

## PRACTICE NOTE 6

### COMMERCIAL ACTIONS

*Application and interpretation of Chapter 47: R.C.S. 1994, r. 47.1*

1. The actions to which the rules apply are intended to comprise all actions arising out of or concerned with any relationship of a commercial or business nature, whether contractual or not, and to include, but not to be limited to —
  - the construction of a commercial or mercantile document,
  - the sale or hire purchase of goods,
  - the export or import of merchandise,
  - the carriage of goods by land, air or sea,
  - insurance,
  - banking,
  - the provision of financial services,
  - mercantile agency,
  - mercantile usage or a custom of trade,
  - a building, engineering or construction contract,
  - a commercial lease.

Some Admiralty actions *in personam*, such as actions relating to or arising out of bills of lading, may also be suitable for treatment of commercial actions if they do not require the special facilities of Admiralty procedure in relation to defenders whose names are not known.

*Commercial judge: R.C.S. 1994, r. 47.2*

2. The commercial judge may hear and determine a commercial action when the court is in session or in vacation: rule 10.7.

*Election of procedure: R.C.S. 1994, r. 47.3*

3.—(1) The initial pleadings in a commercial action are expected to be in an abbreviated form: the purpose of the pleadings is to give notice of the essential elements of the case to the court and the other parties to the action. Compliance with the requirements of paragraph 11 of the practice note will enable the essential elements of the case to be presented in the pleadings in succinct form. Where damages are sought, a summary statement of the claim or a statement in the form of an account will normally be sufficient. Where it is sought to obtain from the court a decision only on the construction of a document, it is permissible for the summons to contain an appropriate conclusion without a condescence or pleas-in-law. The conclusion in such a case should specify the document, the construction of which is in dispute and conclude for the construction contended for.

(2) Rule 47.3(3) is intended to require a party to produce with its summons the “core” or essential documents to establish the contract or transaction with which the cause is concerned. Under rule 27.1(1)(a) documents founded on or adopted as incorporated in a summons must be lodged at the time the summons is lodged for calling.

(3) When the summons is lodged for signetting, a commercial action registration form (Form CA 1), copies of which are available from the General Department, must be completed, lodged in process and a copy served with the summons.

*Disapplication of certain rules: R.C.S. 1994, r. 47.4*

4. The ordinary rules of the Rules of the Court of Session 1994 apply to a commercial action to which Chapter 47 applies except insofar as specifically excluded under rule 47.4 or which are excluded by implication because of a provision in Chapter 47.

*Procedure in commercial actions: R.C.S. 1994 r. 47.5*

5. The procedure in, and progress of, a commercial action is under the direct control of the commercial judge. He will take a proactive approach.

*Defences: R.C.S. 1994 r. 47.6*

6.—(1) In the first instance detailed averments are not required in the defences any more than in the summons and it is not necessary that each allegation should be admitted or denied provided that the extent of the dispute is reasonably well identified. One of the objectives of the procedure is to make the extent of written pleadings subject to the control of the court. Compliance with the requirements of paragraph 11 of this practice note will enable the essential elements of the defence to be presented in the defences in succinct form.

(2) Under rule 27(1)(1)(b), documents founded on or adopted as incorporated in defence must be lodged at the time the defences are lodged.

(3) Defences must be lodged within 7 days after the summons is lodged for calling: rule 18.1(1).

(4) The defenders must complete a commercial action registration form (Form CA 1) and lodge it in process, or complete the process copy, with the information required.

*Counterclaims and Third Party Notices: R.C.S. 1994, r. 47.7.*

7. No counterclaim or the bringing in of a third party may be pursued without an order from the commercial judge.

*Commercial Roll: R.C.S. 1994, r. 47.8*

8. In the Outer House, an action, and all proceedings in it, in which an election has been made to adopt the procedure in Chapter 47 for commercial actions or which has been transferred under rule 47.10 to be dealt with as a commercial action, shall be heard and determined on the Commercial Roll.

