COURT OF SESSION

PRACTICE NOTE

No. 1 of 2017

Commercial Actions

1. This Practice Note has effect from 27 March 2017. It replaces Practice Note No. 6 of 2004 (commercial actions).

Application and interpretation

2. The actions to which Chapter 47 of the Rules of the Court of Session applies are intended to comprise all actions arising out of or concerned with any transaction or dispute 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 the commercial court if they do not require the special facilities of Admiralty procedure in relation to defenders whose names are not known.

Commercial Roll

3. 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 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.

Disapplication of certain rules

4. The rules of the Rules of the Court of Session applicable to ordinary actions apply to a commercial action to which Chapter 47 applies unless specifically excluded under rule 47.4, or excluded by implication because of a provision in Chapter 47.

Commercial judge

5. All proceedings in a commercial action in the Outer House shall be heard before a judge nominated by the Lord President as a commercial judge or, where a commercial judge is not available, any other judge of the court.

Procedure in commercial actions

6. The procedure in, and progress of, a commercial action is under the direct control of the commercial judge. The court will take a pro-active approach. Arrangements will be made to ensure that, where possible, all appearances of an action on the Commercial Roll shall be before the same judge. Other than in exceptional circumstances, parties are expected to arrange for the principally instructed counsel or solicitor advocate to appear at any calling in the Commercial Roll. Unless the court is persuaded otherwise, commercial actions will proceed on the basis that there will be no more than one preliminary hearing and one procedural hearing before the action is appointed to a substantive hearing.

Transfer of actions to Commercial Roll

7.

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

applications are heard by a commercial judge on a date that is convenient to the court.

b. Where the court appoints an action to be a commercial action, the action immediately proceeds to a preliminary hearing. For this reason, parties are expected to submit statements of issues in advance of the hearing on the application. If they have not already done so, parties should lodge all productions that would have been required had proceedings been initiated as a commercial action.

c. 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 38.3(3).

Withdrawal of action from Commercial Roll

8. 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. Parties should have proper regard to the criteria set out in rule 47.9(1)(a) in every case.

9. Rule 47.9(3) was added by Act of Sederunt 2014 No. 291 which came into force on 8 December 2014. Previously, rule 47.9 only allowed a case to be withdrawn from the Commercial Roll if a motion was made by a party to the action at any time before or at the preliminary hearing. This amendment was made in order to allow a commercial judge, after hearing parties, to transfer a case to the Ordinary Roll at any time.

Pre-action communication

10.

a. 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. The commercial action procedure is intended for cases in which there is a real dispute between parties which requires to be resolved by judicial decision, rather than other means, and functions best if issues have been investigated and ventilated prior to the raising of the action.

b. It is expected that, before a commercial action has been raised, the solicitors acting for the pursuer 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 relating to liability is necessary, obtained and disclosed, to the intended defender, the expert's report.

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

12. 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 parties has been the subject of careful discussion between parties and/or their representatives and the action can be said to be truly necessary. The court may have regard to any failure to comply with this paragraph when considering a motion for expenses.

Pleadings

13. ***Summons***

a. Pleadings in traditional form are not normally required or encouraged in a commercial action. The default position is that pleadings should be in abbreviated form. Provided that paragraphs 10 - 12 of this Practice Note (pre-action communication) have been complied with, parties will be aware of each other's position before the action has been commenced. The overriding requirement is one of fair notice: the purpose of the pleadings is to give notice of the essential elements of the case to the court and to the other parties to the action. 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 annexing articles of condescendence or pleas-in-law. The conclusion in such a case should specify the document, the construction of which is in dispute and the construction contended for. Where the issue between parties is a point of law, the summons may contain a brief statement of the pursuer's argument including, if necessary, reference to authority. Where the pursuer's position on any matter is contained in another document, such as a Scott Schedule or the conclusions of an expert report, it is permissible to adopt the document, or a specified part thereof, as part of the pursuer's case. Where damages are sought, a summary statement of the claim or a statement in the form of an account will normally be sufficient.

b. 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.

c. 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.

14. ***Defences***

a. As with the summons, it is not necessary for defences to follow the traditional form of pleading. In the first instance, detailed averments are not required in the answers any more than in the articles of condescendence. In particular, it is *not* necessary that each averment in the summons should be admitted, not known 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. What is said in paragraph 13 regarding the content of a summons, including the overriding requirement of fair notice, applies *mutatis mutandis* to defences.

b. Under rule 27.1(1)(b), documents founded on or adopted as incorporated in a defence must be lodged at the time the defences are lodged.

c. Defences must be lodged within 7 days after the summons has called: rule 18.1(2).

