

CHAPTER 47

COMMERCIAL ACTIONS

Application and interpretation of this Chapter

47.1.-(1) This Chapter applies to a commercial action.

(2) In this Chapter-

"commercial action" means an action arising out of, or concerned with, any transaction or dispute of a commercial or business nature in which an election has been made under rule 47.3(1) or which has been transferred under rule 47.10;

"preliminary hearing" means a hearing under rule 47.11;

"procedural hearing" means a hearing under rule 47.12.

Proceedings before commercial judge

47.2. All proceedings in the Outer House in a commercial action shall be brought before a judge of the court nominated by the Lord President as a commercial judge or, where a commercial judge is not available, any other judge of the court (including the vacation judge); and "commercial judge" shall be construed accordingly.

Election of procedure for commercial actions and form of summons

47.3.-(1) The pursuer may elect to adopt the procedure in this Chapter by bringing an action in which there are inserted the words "Commercial Action" immediately below the words "IN THE COURT OF SESSION" where they occur above the instance, and on the backing, of the summons and any copy of it.

(2) A summons in a commercial action shall -

- (a) specify, in the form of conclusions, the orders sought;
- (b) identify the parties to the action and the transaction or dispute from which the action arises;
- (ba) specify any special capacity in which the pursuer is bringing the action or any special capacity in which the action is brought against the defender;
- (c) summarise the circumstances out of which the action arises; and
- (d) set out the grounds on which the action proceeds.

(3) There shall be appended to a summons in a commercial action a schedule listing the documents founded on or adopted as incorporated in the summons which should also be lodged as an inventory of productions.

Disapplication of certain rules

47.4.-(1) The requirement in rule 4.1(4) for a step of process to be folded lengthwise should not apply in a commercial action.

(2) An open record shall not be made up in, and Chapter 22 (making up and closing records) shall not apply to, a commercial action unless otherwise ordered by the court.

(3) The following rules shall not apply to a commercial action:-

rule 6.2 (fixing and allocation of diets in Outer House),
rule 25.1(3) (form of counterclaim),
rule 25.2(1) (authority for diligence etc. on counterclaims),
rule 36.3 (lodging productions).

Procedure in commercial actions

47.5. Subject to the provisions of this Chapter, the procedure in a commercial action shall be such as the commercial judge shall order or direct.

Defences

47.6.-(1) Defences in a commercial action shall be in the form of answers to the summons with any additional statement of facts or legal grounds on which it is intended to rely.

(2) There shall be appended to the defences in a commercial action a schedule listing the documents founded on or adopted as incorporated in the defences which should also be lodged as an inventory of productions.

Counterclaims and third party notices

47.7.-(1) A party seeking to lodge a counterclaim or to serve a third party notice shall apply by motion to do so.

(2) The commercial judge shall, on a motion to lodge a counterclaim or to serve a third party notice, make such order and give such directions as he thinks fit with regard to-

- (a) the time within which a counterclaim may be lodged or a third party notice served and any answers lodged;
- (b) where the motion is made before the preliminary hearing, a date for the preliminary hearing if it is to be a date other than the date referred to in rule 47.8(2); and
- (c) any application for a warrant to use any form of diligence which would have been permitted under rule 14A.2 (application for interim diligence) had the warrant been sought in a summons in a separate action.

(3) Paragraphs (2) and (3) of rule 47.3 shall apply to the form of a counterclaim as they apply to the form of a summons.

Commercial Roll

47.8.-(1) All proceedings in an action in which an election has been made under rule 47.3(1) or which has been transferred under rule 47.10 shall, in the Outer House, be heard and determined on the Commercial Roll on such dates and at such times as shall be fixed by the commercial judge.

(2) A commercial action shall call on the Commercial Roll for a preliminary hearing within 14 days after defences have been lodged.

(3) The appearance of a commercial action on the Commercial Roll for a hearing on a specified date shall not affect the right of any party to apply by motion at any time under these Rules.

