



## **SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY**

### **Commercial Actions in Hamilton and Airdrie Sheriff Courts**

#### **Practice Note 1 of 2022**

#### **INTRODUCTION**

1. Chapter 40 of the Ordinary Cause Rules 1993 provides an efficient and flexible means of resolving disputes of a commercial or business nature.
2. In term of Direction No 1 of 2022, the procedure provided in Chapter 40 will be available in Hamilton and Airdrie Sheriff Courts with effect from 14 November 2022.
3. The purpose of this Practice Note is to inform practitioners and users of the court's approach to commercial actions.

#### **APPLICATION AND INTERPRETATION**

4. This Practice Note shall apply to all actions in which an election has been made to adopt the procedure in Chapter 40 or which have been appointed to Chapter 40 in terms of Rule 40.5.

## PRE ACTION COMMUNICATION

5. Before a commercial action is commenced it is important that, save in exceptional cases, the matter in dispute should have been discussed and focussed 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 an action.
6. It is expected that, before a commercial action has been raised, the parties and/or their solicitors will have (a) fully set out in correspondence to the intended defender the nature of the claim and the factual and legal grounds on which it proceeds; (b) supplied to the intended defender copies of any documents relied upon; and (c) 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.
7. Solicitors acting for the defender are expected to respond to pre-litigation communication 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.
8. With the exception of cases which involve 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 discussions 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 paragraphs 5 to 7 when considering a motion for expenses.

## COMMERCIAL SHERIFF

9. All proceedings in a commercial action shall be heard before a commercial sheriff nominated by the Sheriff Principal or where the commercial sheriff is not available, by any other sheriff of the court.
10. Chapter 40 procedure is intended to operate flexibly. The commercial sheriff may make such order as the commercial sheriff thinks fit for the progress of the case, in so far as not inconsistent with the provisions of Chapter 40.

## PLEADINGS

11. 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. Pleadings in traditional form are not required or encouraged in a commercial action. Spreadsheets, schedules and other forms and documents may be used.
12. Any issues relating to lack of specification or lack of fair notice should be raised and resolved at a case management conference and ordinarily ought not to be the focus for a debate.
13. Where a party 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 condescence 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.
14. Rule 40.7(2) is intended to require a party to produce with the initial writ a list of the core or essential documents to establish the contract or transaction with which the cause is concerned. Copies of all documents on that list including all documents founded on or adopted as incorporated in the initial writ, should be sent to the defender's agents as soon as the notice of intention to defend is intimated if the documents have not already been served with the initial writ.

15. 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. Lengthy narrative is discouraged. However, the overriding requirement of fair notice applies *mutatis mutandis* to the defences. Rule 40.9(2) requires a defender to append to the defences a list of the documents founded upon or incorporated in the defences. Copies of such documents should also be lodged and intimated when defences are lodged.

#### **ADJUSTMENT OF PLEADINGS/DOCUMENTS**

16. 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 strike-through. The adjusted document should identify the date of adjustment.
17. To facilitate communication, the initial writ, notice of intention to defend and defences should be clearly marked with the name of the individual solicitor dealing with the case and that individual's direct telephone number and email address.

#### **FIXING DATE FOR CASE MANAGEMENT CONFERENCE**

18. On defences being lodged, the action will be allocated to a commercial sheriff. That sheriff will decide whether the first case management conference will be conducted in court or by use of video conferencing. The date, time and mode of the case management conference will be intimated to the parties by the sheriff clerk.
19. It is anticipated that where possible, a commercial action will remain with the same sheriff until it is concluded.

#### **CASE MANAGEMENT CONFERENCE**

20. The purpose of the case management conference is to identify the issues in dispute and to agree upon a framework for their resolution. The case management conference will be conducted on the basis that the provisions of paragraphs 5 to 7 (pre-action communication) have been complied with and that the pleadings have been lodged and intimated. The case management conference is not designed to give parties the opportunity to formulate their claim and response thereto.

21. At least 2 working days prior to the first case management conference parties should:
  - (a) lodge all correspondence and documents which set out their material contentions of fact and law and which demonstrate their compliance with paragraphs 5 to 7 (pre action communication):
  - (b) lodge a note of the issues which they contend require judicial determination, incorporating a note setting out what further procedure, if any, is sought.
22. Parties are expected to make arrangements for 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, to be available to appear personally or actively participate in a video conferencing call.
23. Unless otherwise directed by the court, case management conferences will be conducted by video conference and will be allocated a 20 minute time slot. If parties, principal solicitors, solicitor advocates or counsel consider that more time is required, they should indicate that that is the case to the sheriff clerk.
24. Parties will be expected to provide the sheriff with the information set out at Rule 40.12(2) and address any questions from the sheriff relating to any orders which may be required in terms of Rule 40.12(3).