*Withdrawal of action from Commercial Roll: R.C.S. 1994, r. 47.9*

9. The object of rule 47.9 is to enable cases which are unsuitable for the commercial procedure to be removed from the Commercial Roll, but it should be understood that the commercial procedure is not to be regarded as limited to cases

which are straightforward or simple or as excluding cases which involve the investigation of difficult and complicated facts.

*Transfer of actions to Commercial Roll: R.C.S. 1994, r.47.10*

10.—(1) An ordinary action which has not been brought as a commercial action under rule 47.3(1) may be transferred to the Commercial Roll as a commercial action on application by motion by any party (including the pursuer) to the commercial judge if it is an action within the meaning of a commercial action in rule 47.1(2).

(2) An interlocutor granting or refusing a motion to transfer an action to the Commercial Roll may be reclaimed against only with leave of the commercial judge within 14 days after the date of the interlocutor: rule 38.4(6).

*Pre-action communication*

11.—(1) Before a commercial action is commenced it is important that, save in exceptional cases, the matters in dispute should have been discussed and focused in pre-litigation communications between the prospective parties' legal advisers. This is because the commercial action procedure is intended for cases in which there is a real dispute between the parties which requires to be resolved by judicial decision, rather than other means; and because the procedure functions best if issues have been investigated and ventilated prior to the raising of the action.

- (2) It is therefore expected that, before a commercial action has begun, the solicitors acting for the pursuers will have:
- (i) fully set out in correspondence to the intended defender the nature of the claim and the factual and legal grounds on which it proceeds;
  - (ii) supplied to the intended defender copies of any documents relied upon; and
  - (iii) where the issue sought to be litigated is one for which expert evidence is necessary, obtained and disclosed, to the intended defender, the expert's report.

For their part, solicitors acting for the defender are expected to respond to such pre-litigation communications by setting out the defender's position in substantial terms; and by disclosing any document or expert's report upon which the defender relies. To that response the solicitors for the pursuers are expected to give a considered and reasoned reply. Both parties may wish to consider whether all or some of the dispute may be amenable to some form of alternative dispute resolution.

(3) Saving cases involving an element of urgency, actions should not be raised using the commercial procedure, until the nature and extent of the dispute between the parties has been the subject of careful discussion between the parties and/or their representatives and the action can be said to be truly necessary.

*Preliminary hearing on Commercial Roll: R.C.S. 1994 R. 47.11*

12.—(1) The preliminary hearing will normally be conducted on the basis that the provisions of paragraph 11 in relation to pre-action communication have been

complied with. The preliminary hearing, and any continuations thereof, are not designed to give parties the opportunity to formulate their claim and response thereto.

(2) Parties should lodge, prior to the preliminary hearing, and for consideration at the preliminary hearing all correspondence and other documents which set out their respective material contentions of fact and law which show their compliance with the provisions of paragraph 11. These provisions are supplementary to the provisions of rule 47.3(3).

(3) Where it appears to the court that the need to grant any request for a continuation of a preliminary hearing is brought about by a failure to comply with the provisions of paragraph 11, this may result in the party responsible for any such failure having the expenses of the continued hearing awarded against him on an agent/client basis. Apart from that possible disposal, motions for continuations of the preliminary hearings which are sought simply to enable information to be obtained, which could and should have been obtained, prior to the preliminary hearing, may be refused.

(4) At the preliminary hearing the parties should be in a position to lodge a document setting out in concise form the issues which they contend require judicial determination. The statement of issues should, where possible, be set out in an agreed document.

(5) In applying rule 47.11(3), the court will expect to set realistic time limits; but once established those time limits will be expected to be achieved and extension will only be granted in certain circumstances. This emphasises the importance of ensuring that parties at the preliminary hearing are in a position to explain fully what will be required. Since it is part of the administration of commercial causes that wherever possible a commercial action should at all stages be heard before the same judge, it is important to avoid repeated appearances of the action on the commercial roll. For that reason it is necessary to try to give the court accurate information in order to enable the appropriate time limits for a particular case to be established in the manner which is both realistic and does not prejudice the overall requirement that commercial actions should be dealt with expeditiously.

