recipient agrees to the document being sent by electronic means.

The Act also dispenses with the need for physical attendance at court and allows attendance by electronic means. The judge has the power to override that and require physical attendance if to do otherwise may affect the fairness of proceedings.

The primary legislation is fairly "broad brush" in its approach. Court rules are generally provided for in secondary legislation. At present there have been no changes to the secondary legislation and the courts are operating by issuing guidance on how civil business is to be dealt with. Separate guidance is issued for the Court of Session (Scotland's highest civil Court), All-Scotland Personal Injury Court and each of the 6 Sheriffdoms in Scotland (which deal with the Sheriff Courts, being Scotland's inferior Courts which sit across the country).

- Does the crisis have an effect on court hearings?

The Court of Session has issued guidance that no hearings will take place until 20 April unless they fall into the category of "urgent and necessary" civil business. There is scope for that to be extended post 20 April. "Urgent and necessary" civil business includes interim interdicts (injunctions), child abduction cases and other urgent matters on cause shown.

Each Sheriffdom has issued its own guidance but broadly speaking, most have postponed all hearings for periods of between 8 and 16 weeks apart from urgent and necessary civil business which include interim interdicts, urgent insolvency business, urgent proceeds of crime matters and other urgent matters on cause shown. For some matters such as opposed motion hearings and debates, parties are invited to agree that the matter be resolved by submission of written submissions only.

Very little use has been made of video conferences to date. It is expected that the Inner House of the Court of Session (the highest appeal court in Scotland) will recommence hearings by video link from 21 April.

Conference calls have been used as a means to dealing with procedural hearings in commercial matters for a number of years. However, there have been challenges in continuing with that as few court staff are at work due to the need to observe social distancing.

It is hoped that wider use of video conferencing and conference calls will be facilitated over the coming weeks. One challenge is that most courts retain hard copies only of papers. It has been suggested that solicitors may be made responsible for compiling electronic bundles

for any hearings and forwarding those to the relevant court as solicitors will likely have papers in an electronic format that can be accessed remotely.

- Does the crisis have an effect on deadlines (of procedural and substantive law)?

Court timetables and deadlines have not been addressed in the guidance issued by the courts to date. Practitioners are treating existing timetables as remaining in effect and submitting documents electronically in accordance with the timetable. Due to the effective halt on all non-urgent hearings, it is anticipated that the courts will be sympathetic to requests to extend or renew timetables once matters return to a normal footing. New cases are generally not being processed at all or are being sisted (stayed) immediately after commencement to avoid timetables being set.

Limitation/prescription (time bar) is not addressed in the coronavirus legislation so deadlines for bringing actions and serving papers (the date in Scots law when an action commences) are unaffected. The courts are treating time barring cases as urgent and issuing warrants to serve.

- Does the crisis have an effect on enforcement?

In keeping with the general approach that only urgent and necessary civil business is being dealt with by the courts, decrees (judgments) are not routinely being issued unless it is part of an urgent case. Without the decree, enforcement action cannot take place.

Much enforcement work in Scotland depends on the involvement of Messengers at Arms/Sheriff Officers (process servers). They have taken the view that all most all monetary claims should not be considered urgent. In effect this is preventing the enforcement of decrees issued by the courts. It also prevents summary justice such as the issuing of statutory demands for payment which are often a gateway to insolvency proceedings in the event that payment is not made.

- How do courts work during the crisis?

The Court of Session is only open for urgent and necessary matters until 20 April. It is staffed by a skeleton staff to enable social distancing to be observed and as many staff as possible are working from home. Documents are being accepted electronically by email. There is a dedicated email address for urgent matters.

Sheriff Court business has been condensed into 10 hub courts which are staffed to enable only urgent and necessary matters to be dealt with. The remaining Sheriff Courts are closed. Experience to date suggests that contacting the hub courts is not easy with emails and calls frequently going unanswered.

- How are particularly urgent matters handled, in particular requests for interim measures such as injunctions and freeze orders?

For the Court of Session, there is a dedicated email address to highlight an urgent matter and have it dealt with. The Sheriff Courts do not have dedicated urgent matters only contact details which is causing difficulties in getting urgent cases to sheriffs quickly. Interim interdicts (injunctions) are automatically considered urgent. However, arrestments on the dependence (freezing orders) are not automatically urgent and require the permission of the court to be treated as urgent. This is an additional hurdle which may cause delays in obtaining an order.

- How do lawyers work during the crisis?

Most law firms are operating normally, albeit with most staff working remotely as much as possible.

- How do banks work during the crisis?

Banks are encouraging customers to use online and telephone contacts. These have been extremely busy but generally, with the exception of branch based activities, banks are operating normally.

- Does the crisis have an effect on insolvency law?

It has been announced that changes will be made to corporate insolvency law to alter wrongful trading rules temporarily. Normally if a company director continues to operate the company while it is insolvent, they run the risk of being personally liable for any shortfall in the eventual insolvency of the company. The intention is to remove this liability backdated to 1 March 2020 in the hope that more businesses survive the current lockdown. Rules on fraudulent trading, misfeasance and other director's duties are not being relaxed. Legislation on this is awaited.

The moratorium for personal insolvency in Scotland has been extended from 6 weeks to 6 months from the date the debtor applies. A debtor can apply for a moratorium if they are considering applying for personal insolvency or other debt relief measures. This prevents creditors from taking action against the debtor to recover debts while the moratorium is in place. It has been announced that there are intentions to create a new moratorium for companies that need to undergo financial rescue or restructuring. There is limited detail on the new company moratorium but it is expected it will operate in a similar fashion to existing corporate insolvency moratoria in CVAs and administration.

Courts are not treating liquidations and other insolvency matters as urgent so most insolvency applications are not being processed by the courts unless the court is persuaded that it is urgent.

2 **Forecast: after the crisis and long-term effects**

What are the consequences of the Covid 19 pandemic once the pandemic has abated, in the gradual return to a new normality and what are the long-term effects?

- Which measures introduced during the crisis will be withdrawn immediately and which measures will remain in place?

The Coronavirus Act 2020 has an expiry of 30 September 2020 (although that can be extended up to 30 September 2021 if necessary). That only covers the changes concerning physical appearance and electronic signature/transmission of documents. There is hope amongst practitioners that this crisis may encourage greater use of video/audio conferences, at least for procedural matters and a greater use of electronic documentation rather than hard copy. There is scope within the existing approach of issuing court rules by secondary legislation to facilitate this.

- Will enforcement of economic crime, including corruption matters be weakened due to the lack of financial resources?

The financial crash of 2008 did not stop or reduce asset recoveries and it is not expected that, once business begins to function on a close to normal basis, that there will be a significant difference in 2020/2021. Businesses will want to recoup funds lost to economic crime where possible to improve their own financial picture.

- Will the ratio of third party funded matters rise?

Changes to success fee arrangements in Scotland are to come into force at the end of April 2020. This is likely to see an increase in third party funded matters.

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