RISK ALERT: LITIGATION

Issue:

Potential Claims against Solicitors Arising from Defaults on Court Deadlines

Significance:

There is a growing trend towards severe penalties being imposed for any failure to adhere to court timetables and deadlines. In an increasing number of cases, the court has granted Decree by Default (for the sum sued for) or dismissed actions due to a failure by a party to comply with the court deadlines. This means either the loss of a claim by a pursuer, or a potential windfall in their favour and potential claims against the solicitor by their winning or losing clients.

Action required:

Treat court timetables and deadlines as **SET IN STONE** unless relief from compliance is granted in advance of the deadline;

DIARISE deadlines as soon as they are fixed, with advance reminders which factor in sufficient preparation time;

Seek **RELIEF** from compliance well in advance of any deadlines which cannot reasonably be met;

ALWAYS provide a full and reasonable explanation for seeking an extension;

DON'T RELY upon being able to lodge parts of process late due to "administrative oversight";

Timeously **LODGE A DETAILED VALUATION** in personal injury cases which comprises a real assessment of the value of the claim;

DON'T REDUCE personal injury valuations to take account of litigation risk or causation issues;

DON'T LODGE "nil" or "tbc" valuations; and

SUPERVISE junior fee earners to ensure proactive file and deadline management.

Fault for default: a warning to all litigators

Recent decisions of the the All Scotland Personal Injury Court ("ASPIC") and the Inner House of the Court of Session mean that all litigators must now be increasingly wary of the very real potential risks to their clients (and indeed their own firms) for failing to meet court deadlines. Whilst the relevant decisions discussed in this article arise primarily from cases where there has been a failure to lodge "proper" statements of valuation in personal injury actions, the penalties imposed can and should be read as a warning to all litigators in relation to their obligations to meet court deadlines.

Statements of valuation were first introduced in Scotland within Chapter 43 of the Rules of the Court of Session, which came into effect on 1 April 2003 and applied to all personal injury actions raised in the Court of Session after that date. Personal injury practitioners were understandably concerned about the extent to which they might later be bound by any figures included in a valuation and so any resulting prejudice that might be suffered by their clients, particularly on the defender side. A practice therefore developed whereby parties, predominantly defenders, would lodge statements that gave the valuations as "TBC" or "TBA" (to be confirmed or to be advised). However Practice **Notes No 2 of 2014** and then **No 4 of 2015** indicated that such a practice was not acceptable (the earlier version stating that "these must contain figures"). The degree of risk in attributing value to a claim remained unclear, however, and defender practitioners were wary of doing so, particularly where there might be a good liability or causation defence to the claim. That led to the lodging of "nil" valuations and in some cases, a late statement of valuation, or no statement at all. Such approaches are now becoming subject to increasing criticism. Several of these decisions are in the form of Notes to the Sheriff Principal for the purposes of appeals, which later were, or are presumed to have been, abandoned.

In the sheriff court our story begins with a Note by Sheriff Mackie to the Sheriff Principal dated 14 March 2014 in Allan v Veolia Environmental Services (UK) plc. This was a summary cause personal injury action where the defender lodged a valuation of claim which indicated that the valuation attributed by the defender to each head of claim was "nil". No supporting documentation was provided. The case was put out by order and the parties were ordained to appear. The defender's solicitors indicated that they had a policy of entering nil valuations where fraud was suspected. Sheriff Mackie indicated that "the parties should be candid and figures comprising a real assessment of the value of the claim should be included in the statement of valuation of claim together with a note of the documents relied upon for the purposes of the valuation." She was critical of the defender for having made no attempt to sist or vary the timetable pending the outcome

of the fraud investigations, and for not tendering any explanation as to why the investigations had taken so long and were not completed within the timescale set down in the timetable. That might be thought to give way to a discussion on whether a defender's solicitor should or could competently seek to vary a timetable to enable fraud investigations, but that point is beyond the scope of this article. Sheriff Mackie found that the defender was in default and she granted decree in the sum set out in the pursuer's valuation along with interest and expenses. In reaching her decision, Sheriff Mackie noted that no averment had been made that the claim was fraudulent and there was no documentary evidence that could be relied on to justify a nil valuation. The key message is that **a valuation should be real and candid**, even where liability to make reparation is disputed or where it is averred that the claim is fraudulent.

