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STATUTORY INSTRUMENTS

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**1994 No. 2310**

**Act of Sederunt (Rules of the Court of Session 1994  
Amendment No.1) (Commercial Actions) 1994**

**Citation and commencement**

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session 1994 Amendment No.1) (Commercial Actions) 1994 and shall come into force on 20th September 1994.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

**Amendment of the Rules of the Court of Session**

2.—(1) The Rules of the Court of Session 1994(1) shall be amended in accordance with the following sub-paragraphs.

(2) After rule 10.6 (Lord Ordinary in Exchequer Causes), insert the following rule:—

**“Hearing of commercial actions**

**10.7.** A commercial judge nominated under rule 47.2 (proceedings before commercial judge) may hear and determine a commercial action as defined by rule 47.1(2) when the court is in session or in vacation.”.

(3) In rule 38.4 (leave to reclaim etc. in certain cases), after paragraph (5) insert the following paragraphs:—

“(6) An interlocutor granting or refusing a motion under rule 47.10(1) (appointing action to be a commercial action) may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.

(7) An interlocutor pronounced on the Commercial Roll, other than a final interlocutor, may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.”.

(4) For Chapter 47, substitute the following Chapter:—

**“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;
- (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.

### **Disapplication of certain rules**

**47.4.—**(1) The requirement in rule 4.1(4) for a step of process to be folded lengthwise shall 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(2) (applications for warrants for diligence in 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.

### **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 13.6(c) (warrants for diligence in summons) 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.

(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.

### **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 the 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 be put out by order for a preliminary hearing within 14 days—

- (a) if defences have been lodged, after the date of that interlocutor; or
- (b) if defences have not been lodged, after defences have been lodged.

### **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 shall not be extended except on special cause shown on a motion enrolled not less than 7 days before the date fixed for the procedural hearing.

### **Procedural hearing**

**47.12.**—(1) Not less than 3 days 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, *inter alia*, 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; and
  - (ii) what the issues are which he considers should be sent to debate or proof;
- (b) 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) 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) may determine, in the light of any witness statements, affidavits or reports produced, that proof is unnecessary on any issue;
- (e) may direct that there should be consultation between skilled persons with a view to reaching agreement about any points held in common;
- (f) 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;
- (g) may remit an issue to a person of skill;
- (h) may direct that proof of the authenticity of a document or other formal matters may be dispensed with;
- (i) if invited to do so by all parties, direct the action to be determined on the basis of written submissions, or such other material, without any oral hearing; and
- (j) may continue the procedural hearing to a date to be appointed by him.

### **Debates**

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

### **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.”.

(5) In rule 73.2 (form of applications for rectification of documents), for paragraph (2) substitute the following paragraph:—

- “(2) An application to which this Chapter applies may be made—
- (a) in an action to which Chapter 47 (commercial actions) applies, by summons or by a conclusion ancillary to other conclusions in the summons; or
  - (b) in any other action, by a conclusion ancillary to other conclusions in a summons.”.

Edinburgh  
25th August 1994

*J.A.D. Hope*  
Lord President, I.P.D.