

The insolvency processes and procedures that rely on the Scottish courts for progression

	Process	Issue	Proposed solution(s)	Urgent	Administrative
1	Administration (references to paragraphs are taken from Sch B1, Insolvency Act 1986)	(references to Rules are taken from the Insolvency (Scotland) (CVA and Administration) Rules 2018			
1.1	Extension to administration in terms of para 76 to court	Administration terminates automatically otherwise with no statutory remedy to resurrect or reappoint administrators	extension of administration by consent but note that an administration can be extended only once by consent.	Yes	
1.2	Power to pay ordinary creditors in excess of prescribed part per para 65	Requires application to court for permission	Delay divided until courts reopen and deny creditors dividend (with corresponding implications on creditors' working capital) Preferred approach would be for usual application for extension to be made to relevant hub Sheriff Court or Court of Session.  COVID is severely impacting the financial position of many corporates, individuals and firms and so the ability to release cash to creditors that may themselves be in financial difficulty is important.		Administrative process
1.3	Para 12 – application to court to appoint an administrator	Lodging petition in the relevant court	This should be classed as an 'urgent' application and capable of e-filing.	Yes	

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1.4	Para 14/Para 22	Application by floating charge holder (14) or company/directors (22) to appoint an administrator – requires to be ‘stamped’ by the relevant court. (‘out of court’ administration applications)	This should be classed as an ‘urgent’ application and capable of e-filing.	Yes	No
1.5	Para 43	Application to overcome the administration moratorium. Inability to access the Court could be prejudicial to creditors’ interests.	Only required where the administrator withholds consent.	Potentially	No
1.6	Para 53/54	Administrator to report to court decision of creditors re proposals with or without modifications.			Yes
1.7	Para 55	Administrator to report to court where creditors have failed to reach a decision re proposals	This requires the Court to make e.g. an order to wind up/provide that the appointment shall cease to have effect etc. Potentially could delay reporting until court business returns to normal.	Potentially	
1.8	Para 63	Ability to apply to Court for directions in connection with administrator’s functions.	If the administrator, having taken legal advice, requires to make such an application there is no real alternative. Inability to make such an application could hinder the progress of the administration.	Potentially	
1.9	Para 71/72	Application to court to enable the administrator to dispose of property subject to security (other than a floating charge) (71) or HP agreement (72)	Delay until courts re-open.  Note that given the current closure of the Land Register it is unlikely there will be urgent applications of this nature but that may change if property transactions are able to recommence.	No	No

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1.10	Para 74	Application to court by creditor or member to challenge administrator's conduct of the company.	Delay until courts re-open.		
1.11	Para 75	Application to examine misfeasance re conduct of administrator.	Likely to require witness evidence so will not be possible until courts re-open.		
1.12	Para 79	Application to end administration on application of administrator where objective cannot be achieved.	Consider alternative exit routes or extend by consent until Courts re-open?		
1.13	Para 80	Termination of administration where objective achieved.	File notice with the Court once court re-opens (unless expiry of administration is imminent)	Unlikely	Yes
1.14	Para 81	Court ending administration on application of creditor	Delay until court re-opens.		
1.15	Para 82	Public interest winding up leading to end of administration	Likely that public interest winding up would be delayed until courts re-open so unlikely to be an issue.		
1.16	Para 85	Discharge of administration order where administration ends.	Only relevant to administrators appointed by court application (rather than out of court route).		
1.17	Para 87	Administrator appointed by administration order resigns by notice in writing to Court.			Yes
1.18	Para 88	The Court may by order remove an administrator from office.	Unlikely to be a standalone Court application.		
1.19	Para 91	Court can replace an administrator where there is a vacancy in the office of administrator.	Many administrations will have joint appointees. In the case of a sole appointee, delay retiral/resignation until court re-opens.		Yes
1.20	Para 96	Substitution of an administrator by competing floating charge holder.			No

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1.21	Para 107	Application by administrator to vary time limits	Such applications can be made after the time limit in question has expired so such applications can be delayed until courts re-open.		No
1.22	Rule 3.52	Administrator or IP involved can apply to Court for approval of pre-administration costs.	Delay until courts re-open.		No
1.23	Rule 3.99	Appeal against fixing of remuneration – court application to seek to increase amount/rates as determined by the creditors/creditors committee	Delay until courts re-open.		No
1.24	Rule 3.100	Creditor application to Court re administrator’s remuneration is excessive.	Delay until courts re-open.		
1.25	Rule 3.108	Creditor right to appeal to court against the adjudication of claim by administrator.	Application must be made not later than 14 days before the end of the accounting period.  Consider taking remuneration at approved level and reserving ability to appeal?	Potentially	No

