



PRACTICE NOTE

No. 12 of 1994 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 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 as 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: R.C.S. 1994, r. 10.7. Although the court is in session for about 50 weeks in the year, it is anticipated that during two weeks in April, the month of August and two weeks at Christmas and New Year, only interlocutory or incidental business will be dealt with; proofs and debates will not normally be heard during those times. The dates of these periods will be separately announced.

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; and while they should make clear what the subject matter of the cause is and the legal issues are, they should not be extended by lengthy recitals of contract documents, propositions of law or legal duties or similar material. Where damages are sought, a summary statement of a 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 his summons the "core" or essential documents to establish the contract or transaction with which the cause is concerned. Under R.C.S. 1994, r 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 signeting, a commercial action registration form (Form CA1), 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 in so far 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 be pro-active.

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 can be 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.

(2) Under R.C.S. 1994, r. 27.1(1)(b), documents founded on or adopted as incorporated in defences 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: R.C.S. 1994, r. 18.1(1).

(4) The defender's agent must complete the commercial action registration form (Form CA1) 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 this rule 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: R.C.S. 1994, r. 38.4(6).

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

11. (1) The preliminary hearing of the commercial action is not a formality. It is intended that there should be a serious discussion of the issues in the cause and the steps necessary to resolve them, and counsel or solicitors appearing at the hearing will be expected to be aware of the issues and the principal contentions on each side and to be in a position to inform the court of them. In many commercial disputes, the parties will already be well aware of what their respective contentions are and those contentions may have been set out in correspondence or, for example, in a building contract in a formal claim or similar document. The court will expect to be informed of the position in that respect and may direct that no further pleading is required.

(2) 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 special 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 a manner which is both realistic and which does not prejudice the overall requirement that commercial actions should be dealt with expeditiously.

(3) The hearing of an action at a preliminary hearing will usually be heard in Chambers. Those attending may be seated and wigs and gowns need not be worn.

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

12. (1) The procedural hearing is also a serious 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 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 a 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 proposed procedure since it is intended to enable the court to direct what is really to happen.

(4) This hearing will also be heard in Chambers in the same way as the preliminary hearing.

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

13. 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.

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

14. Before any proof or other hearing at which documents are to be referred to, 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

15. 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

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

General

17. (1) Arrangements will be made to ensure that at all appearances of an action in the Commercial Roll the same judge shall preside. Parties are expected to arrange that counsel or other persons having rights of audience responsible for the conduct of the case and authorised to take any necessary decision on questions of procedure should be available and shall appear at any calling in the Commercial Roll.

(2) Where any pleadings or other documents are to be adjusted, the party proposing adjustments shall do so by preparing a new copy of the document as adjusted in which the new material is indicated by under-lining, 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 on the interlocutor: R.C.S. 1994, r.38.4(7)

Transitional provisions for old commercial actions

18. As the old rules under the R.C.S. 1994 for commercial actions are replaced by new rules with new procedures, there will be no rules applicable to commercial actions commenced under the rules for commercial actions under the R.C.S. 1965 or the old rules under the R.C.S. 1994.

Accordingly, in relation to commercial actions commenced before 20th September 1994 in which a diet of proof or a diet for a hearing on the Procedure Roll has not been fixed, a notice will appear in the Rolls of Court on Thursday 29th September 1994 giving parties in each of the cases listed in the notice 28 days in which to apply to transfer such a case to the new Commercial Roll under rule 47.10. If in a particular case listed in the notice no such application is made within 28 days, the action will proceed as an ordinary action.

3rd September 1994