

Appendix A: Sample Terms of Engagement

A1 This appendix forms a part of the RICS guidance note *Surveyors acting as expert witnesses in Scotland*. Its sample terms are not intended to be mandatory or prescriptive, and may be adapted as required. It is recognised that a variety of circumstances will prevail in the range of assignments surveyors may undertake and that clauses may not be appropriate in every circumstance. For example, where a Client appoints a surveyor directly, without using an Appointer, the terms would need to be amended accordingly. Other or additional terms of engagement may also be indicated.

Terms of Engagement

1 Recital of appointment

1.1 The Appointer has appointed the named surveyor (see 1.5) to provide the following services in respect of [*state identity of property/facility*] and in accordance with these Terms of Engagement.

[*state the nature and extent of the instructions, their purposes and the services which may be provided*]

1.2 The appointment is one which is subject to the RICS professional statement *Surveyors acting as expert witnesses in Scotland*, a copy of which is available on request.

1.3 The Appointer is:

1.4 The Client is:

1.5 The Expert Witness Surveyor is:

[*also state identity and qualifications of any assistant and extent of their intended involvement*]

1.6 The Tribunal is:

[*state name of tribunal to which expert evidence is to be submitted*]

2 Definitions

Unless otherwise agreed by the parties:

2.1 'Appointer' means the person(s), organisation(s), or department(s) from whom instructions are received.

2.2 'Client' means the person(s), organisation(s), or department(s) on whose behalf the Expert Witness Surveyor has been instructed to provide the services listed in 1.1 of these Terms of Engagement.

2.3 'Expert Witness Surveyor' means the person named at 1.5, and appointed to provide the services described in 1.1 of these Terms of Engagement.

2.4 'Assignment' means the matter(s) referred to the Expert Witness Surveyor by the Appointer, in respect of which

the services are required, and to which these Terms of Engagement apply.

2.5 'Fees' means (in the absence of written agreement to the contrary) the reasonable charges of the Expert Witness Surveyor based on the Expert Witness Surveyor's agreed hourly/daily rate [*set out hourly/daily rates*]. Time spent travelling and waiting may be charged at the full hourly/daily rate. Value Added Tax will be charged in addition (where applicable).

2.6 'Disbursements' means the cost, reasonably incurred, of (by way of non-exclusive example) all photography, reproduction of drawings, diagrams, etc., printing and duplicating, and all out-of-pocket expenses, including travel, subsistence and hotel accommodation. Value Added Tax will be charged in addition (where applicable).

2.7 [*The Expert Witness Surveyor's*] Complaints Handling Procedure (CHP) (if the firm is an RICS-regulated firm) will not apply to this engagement, because of the Expert Witness Surveyor's duty to the tribunal.

3 The Appointer

3.1 The Appointer shall:

- (a) provide timely, full and clear instructions in writing supported by good quality copies of all relevant documents within his/her possession – including all court orders and directions which may affect the preparation of advice or reports – along with a timetable for provision of the Expert Witness Surveyor's services; at such times as the timetable is altered, such alterations shall be notified promptly to the Expert Witness Surveyor
- (b) treat expeditiously every reasonable request by the Expert Witness Surveyor for authority, information or materials, and for further instructions, as he or she may require
- (c) update and/or vary without delay the Expert Witness Surveyor's instructions, as circumstances require
- (d) not alter or add to, nor permit others so to do, the content of an Expert Witness Surveyor's report, or any text, document or materials supporting such report, before submission to the Tribunal, without the Expert Witness Surveyor's permission
- (e) where possible, at the Expert Witness Surveyor's request, arrange access to the property/facility relevant to the Assignment in order that the Expert Witness Surveyor can inspect such and make relevant enquiries

- (f) ascertain the availability of the Expert Witness Surveyor for hearings, meetings and appointments at which his/her presence is required
- (g) give adequate written notice to the Expert Witness Surveyor of any attendance required at hearings, meetings and appointments; and
- (h) not use the Expert Witness Surveyor's report or other works for any other purpose save that directly related to the Assignment.