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<b>2</b>	<b>Court Liquidation</b>				
2.1	Petition to court for winding-up of company	<p>Petitioners are currently largely unable to lodge petitions for winding-up.</p> <p>Until a company has been put into insolvency regime, there is (amongst other things):</p> <ol style="list-style-type: none"> <li>1. No payments to employees from the Redundancy Payment Office possible</li> <li>2. A delay in making any distributions to creditors (such as HMRC and preferential creditors, which includes employees)</li> <li>3. A risk any debt the company has may increase.</li> <li>4. An increased risk of dissipation of assets by directors before a provisional liquidator is appointed or winding up order made.</li> <li>5. An increased risk of losing the right to equalise diligences.</li> </ol>	Clear provision be made for any party to lodge a petition for a winding-up with the relevant sheriff court electronically and for the matter to be dealt with on the papers and any first orders to be given electronically.	<p>Urgent where there is a public interest winding-up petition.</p> <p>Urgent where there is a need to appoint a provisional liquidator to protect assets.</p> <p>Urgent where there is a need for the interests of employees or creditors to be protected</p>	This could be an administrative process, not requiring the presence of any of the parties. Where input from agents is necessary it can be done via telephone conferencing
2.2		Sheriff Court business has been consolidated into 10 of the larger Sheriff Courts, with the remaining Sheriff Courts having closed. There is a lack of clarity as to where petitions should be lodged.	Guidance re. to which of the 10 larger Sheriff Courts petitions should be presented.		Administrative guidance required
		Petitions are not being heard whether contested or uncontested and winding up orders are therefore not being granted.	Where a petition is uncontested, the Court may deal with the matters on the papers alone as an administrative matter.	Liquidation appointments should not be delayed as a matter of course	Administrative process where uncontested

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		Until the outcome of the petition is known, then for an uncertain period of time, either: the company is unable to divest its assets or: if it is unaware of the petition, may divest its assets to the detriment of creditors, and any incoming liquidator will require to examine every transaction in terms of s127 for voidable transactions.	Where the petition is contested the Courts could conduct any necessary hearings remotely using video or teleconferencing facilities. Any person intending to appear should inform the Court of their intention to appear and provide an email address and telephone number to be invited to the hearing.	Urgency on a case by case basis	
2.3		It is not easily possible to make an application for sist of proceedings against a company. This may cause companies difficulty where there is a delay in making any winding-up order, which itself (once made) prevents an action or proceeding being proceeded with or commenced against the company.	Provision should be made for Courts to conduct application for a sist of proceedings against a company to be conducted remotely using video or teleconferencing facilities.		Administrative process
2.4	Appointment of liquidator (section 138) where no nomination made by creditors	The Courts are currently unable to consider an application for the appointment of a liquidator under section 138(5). This will prevent the liquidation from progressing, with the attendant issues identified above.	Provision should be made for Courts to deal electronically with the application for the appointment of a liquidator where none is nominated and, where necessary, use video or teleconferencing facilities.	Urgency on a case by case basis.	Administrative process
2.5	Applications by the liquidator	At present, once appointed, it is not possible for the liquidator to easily apply to Court for directions and for orders for preservation of documents or examination in terms of sections 234 and 236.  This has the potential to be extremely prejudicial to the interests of creditors, for example were there to be a risk of	Provision should be made for Courts to deal with applications by the liquidator electronically and, where necessary, use video or teleconferencing facilities.	Urgency on a case by case basis.	Administrative guidance.

