Op civielrechtelijk vlak blijven lopende procedures en procedures die voor het eind van de overgangsperiode zijn ingeleid, onder het EU-recht vallen. Zoals overeengekomen met het VK, wordt alle informatie op dat gebied in verband met het Verenigd Koninkrijk tot eind 2024 op het e-justitieportaal bijgehouden.

Taking of evidence

Schotland

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The standard of proof in civil cases in Scotland is on the balance of probabilities with the burden of proof being upon the party who seeks to have a particular issue decided in their favour. In order to do so, that party has to adduce sufficient evidence to support their argument. If evidence is led on a specific issue which leaves the matter in question finely balanced then the party relying on it as part of their case may well lose on that issue.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

There are certain circumstances in which the onus of proof on a particular issue is on a party but that party is not required to lead all or any direct evidence to support it. There are 4 main situations when this arises:

(i) when a presumption operates in favour of a party

(ii) when the matter is judicially noted i.e. the points in issue are matters which can be immediately ascertained from sources of indisputable accuracy

(iii) when a matter between the parties is said to be res judicata i.e. preventing a matter which has already been adjudicated being adjudicated on subsequent occasions

(iv) when the point is formally admitted by the other party at the outset

There are 3 general categories of presumptions.

These are:

(1) irrebuttable presumptions of law – these are fixed principles of law that cannot be “rebutted” or argued away by means of evidence to the contrary.

(2) rebuttable presumptions of law - these may be countered by evidence which shows that in the particular case it is unsafe to arrive at a particular conclusion purely on the basis of a particular fact. However, unless some rebutting evidence is produced, that conclusion is likely to be drawn.

(3) rebuttable presumptions of fact – these arise from the facts of particular cases derived from common human experience. In regard to a rebuttable presumption of fact, Fact A usually means Fact B but because this is not invariably the case the court will hear rebutting evidence.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

There are no legal rules governing the “weight” that is given to a particular item of evidence and this is a matter for the judge and jury. The court must be satisfied by the party on which the onus of proof on a particular issue lies, that their version of the facts is more probable than that of their opponents.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

A judge cannot make investigations on his or her own behalf in a case, or call witnesses or interview them in private. Whenever the case calls for proof, the judge will hear parties on the evidence which they have decided to lead before him or her, and then make a decision in the case.

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

In general, once parties have finalised their written pleadings then they can apply to the court to fix a proof. At the proof, parties will present to the judge the evidence which they wish to lead to prove their case.

2.3 In which cases can the court reject an application by a party to obtain evidence?

In instances where the court rules that a particular piece of evidence is inadmissible.

For evidence to be admissible it must satisfy two requirements. It must be relevant and it must conform to the peremptory rules of evidence.

2.4 What different means of proof are there?

There are 3 types of hearing at which evidence in the merits of a case could be led. These are proofs, proofs before answer and jury trials. A proof before answer is a proof in a case in which the court considers it necessary to hear the evidence of both parties before deciding any legal questions which may have to be resolved in order to make a final decision in the case. Almost all hearings of evidence are by way of proof or proof before answer and only very rarely do cases go to jury trial. Jury trials are only available in the Court of Session in particular types of action, and in the specialist Sheriff Personal Injury Court.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

Evidence is normally obtained in 3 ways: by oral, real and documentary evidence of a witness.

Oral evidence includes hearsay evidence which is when a witness simply relates what someone saw or heard. As far as possible, the practice is to have witnesses present in court to give their evidence so that they can be examined and cross-examined.

Real evidence is something tangible and physical and must be lodged as a “production”. Usually, at least one witness must speak to the piece of evidence for it to be admissible.

Documentary evidence may be written, printed, or recorded in some other reliable way such as on tape, video, CD or electronically, and it should also be lodged as a production. Expert witnesses will normally be required to attend court to give their evidence e.g to give testimony in support of a report lodged as a production.

Written evidence such as affidavits are regularly admitted and accepted as evidence in civil proceedings. Expert witnesses will normally attend court to give their opinion as evidence in the proceedings. In many cases, an expert will be speaking in support of a report lodged as a production.

2.6 Are certain methods of proof stronger than others?

There is a general rule that the best evidence must be produced in the case. In Scotland, great value is placed on the oral evidence of a witness rather than other forms of evidence, as the witness is able to provide the court with a first hand account of what they have seen or heard.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

A written document is required in certain circumstances. For instance for the constitution of a contract relating to land, in a trust where a person declares himself or herself to be sole trustee of either his or her own property or any property which he or she may acquire or in the making of any will, testamentary trust disposition and settlement or codicil.

Also in cases where documentary evidence is to be relied upon, then the original of the document must be produced unless the parties accept either a copy of the original or one that has been properly authenticated as a true copy by the person making the copy.

2.8 Are witnesses obliged by law to testify?

Generally speaking, any witness who is cited to give evidence is required to do so.

2.9 In which cases can they refuse to give evidence?

In cases where a witnesses has privilege against answering questions e.g. communications between a legal adviser and his or her client. There is also a general rule in Scots law that a person cannot be forced to incriminate themselves. A witness is entitled to refuse to answer a question if a true answer may lead to a crime or involves an admission of adultery as an untrue answer could lead to a charge of perjury.

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

If a person refuses to give evidence then he or she can be forced to testify under threat of a charge of contempt of court. It is also possible to lodge as evidence a previous statement the witness made if they now refuse to give evidence.

2.11 Are there persons from whom evidence cannot be obtained?

No. The Vulnerable Witnesses (Scotland) Act 2004 abolished the ‘competence test' for witnesses in criminal and civil proceedings so evidence is not inadmissible solely because a witness does not understand the duty to give truthful evidence or the difference between truth and lies. It will be for the judge or jury to decide if the testimony is reliable and credible in light of all the evidence led in the case.

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

The role of the judge is to ensure that a witness when giving their evidence is questioned fairly by parties. The judge must also act with impartiality. The judge can also ask questions in order for example to clarify a matter which remains obscure or to open up another line of inquiry which seems relevant. The role of the parties is that they will lead their respective witnesses in turn who will then each in turn be open to cross-examination by the other party or parties. Under the Vulnerable Witnesses (Scotland) Act 2004 vulnerable witnesses (as defined in the Act) are entitled to apply for special measures (e.g. live TV link, screen, supporter) to help them give their evidence. In certain proceedings under the Children (Scotland) Act 1995 the evidence of a witness can also be taken by way of live TV link.

3 The evaluation of the evidence

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

The court has a discretion whether to exclude evidence that has been obtained improperly subject to the overriding objective of the interests of justice.

3.2 As a party to the case, will my own statement count as evidence?

If a party to a civil case gives evidence then the court will take this into account together with any other evidence it has heard when reaching a decision in the case.

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