Withdrawal of action from Commercial Roll

47.9.-(1) At any time before or at the preliminary hearing, the commercial judge shall-

- (a) on the motion of a party, withdraw a commercial action from the procedure in this Chapter and appoint it to proceed as an ordinary action where, having regard to
 - (i) the likely need for detailed pleadings to enable justice to be done between the parties,
 - (ii) the length of time required for preparation of the action, or
 - (iii) any other relevant circumstances,he is satisfied that the speedy and efficient determination of the action would not be served by the cause being dealt with as a commercial action; and
- (b) on the motion of a party with the consent of all other parties, withdraw a commercial action from the Commercial Roll and appoint it to proceed as an ordinary action.

(1A) At any time before or at the preliminary hearing the commercial judge may, on the motion of a party, if he is satisfied that the action is not a commercial action, withdraw it from the Commercial Roll and appoint it to proceed as an ordinary action.

(2) If a motion to withdraw a commercial action from the Commercial Roll made before or renewed at a preliminary hearing is refused, no subsequent motion to withdraw the action from the Commercial Roll shall be considered except on special cause shown.

(3) At any time the commercial judge may, at his own instance, after hearing the parties to the action, if he is satisfied that it is not appropriate for the action to remain on the Commercial Roll, withdraw it from the Commercial Roll and appoint it to proceed as an ordinary action.

Transfer of action to Commercial Roll

47.10.-(1) In an action within the meaning of rule 47.1(2) (definition of commercial action) in which the pursuer has not made an election under rule 47.3(1), any party may apply by motion at any time to have the action appointed to be a commercial action on the Commercial Roll.

(2) A motion enrolled under paragraph (1) shall be heard by a commercial judge on such a date and at such a time as the Keeper of the Rolls shall fix in consultation with the commercial judge.

(3) Where an interlocutor is pronounced under paragraph (1) appointing an action to be a commercial action on the Commercial Roll, the action shall immediately proceed to a preliminary hearing.

Preliminary hearing

47.11.-(1) Unless a commercial action is withdrawn under rule 47.9 from the Commercial Roll then, at the preliminary hearing of a commercial action in which an election has been made under rule 47.3(1), the commercial judge-

- (a) shall determine whether and to what extent and in what manner further specification of the claim and defences should be provided;
- (b) may make an order in respect of any of the following matters:-
 - (i) detailed written pleadings to be made by a party either generally or restricted to particular issues;
 - (ii) a statement of facts to be made by one or more parties either generally or restricted to particular issues;
 - (iii) the allowing of an amendment by a party to his pleadings;
 - (iv) disclosure of the identity of witnesses and the existence and nature of documents relating to the action or authority to recover documents either generally or specifically;
 - (v) documents constituting, evidencing or relating to the subject-matter of the action or any invoices, correspondence or similar documents relating to it to be lodged in process within a specified period;
 - (vi) each party to lodge in process, and sent to every other party, a list of witnesses;
 - (vii) reports of skilled persons or witness statements to be lodged in process;
 - (viii) affidavits concerned with any of the issues in the action to be lodged in process; and
 - (ix) the action to proceed to a hearing without any further preliminary procedure either in relation to the whole or any particular aspect of the action;
- (c) may fix the period within which any such order shall be complied with;
- (d) may continue the preliminary hearing to a date to be appointed by him; and

- (e) may make such other order as he thinks fit for the speedy determination of the action.
- (2) Where the commercial judge makes an order under paragraph (1)(b)(i) or (ii) or (c), he may ordain the pursuer to-
 - (a) make up a record; and
 - (b) lodge that record in process within such period as the commercial judge thinks fit.
- (3) At the conclusion of the preliminary hearing, the court shall, unless it has made an order under paragraph (1)(b)(ix) (order to proceed without a further hearing), fix a date for a procedural hearing to determine further procedure.
- (4) The date fixed under paragraph (3) for a procedural hearing may be extended on cause shown by application to the court, by motion, not less than two days prior to the date fixed for the procedural hearing.

