

## **SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS**

### **PRACTICE NOTE**

#### **No. 1 of 2018**

#### **Commercial Actions**

##### **Introduction**

1. The flexibility of the commercial action rules in Chapter 40 of the Ordinary Cause Rules 1993 affords to the parties the opportunity of an efficient and cost-effective means of resolving disputes of a commercial or business nature. Use of the Commercial Procedure is encouraged in this Sheriffdom and both Aberdeen and Inverness Sheriff Courts have been nominated as Commercial Courts in terms of Rule 40.1 of the Ordinary Cause Rules to encourage extensive use of this procedure.
2. The purpose of this practice note is to inform parties and their agents of the court's approach to a number of procedural matters in commercial actions.
3. This practice note has effect from 1 May 2018.

##### **Application and interpretation**

4. The actions to which Chapter 40 applies are intended to be of broad scope and comprise actions arising out of or concerned with any transaction or dispute of a commercial or business nature 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 services
  - a building, engineering or construction contract,
  - a commercial lease.
5. An action, and all proceedings in it, in which an election has been made to adopt the procedure in Chapter 40 or which has been transferred under rule 40.5 to be dealt with as a commercial action, shall be heard and determined in one of the two nominated courts.

6. Commercial actions emanating from Aberdeen, Peterhead and Banff Sheriff Court districts may all be raised in Aberdeen Sheriff Court and the sheriff clerk at Aberdeen will accept all such actions for warranting. Cases from these Sheriff Court districts appointed to be treated as Commercial actions in terms of rule 40.5 will be transferred to the Commercial roll in Aberdeen. Commercial actions emanating from Inverness, Elgin, Fort William, Portree, Stornoway, Lochmaddy, Tain and Wick Sheriff Court districts may all be raised in Inverness Sheriff Court and the sheriff clerk at Inverness will accept all such actions for warranting. Portree Sheriff Court is no longer a designated court in which Commercial actions may be raised. Cases from these Sheriff Court districts appointed to be treated as Commercial actions in terms of rule 40.5 will be transferred to the Commercial roll in Inverness. Commercial actions emanating from Lerwick and Kirkwall Sheriff Court districts may be raised in Aberdeen Sheriff Court or Inverness Sheriff Court and the sheriff clerk at such court will accept all such actions for warranting. Cases from these Sheriff Court districts appointed to be treated as Commercial actions in terms of rule 40.5 may be transferred to the Commercial roll either in Aberdeen or Inverness.

### **Pre-action communication**

7. 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. The procedure functions best if issues have been investigated and ventilated prior to the raising of the action. It is expected, therefore, that before a commercial action is raised, the parties and/or their legal advisors will have set out fully in correspondence the nature of the claim, the defence to the claim and the factual and legal grounds on which they proceed, as well as disclosing any document or expert's report relating to liability upon which they rely.

8. The commercial sheriff may have regard to any failure to comply with paragraph 7 when considering a motion for expenses.

### **Procedure in commercial actions**

9. The procedure in, and progress of, a commercial action is under the direct control of the commercial sheriff. To ensure that actions are dealt with efficiently and are not unnecessarily constrained by rules of procedure, the commercial sheriff may make such order as the commercial sheriff thinks fit for the progress of the case.

### **Pleadings**

10. The purpose of the pleadings is to give fair notice of the essential elements of the case to the court and to the other parties to the action. The means of achieving fair notice may take many forms. For the avoidance of doubt, pleadings in traditional form are not normally required or encouraged in a commercial action, and lengthy narrative is discouraged. Spreadsheets, schedules and other forms and documents may be used. Any issues relating to lack of specification or lack of fair notice should be raised and resolved at the case management conference and ordinarily ought not to be the focus for a debate.

11. Where a pursuer seeks to obtain from the court a decision only on the construction of a document, it is permissible for the initial writ to contain an appropriate crave without annexing articles of condescendence or pleas-in-law. The crave in such a case should specify the document, the construction of which is in dispute and the construction contended for.

12. Under rule 40.8(2), the pursuer must produce with the initial writ a list of essential or core documents to establish the contract or transaction with which the cause is concerned. Copies of the documents on that list should also be sent to the defender's solicitors as soon as the notice of intention to defend is intimated if the list has not already been served with the initial writ.

13. As with the initial writ, it is not necessary for defences to follow the traditional form of pleading. Detailed averments are not required in the answers any more than in the articles of condescendence. Lengthy narrative is discouraged. However, the overriding requirement of fair notice applies mutatis mutandis to the defences. Under rule 40.9(2) the defender must append to the defences a list of the documents founded upon or incorporated into the defences.