#### **NOTES OF ARGUMENT**

25. 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 list, in numbered paragraphs, of the points which the party intends to make;
  - (c) after each point, it should identify any document on which the parties rely in support of the point; the note of argument should identify the relevant passage in the document in question;

- (d) for every authority relied upon it should (i) state the proposition of law that the authority demonstrates: and (ii) identify the page or paragraph references for the parts of the authority that support the proposition; and
- (e) cite only one authority for each proposition of law, unless additional citation is necessary for a proper presentation of the argument.

#### **JOINT BUNDLE OF AUTHORITIES**

- 26. When a commercial action has been appointed to a debate or a proof before answer, the party at whose instance the debate or proof before answer has been fixed should, after consulting with the other party(s), lodge a joint bundle containing copies of the authorities upon which each party will rely at the hearing.
- 27. The bundle of authorities should not (a) include authorities for propositions not in dispute or (b) contain more than 10 authorities unless the court gives permission for additional authorities to be included. The passages on which each party intends to rely may be marked or highlighted.
- 28. The bundle of authorities should be lodged by the date specified in the interlocutor. Bundles of authorities which do not conform to this Practice Note may be rejected by the court which may also find no expenses are payable in respect of the cost of making up and lodging the bundles. The court may also find that no expenses are payable, or may modify any award of expenses, where authorities are included unnecessarily.
- 29. Parties are encouraged to produce bundles of authorities in electronic format only, unless otherwise directed by the court. Where authorities produced electronically are contained within a folder, they should be identified by tab number and citation.

#### **LODGING OF PRODUCTIONS**

- 30. Unless the court otherwise directs, the working bundle of productions referred to in Rule 40.13 must be lodged by parties by 4.00pm, 2 clear working days prior to the proof or hearing at which the documents are to be referred to by parties.

## **EMAIL COMMUNICATION**

31. In the interests of fairness and transparency, all electronic communication between legal advisers and the commercial sheriff concerning a defended commercial action should be copied to the sheriff clerk and the legal advisers for all other parties.

## **VARYING/DISCHARGING HEARINGS**

32. A request to remove or discharge hearings or to extend or vary time limits may be made by email. Any such request should be copied to the legal advisers for the other parties so that they may confirm their consent or opposition.

## **HEARINGS FOR FURTHER PROCEDURE**

33. 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.

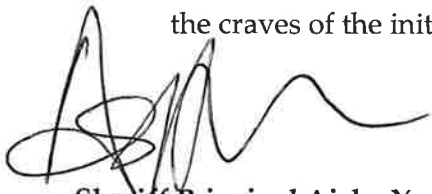
## **PRE-PROOF HEARINGS**

34. When a proof or a proof before answer has been allowed, the sheriff will normally fix a pre-proof hearing. 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. Parties will be expected to comply fully with any orders made by the sheriff prior to a pre-proof hearing. Without prejudice to the foregoing generality, the following matters may be dealt with at the pre-proof hearing:
- (a) consideration of any joint minute of admissions agreed by parties, which should be lodged no later than 2 days prior to the pre-proof hearing;
  - (b) a review of the documents or other productions, which parties consider will be relied upon at the proof hearing. Any such document which has not already been lodged should be lodged no later than 2 days prior to the pre-proof hearing;

- (c) the up-to-date position with regards 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) the extent to which the proof and the attendance of witnesses, may be conducted remotely and how that might be achieved;
- (e) the extent to which affidavit evidence may be used;
- (f) whether any special measures are necessary in respect of any witnesses or parties;
- (g) whether interpreters are required for any witnesses or parties;
- (h) the anticipated length of the proof;
- (i) a list of witnesses together with a summary of the matters the witness may speak to and the likely duration of each witnesses' evidence; and
- (j) such other information as may assist the sheriff to conduct the hearing.

#### **FAILURE TO COMPLY WITH CHAPTER 40 OR ORDER OF COMMERCIAL SHERIFF**

35. Any failure of a party to comply with a provision of a court order may result in a refusal to extend deadlines, dismissal of the action or counterclaim, decree in terms of the craves of the initial writ, counterclaim or a finding of expenses.



**Sheriff Principal Aisha Yaqoob Anwar**

**8 November 2022**