4 The Expert Witness Surveyor

4.1 The Expert Witness Surveyor shall:

- (a) undertake only those tasks in respect of which he or she considers that he or she has adequate experience, knowledge, expertise and resources
- (b) use reasonable skill and care in the performance of his/her instructions and duties
- (c) comply with appropriate codes, rules and guidelines, including those of RICS
- (d) notify the Appointer of any matter which could disqualify the Expert Witness Surveyor or render it undesirable for the Appointer to continue with the appointment
- (e) answer questions or requests for information from the Appointer within a reasonable time
- (f) endeavour to make him or herself available for all hearings, meetings, etc. of which he or she has received adequate written notice
- (g) treat all aspects of the Assignment as confidential
- (h) provide all relevant information to allow the Appointer to defend the Expert Witness Surveyor's Fees or Disbursements at any costs assessment
- (i) respond promptly to any complaint by the Appointer within a reasonable time; and
- (j) retain all intellectual property rights and ownership rights in his/her work and any other original works created by him or her in relation to or in connection with the Assignment on which he or she is instructed, unless otherwise agreed in writing.

5 Fees and Disbursements

5.1 The Expert Witness Surveyor may present invoices at such intervals as he or she considers reasonable during the course of the Assignment, and payment of each invoice shall be due on presentation.

5.2 For the avoidance of doubt, the Expert Witness Surveyor shall be entitled to charge for Fees and Disbursements where, due to settlement of the dispute, or for any other reason not being the fault of the Expert Witness Surveyor:

- (a) the Expert Witness Surveyor's time has been necessarily reserved for a specific hearing, meeting, appointment or other relevant engagement
- (b) specific instructions have been given to the Expert Witness Surveyor for an inspection and report; and
- (c) the reservation of time is not required because the engagement has been cancelled or postponed and/or the instructions have been terminated.

5.3 The Expert Witness Surveyor shall also be entitled to charge for answering questions from a party relating to the Assignment or for the provision of any addendum reports.

5.4 The Appointer and [*identify party*] shall be jointly and severally responsible for payment of the Expert Witness Surveyor's Fees and Disbursements.

5.5 Any restriction or cap by the Tribunal, or by another competent authority, of the recoverability of an Expert Witness Surveyor's Fees and Disbursements, shall not affect the liability of the Appointer to pay those Fees and Disbursements.

5.6 The Appointer shall pay to the Expert Witness Surveyor, if applicable, interest under the *Late Payment of Commercial Debts (Interest) Act 1998* on all unpaid invoices, or will pay to the Expert Witness Surveyor, at the Expert Witness Surveyor's sole discretion, simple interest at [...] % per month (or part thereof) on all invoices which are unpaid after 30 days from the date of issue of the invoice, calculated from the expiry of such 30-day period, together with the full amount of administrative, legal and other costs incurred in obtaining settlement of unpaid invoices.

6 Disputes over Fees and Disbursements

6.1 In the event of a dispute as to the amount of the Expert Witness Surveyor's Fees and Disbursements, such sum as is not disputed shall be paid forthwith pending resolution of the dispute, irrespective of any set off or counter claim which may be alleged.

6.2 Any dispute relating to the amount of the Expert Witness Surveyor's Fees and Disbursements shall, in the first instance, be referred to [*for example, the Expert Witness Surveyor's firm*].

6.3 Any dispute over Fees or Disbursements that cannot be resolved by [*for example, the Expert Witness Surveyor's firm*] shall be referred to [*for example, a mediator chosen by agreement of both parties*]. Where agreement cannot be reached on the identity of [*for example, a mediator*] the services of [*for example, the RICS Dispute Resolution Service (DRS)*] shall be used to appoint [*for example, a mediator*]. In the event that any dispute cannot be resolved by [*for example, mediation*], the courts of [*state jurisdiction; for example, Scotland*] shall have exclusive jurisdiction in relation to the dispute and its resolution.

6.4 The law of Scotland shall govern these Terms of Engagement.

Appendix B: Immunity of the expert witness

Scotland

B1(a) An expert witness owes a duty of care to give honest, independent and unbiased, advice and opinion to his/her client and to the court on the matters in which he/she is instructed. If the expert witness gives such advice that is within the range of reasonable expert opinion on the matter then it is very likely that he/she will have discharged his/her duty both to the court and his/her client.

(b) The duty may arise by way of contractual relationship (through an express term or implied term), or in negligence (under the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 principles), depending upon the nature of the appointment.

(c) It is now clear that the duty applies equally to pre-expert witness report advice, expert witness reports, joint meetings and joint reports as well as evidence given in court.

(d) The duty applies equally to expert evidence in relation to civil, criminal and family proceedings as well as all tribunals defined in the preamble to the professional statement.

B2 The absolute privilege enjoyed by all judges, advocates and witnesses in respect of claims for defamation in relation to anything said in court remains.