### **Adjustment of pleadings**

14. 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 tracked changes or strike-through or a different font.

15. To facilitate communication, the initial writ, notice of intention to defend and defences should have marked on them the name of the individual solicitor dealing with the case and that individual's direct telephone number, email address and information which is sufficient to allow hearings by video-conference to be established.

### **Fixing date for case management conference**

16. On defences being lodged, the action will be allocated to one of the commercial sheriffs. That sheriff will decide whether the first case management conference will be conducted in court or by telephone or video conferencing call. The presumption is that it will be by conference call unless parties have identified a reason that would not be appropriate. The date of the case management conference will be intimated to the parties by the sheriff clerk. The intimation will inform the parties of the date, time and place of the case management conference and the manner in which it will be conducted, the identity of the commercial sheriff allocated to the case and the email address for that particular sheriff. It is anticipated that where possible, a commercial action will remain with the same sheriff until it is concluded.

### **Case management conference**

17. The purpose of the case management conference is to identify the issues in dispute and to agree upon a framework for their resolution.

18. At least two working days prior to the case management conference parties should (a) 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 paragraph 7 above (pre-action communication); and (b) lodge a note of proposals for further procedure including whether alternative dispute resolution might be appropriate in respect of some or all of the issues.

19. Parties are expected to arrange that the principal solicitors, solicitor advocates or counsel responsible for the conduct of the case and authorised to take any necessary decisions on questions both of substance and procedure are available and either appear personally at any calling or actively participate in the telephone or video conferencing call.

20. The default position is that each case management conference, and continued case management conference, will be allocated a 30 minute time slot. If parties, principal solicitors, solicitor advocates, or counsel consider that more time is required, a double slot may be allocated. To avoid timetabling difficulties, this matter requires careful consideration by the legal advisors and should be discussed in advance with the sheriff clerk.

21. The sheriff will determine where, when and in what manner, any continued case management conference will take place.

### **Motions**

22. It is expected that opposed motions will be dealt with within a 30 minute time slot. It is expected that parties will have discussed the matter prior to any opposition being lodged and that if such a time slot is considered inadequate a note to that effect setting out reasons will accompany the opposition lodged by the objecting party.

### **Notes of argument**

23. Unless the court dispenses with the requirement for a note of argument setting out the basis of any preliminary plea, in accordance with rule 40.12(3)(i), the following general principles apply:

- a. the note 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 document on which the party wishes to rely, and should identify the relevant passage in the document in question;
- d. no more than one authority should be cited in respect of each proposition in law unless absolutely necessary for proper presentation of the argument.

### **Joint bundle of authorities**

24. 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. The joint bundle should not include more than 5 authorities per party (in addition to any relevant statutory provisions), unless on cause shown permission of the court to include a greater number has been obtained.

### **Lodging of productions**

25. Unless the court otherwise directs, the bundle of productions referred to in rule 40.13 must be lodged by the pursuer by 4.00pm at least 2 clear working days prior to the hearing. The bundle in relation to the hearing of a motion should be lodged by the party enrolling the motion.

## **Lodging documents**

26. The following documents need be lodged only in electronic form:

- adjusted pleadings,
- statements of facts,
- notes of proposals for further procedure,
- notes of argument,
- lists of witnesses and witness summaries,
- inventories of productions (but not the actual productions),
- lists of authorities (but not the actual authorities).

27. All such documents should be sent to the Commercial Court inbox for the appropriate court (cmcaberdeen@scotcourts.gov.uk or commercialinv@scotcourts.gov.uk), the sheriff clerk, the commercial sheriff and the other parties.

28. Where any document bears a signature, a scanned copy of the signed document should be emailed to the Commercial Court inbox and the sheriff clerk. The original document must be available for production on request by the sheriff clerk or the commercial sheriff.

## **Email communication**

29. In the interest of fairness, openness and transparency, all electronic communication between legal advisors and the commercial sheriff concerning a defended commercial action between the legal advisors and the commercial sheriff, should be copied to the sheriff clerk, the Commercial Court inbox, and the legal advisors for all other parties.

30. 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 legal advisors for the other parties so that they may confirm their consent or opposition.

## **Hearings for further procedure**

31. The commercial sheriff should be fully engaged in managing all procedural aspects of the action. To facilitate that level of engagement the commercial sheriff may, at any time prior to final judgment, fix a hearing for further procedure and make such order as the commercial sheriff thinks fit. Such a hearing may take the form of a pre-proof hearing for the express purpose of ascertaining how preparations for the proof are proceeding, and whether settlement is anticipated.