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

15. ***Adjustment of pleadings***

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 using track changes or strikethrough or a different font.

Counterclaims and Third Party Notices

16. No counterclaim or the convening of a third party may be pursued without an order from the commercial judge.

Preliminary hearing on Commercial Roll

17.

a. The preliminary hearing will normally be conducted on the basis that the provisions of paragraphs 10 - 12 in relation to pre-action communication have been complied with, and that pleadings complying with paragraphs 13 and 14 have been lodged

and intimated. The preliminary hearing is not designed to give parties the opportunity to formulate their claim and response thereto. Adjustment of pleadings will not always be necessary and it should not be assumed that an order allowing a period of adjustment will be made. Any adjustment allowed will normally be restricted to clarification of a party's position in response to averments or requests for further explanation by another party.

b. Prior to the preliminary hearing parties should lodge all correspondence and other documents which set out their material contentions of fact and law and which demonstrate their compliance with the provisions of paragraphs 10 - 12. These provisions are supplementary to the provisions of rule 47.3(3).

c. Continuations of preliminary hearings will seldom be granted. Where it appears to the court that any request for a continuation of a preliminary hearing is brought about by a failure to comply with the provisions of paragraphs 10 - 12, this may result in the party responsible for any such failure having the expenses of the continued hearing awarded against it on an agent client basis. Motions for continuations of preliminary hearings which are sought simply to enable information to be obtained, which could and should have been obtained prior to the preliminary hearing, are likely to be refused.

18. Prior to the preliminary hearing 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 be lodged by 4.00 pm two working days before the hearing, and, where possible, be set out in an agreed document. Parties should consider and discuss whether resorting to alternative dispute resolution might be appropriate in respect of some or all of the issues.

19. In applying rule 47.11, the court will set realistic deadlines which are expected to be adhered to. It is likely that extensions will only be granted if reasonable cause is shown. At the preliminary hearing parties will be expected to address the court and provide detailed and accurate information to ensure that appropriate deadlines are fixed. In

fixing any deadlines the court will be mindful of the fact that the commercial cause procedure is intended to progress actions expeditiously.

Procedural hearing on Commercial Roll

20.

a. At the procedural hearing 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. Parties will be expected to be able to advise the court on the steps that have been taken to date to achieve an extra-judicial settlement and on the likelihood of such a settlement being achieved. They will be asked to express a view on the stage at which any joint meeting between parties ought to be ordered to take place. The court will ascertain from parties whether there are any further steps that could be taken by the court to assist in the resolution of the dispute.

b. Prior to the procedural hearing parties are expected to lodge a note of proposals for further procedure setting out their position as to the future progress of the case and, in particular, whether a diet of debate or proof is sought.

c. In the lead up to the procedural hearing parties should consider and discuss whether resorting to alternative dispute resolution might be appropriate in respect of some or all of the issues.

d. At the procedural hearing it is anticipated that the court will fix a substantive hearing along with an appropriate timetable or, if necessary, a further procedural hearing to allow any outstanding matters to be resolved. Where a diet of proof is allowed, the timetable may include provision for the preparation and lodging of a statement of agreed facts.

Motions by email

21. Requests to move or discharge hearings or to extend or vary time limits may be made by email. Any such request should be copied to the agents for all other parties so that they

may confirm their consent or lack of opposition. Such requests will be feed as motions to the requesting party.

22. Motions in Form 23.2 and notices of opposition in Form 23.4 may be enrolled by emailing the completed form to gcs@scotcourts.gov.uk and Commercial@scotcourts.gov.uk. Where any documents bear a signature, e.g. joint minutes, a scanned copy of the signed document should be emailed to the Commercial Section of the Offices of Court, but the hard copy original document should be available for production on request by the Commercial Section or by order of the court.

Debates

23. 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 rules (Procedure Roll), however, do apply to a debate in a commercial action.

Lodging of productions

24. Before any hearing at which reference is to be made to documents, parties should, 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. The bundle for a motion hearing should be prepared by the party enrolling the motion; otherwise, unless there is agreement to the contrary, the bundle should be prepared by the pursuer.