It now seems clear that a valuation should quantify the damages element of the dispute, irrespective of any degree of liability risk or issues of causation. It is safe to say that a defender who lodges a nil valuation runs the risk of Decree by Default. Of course, there may be cases where a defender might say that the real and candid valuation of the claim is nil. For example, where the defender's position is that the injury could not have been caused by the accident. We enjoyed success in persuading Sheriff Arthurson QC to distinguish Allan on such grounds and refuse a motion for Summary Decree in August 2015. He accepted that the defender's nil valuation had been lodged after careful consideration of the terms of an expert report. Others might not be prepared to take the same approach, however. That is particularly so given the further guidance provided by the Inner House of the Court of Session in ***Moran v Freyssinet Ltd [2016 SC 188]*** in a decision dated 3 November 2015. The claim was for damages in respect of Hand Arm Vibration Syndrome and, at first instance, the defenders had unsuccessfully attempted to lodge two valuations on the morning of proof: one at nil and then one in the sum of almost £10,700. Lord Boyd granted decree for the sum concluded for. The Inner House found that he had been entitled to do so, holding that the defenders should lodge a "meaningful statement of valuation of claim" and that "the court may take a critical view of a "nil" statement of valuation" used by some practitioners instead of "TBC" or "TBA"."

Shortly thereafter, Sheriff Braid produced a Note, dated 3 December 2015, in an action for damages arising from personal injuries raised under Chapter 36 of the Ordinary Cause Rules where we acted on behalf of the defenders: Stewart v Covea Insurance. The pursuer had failed to lodge a Record by the timetabled date and then failed to lodge a written explanation in advance of the hearing, which had been fixed. Sheriff Braid was *"mindful that the phrase "administrative error" and its close relative, "administrative oversight" are trotted out with monotonous regularity as catch-all phrases designed to cover virtually every failure to comply with the rules. However, such phrases tell the court nothing, being not so much an explanation, as a description of what has happened."*

He went on to provide guidance: *"What is required by way of explanation is to be told why it has occurred. A view can then be taken as to whether the error or failure was excusable or not. Having regard to the explanation now tendered, it is dubious whether it can be categorised as administrative error in any event. It seems rather to have been an inability to meet the deadline due to lack of resources, or inefficient deployment of resources."*

Sheriff Braid dismissed the action with a finding of expenses in favour of the defenders. Fortunately for the pursuer's agents, the claim was not yet subject to limitation and so the pursuer could simply re-raise proceedings. However, this would not rule out a possible claim against the pursuer's solicitors for any losses that might be sustained by the pursuer through the solicitors' handling of the case, such as any additional court dues, delay and any inconvenience caused.

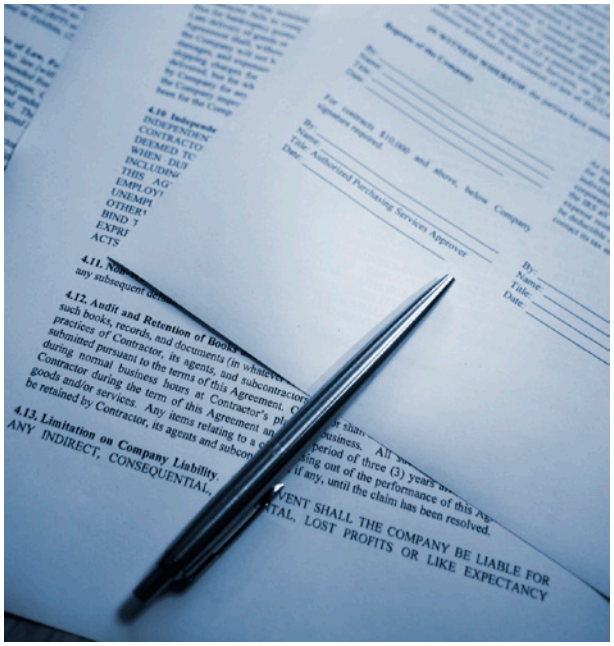
Just over six months after Sheriff Braid's decision, **Practice Note No 3 of 2016** was issued by Sheriff Principal for the Sheriff Personal Injury Court and Sheriff Court at Edinburgh, which provided that a statement of valuation must contain figures and that it was not acceptable to insert "to be confirmed" or some abbreviation or variation thereof. A "nil" value should only be inserted in circumstances where it is averred that no, or no such, loss has been sustained; and an explanation for the reason for a "nil" value should be inserted in the statement. The note went on to state that where a valuation, in proper form, was not lodged timeously, the rules provide for dismissal or decree for the amount in the pursuer's statement of valuation of claim.

