

27.2. UNITED KINGDOM - SCOTLAND

Contributing correspondents

Hon. Lord BRACADALE, *Judge at the Supreme Court*

Hon. Lord HODGE, *Judge at the Supreme Court*

Authors

Alix Loubeyre, doctoral student

Other administrative order

NO

i. procedural rules in calling for an expert examination

I. 1) On the initiative of

The judge can suggest to the parties that the Court would like to have the opinion of an expert on a particular subject.

He can also decide that a particular question should be “remit to a man of skill”.

The judge can also appoint an assessor to sit with him and counsel him on technical questions but this possibility is rarely used.

I.2) Mandatory expert examinations

NO

I. 3) Decision-maker

The judge or the parties.

I.4) Is a pre-trial expert examination possible?

Yes, in some cases and with the parties’ agreement, the judge can get explanations from an expert before ruling on technical issues in a dispute.

This enables the judge to understand the technical framework without addressing questions that are particular to the dispute and will be treated by the parties’ experts.

II. Choice and appointment of the expert(s)

II. 1) Register

There is no register of experts, as experts are above all technical counsels for the parties.

Each year however the Law Society of Scotland does publish a directory of experts, in which enrolment is obtained by application supported by 2 recommendations or on accreditation by another

professional body.

II. 2) Oath

Each time the expert testifies before the Court.

II. 3) Choice of the Expert

The parties alone in most cases.

If the judge decides to call for an expert, he appoints him.

II. 4) Participation by the parties in the appointment process

When the judge appoints an expert he generally discusses his choice with the parties.

II. 5) Nationality

Irrelevant

II. 6) Recusal by the litigant parties

A party can question the relevance of the expert's findings or his independence.

II. 7) Expert's withdrawal (refusal of a mission)

An expert can refuse a mission for the parties or for the Court.

II. 8) Possibility of adding another expert

If the judge names an assessor to sit with him, he must give his authorisation if the assessor needs the assistance of another expert.

If the expert is appointed by the parties, it depends of their private agreement.

II. 9) Possibility of being assisted by a colleague

YES

III. DEFINITION OF THE EXPERT'S MISSION

III. 1) Who determines the mission?

If the expert is court-appointed, the court will determine the questions he must reply to, after consulting the parties.

III. 2) Type of mission

All

IV. PROGRESS OF THE EXPERT'S MISSION

IV. 1) Judge supervision

NO

IV. 2) Form of contradictory procedure

Deferred. The expert's report is submitted to the parties. If they contest it, the expert will have to bear testimony in court and will be cross-examined by the parties and the judge.

IV. 3) Participation in the hearing

Yes, if needed

V. Close of the expert examination

V. 1) Does conciliation put an end to the expert's mission?

YES

V. 2) Form imposed on the report

No, but the Academy of Experts publishes models of standard reports and declarations.

V. 3) Does the report put an end to the expert's mission?

No, if the parties contest the report, the expert must attend the hearing.

The assessor who assists the judge sits with him to hear the parties' arguments and discuss the means of evidence with the judge during deliberations.

V. 4) Is there an imposed structure for the report?

NO

V. 5) Is a preliminary report mandatory?

NO

V. 6) Is the judge bound by the expert's conclusions?

NO

V. 7) Possibility of a second opinion

YES

VI. Funding for the expert examination

VI. 1) Security-Payment

No, the norm is that the experts are paid after handing in their report.

VI. 2) Determining the amount of payment due

Not applicable

VI. 3) Possibility of additional payment

Not applicable

VI. 4) Determining fees and costs

The expert's fees are negotiated between the expert and the party that sought his involvement and who pays him.

They can be borne, in part or in whole, by the unsuccessful party to the proceedings.

VI. 5) Possibility of contesting the fees

Not applicable

VII. Expert liability within proceedings

VII. 1) Are there any laws governing expert examinations?

Scottish courts have no written, official rules on expert examinations. However, there is a convention according to which experts have a duty towards the judge in the finding of evidence and have a mission of assistance; they must hold no financial interest in the dispute and have no conflict of interests that could be detrimental to their mission towards the court.

The English practice according to which experts must certify in their report that they have respected certain obligations is not mandatory in Scotland but experts do however also have to respect these obligations.

This kind of declaration is in fact increasingly common in Scottish courts.

VII. 2) Expert liability

An expert who knowingly provides false evidence can be sued for perjury and contempt of Court. In its judgement, the court can publicly criticise an expert who has been incompetent.

VII. 3) Mandatory insurance for the expert

Most if not all experts have professional insurance.

The Court does not verify if experts are indeed insured.

VIII. The expert's status

VIII. 1) Existence of selection criteria (accreditation)

NO

VIII. 2) Classification of skills

Not by the court but the "Directory of Expert-witnesses" published by the Law Society of Scotland

classifies the fields of competence.

VIII. 3) Required qualifications

NO

VIII. 4) Grant of accreditation

No accreditation

VIII. 5) Possibility of accrediting a legal person

Not very common. An expert from a specific institution would tend to write a report and mention that other people assisted him in his work.

However, in intellectual property law, the judge can ask the Patent Office to prepare a report.

VIII. 6) f) Validity period for the accreditation

No accreditation

VIII. 7) Regular assessment tests

Not applicable. Professional organisations may have their own rules for specific accreditation.

VIII. 8) Supervision of the expert's mission

Not applicable

VIII. 9) Expert's activity report

Not applicable

VIII. 10) Code of ethics

Yes. Professional organisations to which experts belong often have their own codes of ethics.

VIII. 11) Good practice

Yes. The Law Society of Scotland has published a guide of good practices that the persons registered in the directory of expert-witnesses must abide by.

Every year, the Academy of Experts of the United Kingdom also publishes a guide in partnership with magistrates.

VIII. 12) Possibility of penalties

No specific penalties. The Court can punish a witness who provides dishonest evidence and professional bodies can act if one of their members discredits their organisation.

VIII. 13) Laws governing the expert's status

No, only the rules regarding witnesses may apply to the status of experts.

IX. Bibliography

(a) Scottish manuals, evidence and procedures:

Macfadyen and Others, "Court of Session Practice"

Macphail, "Sheriff Court Practice" (3rd ed.)

Walker and Walker, "The Law of Evidence in Scotland" (3rd ed. 2009)

(b) English manuals frequently used in Scotland:

Hodgkinson & James, "Expert Evidence. Law and Practice" (3rd ed. 2010), which is the major textbook,

Blom Cooper "Experts in the Civil Courts" (2006) and

Bond and Others "The Expert Witness: a Practical Guide" (3rd ed. 2007) which is a brief general guide.