*Procedural Hearing on Commercial Roll: R.C.S. 1994, r. 47.12*

13.—(1) The procedural hearing is also an important hearing at which parties will be expected to be in a position to discuss realistically the issues involved in the action and the method of disposing of them. It should normally be expected that by the time of the procedural hearing the parties' positions will have been ascertained and identified and that all prospects for settlement have been fully discussed. In consequence it is expected that, once a case has passed beyond the stage of a procedural hearing, it will not settle.

(2) This is one of the ways in which it is sought to meet the problem of ensuring that the judge is in the position to deal realistically with the procedure which he cannot do unless he is given information on which to proceed.

(3) Rule 47.12(2) is the kernel of the procedures and it is intended to enable the court to direct what is really to happen.

*Debates: R.C.S. 1994, r. 47.13*

14. A debate in a commercial action is not heard on the Procedure Roll but on the Commercial Roll. The provisions of Chapter 28 of the R.C.S. 1994 (Procedure Roll), however, do apply to a debate in a commercial action.

*Pre-Proof By Order Hearing*

15. When a proof, or proof before answer, has been allowed, the court will normally also fix a pre-proof by order hearing to take place in advance of the proof diet. The general purpose of such a hearing is to ascertain the parties' state of preparation for the proof hearing and to review the estimated duration of that hearing.

Without prejudice to the foregoing generality, the following matters will be dealt with at the pre-proof by order hearing:

(1) Consideration of any joint minute of admissions, agreed by the parties, which should be lodged no later than two days prior to the pre-proof by order hearing.

(2) A review of the documents, or other productions which the parties at the time of the pre-proof by order hearing consider will be relied upon at the proof hearing. Any such document should be lodged no later than two days prior to the pre-proof by order hearing.

(3) The up-to-date position with regard to any expert reports which are to be relied upon by the parties will be reviewed. The parties should be in a position to advise the court of what consultation, if any, has taken place between their respective experts with a view to reaching agreement about any points held in common and what matters remain truly in dispute between them.

(4) Where a proof before answer has been allowed, parties should produce, for consideration, at the pre-proof by order hearing, a statement of legal arguments and lists of authorities which they may seek to rely on at the diet of proof before answer, insofar as these have not already been lodged.

*Lodging of productions: R.C.S. 1994, r. 47.14*

16. Before any proof or other hearing at which reference is to be made to documents, parties shall, as well as lodging their productions, prepare for the use of the court a working bundle in which the documents are arranged chronologically or in another appropriate order without multiple copies of the same document.

*Hearings for further procedure: R.C.S. 1994, r. 47.15*

17. The commercial judge or a party may have a commercial action put out for a hearing other than a preliminary or procedural hearing to deal with a procedural or other matter which has arisen for which provision has not been made.

*Failure to comply with rule or order of commercial judge: R.C.S. 1994, r. 47.16*

18. The purpose of this rule is to provide for discipline to ensure effective supervision of case management.

*General*

19—(1) Arrangements will be made to ensure that (save in exceptional circumstances) at all appearances of an action in the commercial roll the same judge shall preside. Parties are expected to arrange that counsel, or solicitors having rights of audience responsible for the conduct of the case, and authorised to take any necessary decision on questions both of substance and procedure, are available and appear at any calling in the commercial roll.

(2) Where any pleadings or other documents are to be adjusted, the party proposing adjustment shall do so by preparing a new copy of the document as adjusted in which the new material is indicated by underlining, side-lining, a difference in typeface, or other means.

(3) An interlocutor pronounced on the commercial roll, other than a final interlocutor, may be reclaimed against only with leave of the commercial judge within 14 days after the date of the interlocutor: rule 38.4(7).

*Revocation of previous practice note*

20. 1. The Practice Note No.12 of 1994 (commercial actions) is hereby revoked.