Documentary productions in electronic format

25. Productions need only be lodged in electronic format. Details of documents to which this applies and the format currently required are available in a guidance note in the Commercial Actions section of the SCTS website. Inventories listing productions should continue to be lodged also in hard copy.

Notes of argument

26. A note of argument should comply with the following general principles:
    a. A note of argument should be a concise summary of the submissions to be developed.
    b. It should contain a numbered list of the points which the party wishes to make.
    c. Each point should be followed by a reference to any transcript of evidence or other document on which the party wishes to rely. The note of argument should identify the relevant passage in the document in question.
    d. At the beginning of the note there should be a succinct executive summary of the party's arguments. The executive summary should not exceed one page in length.

27. A note of argument should state, in respect of each authority cited –
    a. the proposition of law that the authority demonstrates; and
    b. the parts of the authority (identified by page or paragraph references) that support the proposition.

28. More than one authority should not be cited in support of a given proposition unless the additional citation is necessary for a proper presentation of the argument.

Joint bundle of authorities

29. When a commercial action has been appointed to a debate, the party at whose instance the debate has been fixed should, after consultation with the other parties, lodge a joint bundle containing copies of the authorities upon which each party will rely at the hearing.

30. The bundle of authorities should, in general–
    a. not include authorities for propositions not in dispute; and
    b. not include more than 10 authorities (in addition to any relevant statutory provisions), unless on cause shown permission of the court to include a greater number has been obtained.

31. Authorities which have been reported in Session Cases, or in the Law Reports published by the Incorporated Council of Law Reporting for England and Wales, should be cited from those sources. Where a case is not reported in Session Cases or the Law Reports, references to other recognised reports may be given. Unreported judgments should only be cited when they contain an authoritative statement of a relevant principle of law not to be found in a reported case or when they are necessary for the understanding of some other authority.

32. The bundle of authorities should be lodged by the date specified in the interlocutor.

33. Bundles of authorities which do not conform to this Practice Note may be rejected by the court, which may also find that no expenses are payable in respect of the cost of making up and lodging the bundle. The court may also find that no expenses are payable, or may modify any award of expenses, where authorities are included unnecessarily.

34. Parties are encouraged to produce bundles of authorities in electronic format only. Where authorities produced electronically are contained within a folder, they should be identified by tab number and citation, e.g. "016 Mayo Associates SA v Cantrade Private Bank Switzerland (CI) Ltd [1998] JLR 173". The tab numbering should restart in each folder. If a party intends to use hard copy documents at the hearing, their folder and tab numbers should correspond to the electronic folder and tab numbers.

Joint meetings of parties

35. The commercial judge has power, in terms of rules 47.11(1)(e) and 47.12(2)(o), to order parties to hold a joint meeting with a view to exploring whether the dispute is capable of extra-judicial settlement or, alternatively, whether the issues requiring judicial determination can be restricted. Such an order will not be made as a matter of course but it is likely that a joint meeting will be ordered in most cases. The stage of the proceedings at which the meeting will be ordered will vary from case to case, and will

depend upon when the court considers that such a meeting is most likely to be productive of substantial progress.

Pre-proof by order hearing

36. When a proof, or proof before answer, has been allowed, the court will normally 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 parties' state of preparation for the proof and to review the estimated duration of that hearing. Without prejudice to the foregoing generality, the following matters may be dealt with at the pre-proof by order hearing:
    a. Consideration of any joint minute of admissions agreed by parties, which should be lodged no later than two days prior to the pre-proof by order hearing.
    b. A review of the documents, or other productions, which parties 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.
    c. The up-to-date position with regard to any expert reports which are to be relied upon. 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.
    d. Not less than two days prior to a pre-proof by order hearing parties should lodge an estimated timetable for the conduct of the proof.

Hearings for further procedure

37. The commercial judge may at any time before final judgment, at his own instance or at the request of a party, have a commercial action put out for a hearing for further procedure to deal with a procedural or other matter which has arisen for which provision has not been made.

Reclaiming

38. 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 38.3(6).

Failure to comply with rule or order of commercial judge

39. The purpose of rule 47.16 is to provide for discipline to ensure effective supervision of case management. Any failure of a party to comply with a provision in the rules or a court order may result in a refusal to extend deadlines, dismissal of the action or counterclaim, decree in terms of the conclusions of the summons or counterclaim or a finding of expenses.

Edinburgh

2 March 2017

CJM Sutherland

Lord President