B3 Lord Dyson provided some very helpful guidance at paragraph 99:

‘There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.’

B4 Further useful advice was given by Lord Collins at paragraph 85:

‘...a conscientious expert will not be deterred by the danger of civil action by a disappointed client, any more than the same expert will be deterred from providing services to any other client. It is no more

(or less) credible that an expert will be deterred from giving evidence unfavourable to the client’s interest by the threat of legal proceedings than the expert will be influenced by the hope of instructions in future cases. The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report. It is almost certain to be one of those reports, rather than evidence in the witness box, which will be the focus of any attack, since it is very hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case.’

B5 Lord Phillips provided advice where an expert witness changes his/her mind:

‘...the question then arises of the expert’s attitude if he subsequently forms the view, or is persuaded by the witness on the other side, that his initial advice was over-optimistic, or that there is some weakness in his client’s case which he had not appreciated. His duty to the court is frankly to concede his change of view. The witness of integrity will do so. I can readily appreciate the possibility that some experts may not have that integrity. They will be reluctant to admit to the weakness in their client’s case.

They may be reluctant because of loyalty to the client and his team, or because of a disinclination to admit to having erred in the initial opinion. I question, however, whether their reluctance will be because of a fear of being sued – at least a fear of being sued for the opinion given to the court. An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty.’

B6 Expert witnesses are reminded that, when considering what amounts to professional negligence in the discharge of their duties, regard will be given to the professional statement and the guidance note. In particular, reference should be made to the note about professional statements on page 2 of the professional statement.

B7 Expert witnesses are advised to obtain adequate professional indemnity insurance to reflect the nature of their practice rather than simply providing the minimum cover required by RICS.

B8 Expert witnesses are reminded that, regardless of whether they are pursued in a civil action for breach of their duties, there may be disciplinary consequences should they fail to comply with the professional statement.

B9 An expert witness remains liable for criminal prosecution for perjury, perverting the course of justice or for contempt of court.

B10 An expert witness may also be liable if they defame the opposing party or any third party in any report including one prepared for court proceedings.

Appendix C: Definitions

This appendix forms a part of both the professional statement and guidance note of *Surveyors acting as expert witnesses in Scotland*. The following are short definitions of some terms from the professional statement and guidance note. In certain circumstances other terms may be used. Members are advised to refer to a legal dictionary (or legal textbooks), and/or to relevant rules, directions and procedures of the tribunal in question. Members may also find it useful to view Appendix B: Definitions in the RICS practice statement and guidance note *Surveyors acting as advocates*.

Case manager: a person who, acting on behalf of a party, is responsible for the general conduct, management and administration of the case, marshalling and coordinating that party's team (if any) and liaising as appropriate with the tribunal and opposing party.

Conditional fee: this term refers to any arrangement where remuneration – however fixed or calculated – is to be made conditional upon the outcome of proceedings or upon the nature of evidence given. Other labels in common use are 'incentive fee', 'speculative fee', 'success fee', 'success-related fee', 'performance fee', 'no win, no fee' and 'contingency fee'.

CPR: the **Civil Procedure Rules** (known as CPR) can be found at www.justice.gov.uk/civil/procrules_fin/index.htm. This is the set of rules governing the procedure of the several courts in England, Wales and Northern Ireland. These procedural rules are supplemented by Protocols, Pre-Action Protocols, Practice Directions and court guides. The equivalent Scottish Rules of Court can be found in the relevant Parliament House book.

Direction: a requirement laid down by a tribunal.

Disclosure: the production and inspection of documents in accordance with applicable rules and/or directions of a tribunal. Different rules apply in the Scottish courts where documents can be recovered from another party using 'commission and diligence'.

Evidence: this may be evidence of fact, expert (opinion) evidence or hearsay evidence. The weight to be attached to evidence by a tribunal will depend on various factors, the importance of which may vary from case to case.

Expert witness: a witness called by a tribunal to give expert opinion evidence by virtue of experience, knowledge and expertise of a particular area beyond that expected of a layperson. The overriding duty of the expert witness is to provide independent, impartial and unbiased evidence to the tribunal – covering all relevant matters, whether or not they favour the client – to assist the tribunal in reaching its determination.

Hearsay evidence: evidence by way of the oral statements of a person other than the expert witness who is testifying and/or by way of statements in documents, offered to prove the truth of what is stated. See also the *Civil Evidence (Scotland) Act 1988* and the *Civil Evidence Act 1995*. In arbitral proceedings, subject to any agreement between the parties or prior direction given by the arbitrator, hearsay will be admissible, subject to notice being given to the other party.

