



Can documentary or other evidence be urgently seized in Scotland?

Dawn Raids, Section 1 Orders and Commission and Diligence

Commission and Diligence

In Scottish civil proceedings there is no general requirement of disclosure, unlike in England & Wales and the USA. In Scotland the parties can voluntarily exchange documentation, but there is no obligation on them to do so.

The starting position in a Scottish court action is that it is for each party to amass its evidence in support of its claim. If the other side refuses to voluntarily disclose documents an application can be made to the court for an order requiring production, but the burden is on the party applying for the order to show (1) that they have a pleaded prima facie relevant claim on the basis of the evidence they already possess, and (2) that they require additional specific information in the hands of the opponent in order to make their claim more specific.

The procedure is for the party to apply for a Commission and Diligence for recovery of documentation from the other party, or from a third party. They must lodge a Specification with the court, a document specifying the specific categories of documents they are seeking to recover. The court must be satisfied that the calls are relevant to the case as pleaded and that they are not too broad (i.e. not a fishing expedition).

Section 1 Orders

Where a court action has not yet been raised it is possible to seek to recover documents or other property using Section 1 of the Administration of Justice (Scotland) Act 1972. This provision gives the Scottish courts power to order the production of documents or other property where that appears relevant to either existing civil proceedings, or civil proceedings which are likely to be brought.

Where a claim has already been brought, the test will be the same as that for a commission and diligence, that the party has pleaded a prima facie relevant case and requires the additional documents to make that claim more specific and detailed.

Where court proceedings have not yet been initiated the test is very similar: the applicant must satisfy the court that it has a prima facie case, that it is likely that proceedings will be raised, and that the documents sought will enable them to plead a more specific or detailed case.

Ex parte Applications / Dawn Raids

It is possible to secure a Section 1 order for recovery of documents and/or property without the knowledge of the **haver**, where there is a danger that advance warning would result in the documents/property being moved/deleted/interfered with, preventing recovery. These orders are often granted, for example, in copyright infringement cases and in restrictive covenant and data protection claims, where an ex-employee is alleged to have removed confidential data from the former employer and to be making use of that data in setting up a competing business.

Execution of Dawn Raid

The applicant will seek the appointment of a Commissioner (usually an Advocate) who will be authorised by the court to carry out the raid, search for and remove the relevant documents or other property, and deliver them to the court. The Commissioner is in charge of the execution of the raid, within the terms of the court order and may be assisted by the applicant's solicitors. A shorthand writer is often instructed.



Conclusion

Documents and other property can be obtained from other parties and third parties by application to the Scottish courts. We are well used to receiving instructions in relation to such requests.

If you require further information, please do not hesitate to get in touch with **Barbara Bolton** or with your usual Shepherd and Wedderburn.