Procedural hearing

47.12 – (1) Not less than 3 days, or such other period as may be prescribed by the commercial judge at the preliminary hearing, before the date fixed under rule 47.11(3) for the procedural hearing, each party shall –

- (a) lodge a written statement of his proposals for further procedure which shall state-
 - (i) whether he seeks to have the commercial action appointed to debate or to have the action sent to proof on the whole or any part of it;
 - (ii) what the issues are which he considers should be sent to debate or proof; and
 - (iii) the estimated duration of any debate or proof;
 - (b) where it is sought to have the action appointed to proof, lodge a list of the witnesses he proposes to cite or call to give evidence, identifying the matters to which each witness will speak;
 - (c) where it is sought to have the action appointed to proof, lodge the reports of any skilled persons;
 - (d) where it is sought to have the action appointed to debate, lodge a note of argument consisting of concise numbered paragraphs stating the legal propositions on which it is proposed to submit that any preliminary plea should be sustained or repelled with reference to the principal authorities and statutory provisions to be founded on; and
 - (e) send a copy of any such written statement, lists, reports or note of argument, as the case may be, to every other party.
- (2) At the procedural hearing, the commercial judge –
- (a) shall determine whether the commercial action should be appointed to debate or sent to proof on the whole or any part of the action;

- (b) where the action is appointed to debate or sent to proof, may order that written arguments on any question of law should be submitted;
- (c) where the action is sent to proof, may determine whether evidence at the proof should be by oral evidence, the production of documents or affidavits on any issue;
- (d) where the action is sent to proof, may direct that parties serve on one another and lodge in process signed witness statements or affidavits from each witness whose evidence they intend to adduce, setting out in full the evidence which it is intended to take from that witness, and fix a timetable for the service (whether by exchange or otherwise) and lodging of such statements or affidavits as may be thought necessary;
- (e) may direct that such witness statements or affidavits shall stand as evidence in chief if the witness concerned, subject to such further questioning in chief as the court may allow;
- (f) may determine, in the light of any witness statements, affidavits or reports produced, that proof is unnecessary on any issue;
- (g) where the action is sent to proof, may appoint parties to be heard By Order at a date prior to the proof diet;
- (h) may direct that skilled persons should meet with a view to reaching agreement and identifying areas of disagreement, and may order them thereafter to produce a joint note, to be lodged in process by one of the parties, identifying areas of agreement and disagreement, and the basis of any disagreement;
- (i) without prejudice to Chapter 12 (assessors), may appoint an expert to examine, on behalf of the court, any reports of skilled persons or other evidence submitted and to report to the court within such period as the commercial judge may specify;
- (j) where the action is sent to proof, may make an order fixing the time allowed for the examination and cross-examination of witnesses;
- (k) may, on the motion of a party, direct the cause to be determined on the basis of written submissions, or such other material, without any oral hearing;
- (l) may continue the procedural hearing to a date to be appointed by him;
- (m) may make an order for parties to produce a joint bundle of productions arranged in chronological order or such other order as will assist in the efficient conduct of the proof;
- (n) may order and fix a date for a further procedural hearing or fix a date for the hearing of any debate or proof; and
- (o) may make such other order as he thinks fit.

Debates

47.13. Chapter 28 (procedure roll) shall apply to a debate ordered in commercial action under rule 47.12(2)(a) as it applies to a cause appointed to the Procedure Roll.

Pre-proof By Order

47.13A. Not less than 2 days prior to any hearing appointed under rule 47.12(2)(g) parties shall lodge in process an estimated timetable for the conduct of proof together with a note of any issues which are to be addressed prior to the proof.

Lodging of productions for proof

47.14.-(1) Any document not previously lodged required for any proof in a commercial action shall be lodged as a production not less than 7 days before the date fixed for the proof.

(2) No document may be lodged as a production after the date referred to in paragraph (1), even by agreement of all parties, unless the court is satisfied that any document sought to be lodged could not with reasonable diligence have been lodged in time.

Hearings for further procedure

47.15. At any time before final judgment, the commercial judge may, at his own instance or on the motion of any party, have a commercial action put out for hearing for further procedure; and the commercial judge may make such order as he thinks fit.

Failure to comply with rule or order of commercial judge

47.16. Any failure by a party to comply timeously with a provision in these Rules or any order made by the commercial judge in a commercial action shall entitle the judge, at his own instance-

- (a) to refuse to extend any period for compliance with a provision in these Rules or an order of the court,
- (b) to dismiss the action or counterclaim, as the case may be, in whole or in part,
- (c) to grant decree in respect of all or any of the conclusions of the summons or counterclaim, as the case may be, or
- (d) to make an award of expenses,

as he thinks fit.