Legal professional privilege (sometimes called 'legal advice privilege'): legal professional privilege attaches to, and protects:

- communications (whether written or oral) made confidentially
- passing between a lawyer (acting in his/her professional legal capacity) and his/her client; and
- solely for the purpose of giving or obtaining legal advice.

Licensed access: RICS members are currently permitted by the *Faculty of Advocates Direct Access Rules 2006* to instruct a barrister direct, without the services of a solicitor, for certain purposes. The surveyor should be experienced in the field to which the referral relates. The Faculty of Advocates in Scotland can be consulted for further advice.

Litigation privilege: where litigation is in reasonable contemplation or in progress, this protects:

- written or oral communications made confidentially
- between either a client and a lawyer, or the lawyer and a third party
- where the dominant purpose is for use in the proceedings; or
- either for the purpose of giving or getting advice in relation to such proceedings, or for obtaining evidence to be used in such proceedings.

The privilege applies to circumstances where court proceedings are in reasonable contemplation or in progress. This may also apply where tribunal or other dispute resolution methods are in contemplation but legal advice should be sought in such cases before reliance is placed on litigation privilege, employment tribunals and, where it is subject to English procedural law, arbitration. With regard to other tribunals, the position is less clear.

Negotiator: a person who negotiates a deal (of property or asset) or solution. Also, in dispute resolution, a person who seeks to negotiate the resolution of the dispute as best he or she may. A negotiator has no involvement in this role with a tribunal. A negotiator's role is markedly different to that of an advocate, expert witness, case manager or witness of fact.

Representation(s): this term may, depending on the circumstances and context, be used to refer to one or more of:

- a statement of case
- an assertion of fact(s)
- expert opinion evidence; and
- an advocacy submission.

Representations may be made orally or in writing.

Scott Schedule: a document setting out, in tabular form, the items in dispute and containing (or allowing to be added) the contentions or agreement of each party (named after a former Official Referee).

Single Joint Expert (SJE) or Court Appointed Expert (CAE): an expert witness appointed pursuant to an order of a court, and instructed jointly by parties to a dispute.

Submission(s): the presentation by way of advocacy of a matter in dispute to the judgment of a tribunal. The term is occasionally used loosely in the surveying community to refer to evidence of fact or expert opinion evidence presented, or to a mix of such expert opinion evidence and advocacy; such usage is often misplaced.

Surveyor-advocate: a person who presents to the tribunal a client's properly arguable case as best as he or she may on the evidence and facts available; a spokesperson for a client who, subject to any restrictions imposed by the surveyor's duty to the tribunal, must do for his/her client all that the client might properly do for him or herself if he or she could. Sometimes also referred to as party representative (although this term is occasionally loosely also used to refer to the surveyor as a negotiator). The advocacy role is markedly different from the role of an expert witness or a negotiator (see below).

Tribunal: see definition in Preamble to the professional statement.

'Without prejudice': the without prejudice rule will generally prevent statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before a court as evidence of admissions against the interest of the party which made them. There are a number of established exceptions to the rule.

Witness of fact: a person who, usually under oath or solemn affirmation, gives evidence before a tribunal on a question of fact.

Appendix D: Further reading and glossary of Acts, procedures and protocols

Most of the items below can be obtained via RICS Books (www.rics.org/uk/shop). Please note that some publications reference earlier editions of *Surveyors acting as expert witnesses in Scotland* or *Surveyors acting as advocates*.

Baker, E., and Lavers, A., *Case in Point: Expert Witness*, RICS Books, Coventry, 2005 (ISBN 978 1 84219 230 6)

Bond, C. et al, *The Expert Witness in Court – A Practical Guide* (2nd edition) Shaw & Sons, Crayford, 1999 (ISBN 978 0 72191 441 1)

Burns, S. (in association with Bond Solon Training), *Successful Use of Expert Witnesses in Civil Disputes*, Shaw & Sons, Crayford, 2003 (ISBN 978 0 72191 450 3)

Cato, D., *The Expert in Litigation and Arbitration*, LLP Professional Publishing, London, 1999 (ISBN 978 1 85978 662 6)

Civil Evidence (Scotland) Act 1988, available at www.legislation.gov.uk/ukpga/1988/32/contents

Clarke, P. H., *The Surveyor in Court*, Estates Gazette, London, 1985 (ISBN 0 7282 0091 0) (out of print but available from the RICS Library)