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		destruction of evidence or an urgent need to recover an item or document.			
2.6	Early dissolution s204	Liquidator seeks early dissolution of the company and permission to retain any funds in hand in relation to the costs incurred which are in excess of the available realisations			Administrative matter that could be dealt with electronically by the courts

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3	<b>Voluntary Liquidation</b>				
3.1	Application of the court liquidation process to voluntary liquidation per s112 IA86	All points pre court liquidation as above or per Remuneration approval as appropriate			

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4	<b>Remuneration approval</b>				
4.1	Application for appointment of a court reporter to report on liquidator's remuneration (also applies to Administration)	Applications not being progressed at present	Continue to process the applications as they are lodged	On the face of it, not urgent. However, if remuneration applications are not dealt with (particularly for small firms) funds are locked up in cases which are required to allow the liquidator's practice to continue to run, and dividends to creditors are delayed.	Most applications are dealt with on an administrative basis at this stage  Could be dealt with on an administrative basis unless contentious
4.2	Approval of fees once court reporter's report completed	Not being progressed at present	Where the court reporter's report is uncontentious, the interlocutor approving the remuneration should be issued.	On the face of it, not urgent. However, if remuneration applications are not dealt with (particularly for small firms) funds are locked up in cases which are required to allow the liquidator's practice to continue to run and dividends to creditors are delayed.	Could be dealt with on an administrative basis unless contentious

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5	<b>Sequestration (section references to BSA2016)</b>				
5.1	S2(1)(b) Sequestration of estate of living debtor: Presentation of creditor petition to relevant Sheriff court (or Hub) And S6 Sequestration of other estates	In the absence of legislation to temporarily suspend creditor petitions, a creditor retains the right to present a petition for the sequestration of a debtor's estate (where the debtor has not chosen to use the extended Moratorium provisions per part 15) There may be circumstances when the debtor's estate is at risk of diminution if a petition is not presented timeously or potential actions of challenge open to the trustee may be lost (eg section 98/99). The date of the warrant to cite is required to constitute the date of sequestration to protect assets and to become the date of vesting on award. A creditor who has established the apparent insolvency of a debtor would be disadvantaged if he was unable to present a petition within the statutory 4-month period. A petition by a trustee under a trust deed is also possible and if this is in the best interests of the creditors should be dealt with for the same reasons as a creditor petition.	Creditors' petitions should continue to be dealt with by the courts		Most applications are dealt with on an administrative basis at this stage  Could be dealt with on an administrative basis unless contentious
5.2	S22 When sequestration is awarded	Citation of the debtor – required in person  Service on debtor is provided for in Sheriff Court Bankruptcy Rules 2016. Rule 6 Sheriff Officer service is the norm,	We are aware that some Sheriff Officers will continue to serve where possible. Court could instruct notice electronically where it can be demonstrated the debtor's email		Most applications are dealt with on an administrative basis at this stage

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		but the Sheriff can authorise service by any method thought to be fit	address is known to the petitioning party or by advertisement.  Or Court could authorise service by Sheriff Officers by letter box service rather than personal service where the sheriff officer was satisfied the debtor did reside at that address. The court just needs to be satisfied that the debtor is aware of the petition for sequestration		Could be dealt with on an administrative basis unless contentious
5.3	S23 Circumstances in which sequestration is not to be awarded	Making of Award may be delayed to allow debtor a period of time to make payment or enter a Debt Arrangement Scheme. Where a petition is lodged, and an award hearing set significantly into the future, then an already extended period between the date of sequestration and the award could be further extended by the rights of the debtor to have the award postponed.	Timeous treatment of the petition and citation per above. However, if the courts accept the presentation of the petition and set an award date in the future, then the petitioning creditor could ask for the appointment of an Interim Trustee per section 54.		
5.4	S39 Interim Preservation of Estate	Interim Trustee can exercise various powers without sanction in respect of interim preservation of estate. Certain powers require sanction of the court.	In the event that an Interim Trustee required to exercise a power other than an express statutory power, and application will be required to court.	Interim Trustee role that of preservation of estate, and therefore the request for further powers would likely be urgent	
5.5	S112 Debtor's family home - action to remove	The AiB has requested that Trustees sist or suspend any further action in relation to the family home generally, and evictions specifically.	Trustee may require motion to sist		Motion to sist likely to be administratively routine
5.6	S112 Debtor's family home – automatic	To preserve the Trustee's interest in the family home at the 3 <sup>rd</sup> anniversary, the trustee has a number of options set out	In the event that RoS confirm that they will not be accepting electronic application of inhibition renewals,	This may be urgent, depending on the circumstances.	