The most striking case is undoubtedly Sheriff Mackie's recent decision in December 2016 in **CM v Aviva Insurance UK Limited [2016] SC EDIN 81** where she granted Decree by Default in the sum of £220,000 against a defender in respect of their failure to lodge a valuation prior to proof. The original court timetable had been varied by the pursuer but the defender failed to lodge a valuation by the revised date. The defender then sought to retrospectively vary the timetable on the basis of "oversight" but their motion was dropped by the court for lack of proper justification for the variation. The defender then pursued a further motion to vary, seeking to allow them until the first day of proof for the lodging of a valuation. The motion was unopposed but put out for a hearing nonetheless. Sheriff Mackie found that the failure to lodge a valuation was not due to oversight or inadvertence but a deliberate, conscious and intentional decision to ignore the timetable. She was unable to find that cause had been shown for the proposed variation and refused the motion to vary the timetable. She indicated that it was "appropriate to mark the court's disapproval of the defenders' persistent and sustained failure to comply with the rules by imposing... decree for payment of an amount not exceeding the amount of the pursuer's statement of valuation". In determining the appropriate award, Sheriff Mackie noted that Lord Boyd (in Moran, above) had granted degree for the sum sued for, which was about 50% of the pursuer's valuation. Sheriff Mackie also noted that the court was imposing a sanction for failure

to comply with the rules; it was not required to do justice between the parties by denying the pursuer a windfall. It seems reasonably likely that the pursuer will have sustained a windfall beyond the true value of their claim, which might well require to be met by the defenders' solicitors given that arose from the strategy they adopted.

Summary

There is little doubt based upon these examples that **any** failure to adhere to the court rules could leave a party open to losing their case entirely. There does not appear to be any practical difference between the requirement to lodge a statement of valuation in a personal injury action and, say, witness summaries or expert reports in a commercial action or any other type of procedure, although in personal injury cases the courts have emphasised the need for a "proper" statement of valuation in facilitating settlement discussions required by the rules. It is not difficult to imagine, however, that the Court of Session Commercial Court, for example, might view its own proactive case management as having a similar purpose, where the timetabling of meetings to discuss possible resolution of actions has become increasingly common.



This follows the approach that has been taken in England & Wales since the Civil Justice Reforms introduced on 1 April 2013. The "Jackson Reforms", as they are commonly known, introduced a new test for relief from sanctions (equivalent to the Scottish Courts' dispensing power) that specifically stresses that the court should consider the need to conduct litigation efficiently and enforce compliance with the rules. After an initial and arguably draconian interpretation of this test, culminating in the infamous **Mitchell v News Group Newspapers [2013] EWCA Civ 1537** decision, which appeared to suggest that relief would only ever be granted where a default was trivial or could be adequately justified by the party in default. That position was softened somewhat by the clarification offered by the Court of Appeal in **Denton v TH White [2014] 1 WLR 3926** and a three-stage test was enunciated requiring the court to consider: 1) the seriousness of the breach; 2) the reasons for the default; and 3) all the circumstances of the case. However, in applying this test, considerable weight is still given by the English & Welsh courts to the effect of the breach on their ability to conduct litigation efficiently and the need to encourage compliance with the rules. **Prince Abdulaziz v Apex Global Management Ltd [2014] EWCA Civ 1106** is also an interesting and high-profile example of a party facing Decree by Default for $6 million for failing to comply with an English court order where the Pursuer, a Saudi Prince, refused to lodge a signed witness statement in support of his pleadings on grounds that members of the royal household did not personally sign court documents as a matter of protocol. By majority decision (4-1) the Supreme

declined to interfere on the basis that the sanction was within the reasonable discretion to be exercised by a first-instance court when managing litigation. Lord Clarke dissented on the basis that the sanction was disproportionate and it was wrong to disregard the underlying merits altogether. Whilst this case is perhaps idiosyncratic in its scope, it displays the kind of behaviour that Sheriff Mackie described a deliberate, conscious and intentional decision not to comply with the rules; and the court marking its disapproval.

If a pursuer's claim is dismissed by the court following a failure to comply with the rules, they may not have the opportunity to re-raise if the right of action has become subject to limitation and the opportunity to pursue a claim has been lost. On the other hand if Decree by Default or Summary Decree is granted against a defender for the sum sued for, or the total of a pursuer's valuation in a personal injury case, the defender may well face a liability greater than the reasonable value of the claim. In either case, the solicitor could face a claim by their client for failing to meet the court timetable and face the possibility of a claim for breach of duty – a circumstance notifiable to Master Policy insurers.

Key contacts

Alan Calvert
PARTNER
+44 (0)131 656 0223
alan.calvert@brodies.com

Louise Kelso
ASSOCIATE
+44 (0)131 656 3761
louise.kelso@brodies.com