COPFS *Guidance booklet for expert witnesses - The role of the expert witness and disclosure*: http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Guidance%20booklet%20for%20expert%20witnesses.PDF

Court of Session Rules (Scotland), available at www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules

Dilapidations in Scotland (2nd edition), RICS guidance note, RICS Books, Coventry, 2015 (ISBN 978 1 78321 095 4)

Dundas and Bartos *Arbitration (Scotland) Act 2010* H Dundas & D Bartos (2nd edition), W. Green

Hodgkinson, T., and James, M., *Expert Evidence: Law & Practice* (3rd edition), Sweet & Maxwell, London, 2009 (ISBN 978 1 8470 3614 8)

Hunter, *The law of Arbitration in Scotland* (2nd edition) LexisNexis, 2002

Law Society of Scotland Code of Practice: <http://www.expertwitnessscotland.info/codepract.htm>

MacFadyen *Court of Session Practice*, Bloomsbury Publishing Looseleaf

Morris, A., *The Surveyor as Expert Witness: Building and Development Play*, Estates Gazette Books, London, 2005 (ISBN 978 0 7282 0480 Pamplin, C. (Dr), *Expert Witness Fees*, JS Publications, Newmarket, 2007 (ISBN 978 1 9059 2601 5)

Pamplin, C. (Dr), *Expert Witness Practice in the Civil Arena*, JS Publications, Newmarket, 2007 (ISBN 978 1 9059 2600 8)

Rating consultancy: RICS/IRRV/RSA code of practice (3rd edition), RICS practice statement, RICS Books, Coventry, 2010 (ISBN 978 1 8421 588 8)

Surveyors acting as advocates, RICS practice statement and guidance note, RICS Books, Coventry, 2008 (ISBN 978 1 8421 9429 4)

Surveyors acting as arbiter or as independent expert in commercial property rent reviews (Scottish edition), RICS guidance note, RICS Books, Coventry, 2002

Surveyors acting as arbitrators and as independent experts in commercial property rent reviews (8th edition), RICS guidance note, RICS Books, Coventry, 2002 (ISBN 1 8421 9096 2)

Surveyors acting as arbitrators in commercial property rent reviews (9th edition), RICS guidance note, RICS Books, Coventry, 2013 (ISBN 978 1 7832 1020 6)

The Changing World of the Expert, D Armstrong (2013) 58 JLSS 16 *The End of Immunity for Expert Witnesses?* R Rennie, S Brymer, D Reid (2012) 80 SLG 37

The Expert Approach, P Nicolson. (2012) 57 JLSS 12, 17-19

The Laws of Scotland, Stair Memorial Encyclopaedia, Butterworths, London, 1991 (contains 25 volumes)

The Queen's Bench Guide (section 7.9), available at www.justice.gov.uk/downloads/courts/queens-bench/queen-bench-guide.pdf

Watson, J., *Nothing but the Truth – Expert Evidence in Principle and Practice for Surveyors, Valuers and Others* (2nd edition), Estates Gazette, London, 1975 (ISBN 978 0 7282 0015 9)

For the various court guides, see <http://www.scotcourts.gov.uk>

The RICS Dispute Resolution Service and RICS Library may be able to provide further information relevant to expert witness practice.



Confidence through professional standards

RICS promotes and enforces the highest professional qualifications and standards in the development and management of land, real estate, construction and infrastructure. Our name promises the consistent delivery of standards – bringing confidence to the markets we serve.

We accredit 118,000 professionals and any individual or firm registered with RICS is subject to our quality assurance. Their expertise covers property, asset valuation and real estate management; the costing and leadership of construction projects; the development of infrastructure; and the management of natural resources, such as mining, farms and woodland. From environmental assessments and building controls to negotiating land rights in an emerging economy; if our members are involved the same professional standards and ethics apply.

We believe that standards underpin effective markets. With up to seventy per cent of the world's wealth bound up in land and real estate, our sector is vital to economic development, helping to support stable, sustainable investment and growth around the globe.

With offices covering the major political and financial centres of the world, our market presence means we are ideally placed to influence policy and embed professional standards. We work at a cross-governmental level, delivering international standards that will support a safe and vibrant marketplace in land, real estate, construction and infrastructure, for the benefit of all.

We are proud of our reputation and we guard it fiercely, so clients who work with an RICS professional can have confidence in the quality and ethics of the services they receive.

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