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	revesting on 3 <sup>rd</sup> anniversary	at s112(3)(a)(i) to (ix). Registers of Scotland need to confirm they are accepting Renewal of the Inhibition per s26 before the expiry of the three-year period	there may be some cases where the trustee is obliged to raise court action to protect the family home as a vested asset for the benefit of creditors		
5.7	S211 Power to cure defect in procedure	We foresee a number of such applications to the Court, in the absence of routine business being re-established.	The courts dealing with as many of the routine measures as possible means that a backlog to be dealt with post lock down is avoided.		
		We have identified a number of sections in the Act where an application to the relevant court may be required but where we believe the application would require to demonstrate to the court's satisfaction that such an application was urgently required:			
5.8	S29 Recall of sequestration	Solvent recall applications go to the Accountant in Bankruptcy to be dealt with administratively. In only certain circumstances set out in s30 is application to court required			
5.9	S66 Appointment of replacement trustee	In the event that creditors vote to replace the original trustee where that is the AiB, the replacement trustee requires to apply to court for confirmation of their appointment.			
5.10		Appointment of trustee on revival of the sequestration process	This may be necessary where, for example, assets have emerged after the trustee has been discharged and a new trustee is required to deal with them – it might be important to preserve the assets for that appointment to be made as soon as possible		

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5.11	S78(11) Vesting of the estate at the date of sequestration	Application to exclude an asset from vesting in the Trustee			
5.12	S118/119 Private and Public examination	Application to the court to obtain the co-operation of the debtor (or relevant third party) to engage with the trustee, failing which the Trustee may wish to instruct a private or public examination			
5.13	S127 Adjudication of claims: review and appeal	In the event that a creditor's wishes to appeal a decision by the AiB regarding an adjudication, the right to apply to the court for further review of the decision could be exercised			
5.14	S134 Appeal of Trustee's remuneration	In a small handful of cases, any objection to the amount of a Trustee's remuneration fixed by the AiB will be appealed to the court			
5.15	S139 Discharge of debtor	In the event that the debtor has not been discharged by the AiB on appeal the right to apply to the court for further review of the decision could be exercised			
5.16	S149 Discharge of Trustee	In the event that the debtor has not been discharged by the AiB on appeal the right to apply to the court for further review of the decision could be exercised			
5.17	S160 Interim BRO	If AiB concludes that debtor conduct warrants a BRO in excess of 5 years, an application to court will be required to protect position, possibly seeking the making of an interim BRO.			

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6	Other legal issues that impact on insolvency				
6.1	Statutory Declaration	<p>Statutory declarations are required in a number of insolvency and Insolvency Act 1986 procedures, as part of the process to instigate the necessary steps to commence insolvency. These are required, for example, for a statutory declaration of solvency by directors of a company, before a members voluntary liquidation can be commenced, and for the appointment of administrators to a company.</p> <p>With notary publics and solicitors working remotely, plus current social distancing requirements personal attendance before a notary to make a statutory declaration, especially in cases of urgency but in any event, is made significantly more difficult, and poses a public health risk in terms of the declarant and the notary meeting in person. However, a statutory declaration that is made otherwise than in-person before a person authorised for that purpose, may constitute a formal defect or irregularity, and could invalidate the proceedings that are based on it.</p>	<p>Similarly to the temporary Insolvency Practice Direction, applied by the Courts of England &amp; Wales, it is proposed that there be a practice direction for the Scottish Courts which deems any defect (if any) in the procedure based on a statutory declaration taken by video conference as a curable defect, on the basis there is no substantial injustice caused (and applied to all statutory declarations for the purposes of the Insolvency Act 1986, or the Bankruptcy (Scotland) Act 2016, provided:</p> <ol style="list-style-type: none"> <li>1. The person making the statutory declaration does so by way of video conference with the person authorised to administer the oath.</li> <li>2. The person authorised to administer the oath attests that the statutory declaration was made in the manner referred to in 1 above; and</li> <li>3 The statutory declaration states that it was made in the manner referred to in paragraph 1 above.</li> </ol>	<p>If an insolvent entity requires to commence an insolvency procedure, the necessity is one of urgency, and the ability of practitioners to proceed on remote statutory declarations is therefore one of urgency.</p>	<p>Administrative, in the sense that it does not require a court hearing, and the proposed solution is for a suggested temporary practice direction.</p>