

1988 No. 1521 (S.150)

COURT OF SESSION, SCOTLAND

**Act of Sederunt (Rules of the Court of Session
Amendment No.4) (Commercial Actions) 1988**

Made - - - - - *1st September 1988*

Coming into force *27th September 1988*

The Lords of Council and Session, under and by virtue of the powers conferred on them by section 16 of the Administration of Justice (Scotland) Act 1933(a) and of all other powers enabling them in that behalf, do hereby enact and declare:

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No.4) (Commercial Actions) 1988 and shall come into force on 27th September 1988.

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

Amendment of the Rules of the Court of Session

2. For rules 148 to 151 of the Rules of the Court of Session(b), substitute the following rules:—

“148. Application

(1) In an action to which paragraph (2) applies, the pursuer may elect to adopt the procedure in this section.

(2) This section applies to any action relating to the ordinary transactions of merchants, traders and providers of financial services, and shall include any action relating to —

- (a) the construction of commercial or mercantile documents;
- (b) the export or import of merchandise;
- (c) the carriage of goods by land, air or sea (other than an admiralty action);
- (d) insurance;
- (e) banking;
- (f) mercantile agency; and
- (g) mercantile usage or custom of trade,

and any such action shall be referred to as a commercial action.

(3) An election under paragraph (1) shall be made by signeting a summons with the words “Commercial Action” marked above the instance, and on the backing, of the summons.

(4) Subject to the provisions of this section, the other provisions of the Rules of the Court of Session, so far as applicable, apply to the practice and procedure to which this section applies.

(a) 1933 c.41; section 16 was relevantly amended by section 29(1) of the Administration of Justice Act 1977 (c.38).
(b) S.I. 1965/321; the relevant amending instrument is S.I. 1978/690.

149. Nominated judges

A commercial action shall be heard by a Lord Ordinary nominated by the Lord President or, in the absence of a nominated judge, by any other Lord Ordinary or by a vacation judge.

150. Commercial roll

A commercial action shall be assigned to the commercial roll.

151. Procedure following the lodging of defences

(1) Within 14 days after defences have been lodged in process, a commercial action shall be put out by order on the commercial roll for hearing on a specified date.

(2) The appearance of a commercial action by order shall not affect the right of any party to apply to the court by motion.

(3) All motions that require the attendance of counsel or relate to matters mentioned in paragraph (4)(b) shall be heard when the commercial action is heard by order.

(4) At the first, or any subsequent hearing by order, the court –

(a) may make such further order as it thinks fit for the speedy determination of the question in dispute between the parties;

(b) may –

(i) allow a specified period of adjustment;

(ii) allow an amendment;

(iii) ordain a party to give further specification of his case in his pleadings;

(iv) allow a counter-claim to be lodged;

(v) grant warrant for service of a third party notice;

(vi) remit to a man of skill;

(vii) where it proposes to appoint an action to the procedure roll under subparagraph (c)(i), ordain a party to lodge a concise note of his proposed argument within such time as it considers appropriate;

(c) shall, where adjustment has not been allowed or the period of adjustment has expired –

(i) appoint the action to the procedure roll, or allow a proof, or a proof before answer, of the whole or such part of the action as the court shall think fit; or

(ii) make such other order as it thinks fit for the further progress of the action.

(5) Where the court makes an order under paragraph (4)(c)(i), it may order the pursuer to make up a closed record; and rule 91(2) and (3) (closing record)(a) shall apply.

151A. Withdrawal from commercial roll

(1) The court may, on its own motion or on the motion of any party, if it thinks it appropriate to do so, withdraw an action from the commercial roll.

(2) Where the court pronounces an interlocutor withdrawing an action from the commercial roll, the action shall proceed as an ordinary action.

(3) An interlocutor withdrawing or refusing to withdraw an action from the commercial roll shall be final.

151B. Transfer to commercial roll

(1) In an action in which the pursuer has not elected to adopt the provisions of this section, a party may apply by motion to have the action appointed to the commercial roll.

(2) A motion under paragraph (1) shall be heard by a judge mentioned in rule 149.

(a) Rule 91 was substituted by S.I. 1982/1825.

(3) An interlocutor appointing or refusing to appoint an action to the commercial roll under paragraph (1) shall be final.

151C. Inspection and recovery of documents

(1) Within 28 days of an interlocutor allowing a proof or proof before answer, each party to a commercial action shall intimate to every other party a list of the documents relating to the matters at issue between them which are, or to the best of his knowledge have been, in his possession or control.

(2) A party who has received a list of documents intimated under paragraph (1) may inspect those documents which are in the possession or control of the party intimating the list within 28 days of the receipt of the list at a time and place to be mutually arranged between those parties.

(3) A party shall have the right to obtain a copy or copies of any document under paragraph (2) on payment of a copying fee of not more than that prescribed by item 2 in Chapter I of the Table of Fees in rule 347(a).

(4) Nothing in this rule shall affect –

- (a) the law relating to, or the right of a party to object to, the inspection of a document on the ground of privilege or confidentiality; or
- (b) the right of a party to apply for an order under rule 95 for a commission and diligence for recovery of documents or under rule 95A(b) for an order under section 1 of the Administration of Justice (Scotland) Act 1972(c).

151D. Exchange of lists of witnesses

(1) Within 28 days of an interlocutor allowing a proof or proof before answer, each party to a commercial action shall intimate to every other party a list containing the names and addresses of the witnesses whom he intends to call to give evidence.

(2) Where a party seeks to call as a witness a person not on his list intimated under paragraph (1), and any other party objects, he shall seek leave of the court to do so, which leave may be granted on such conditions, if any, as the court thinks fit.

151E. Evidence generally

(1) Where possible, parties shall agree any statement or document not in dispute.

(2) A party may apply by motion for a specified statement or document to be admitted as evidence without calling as a witness the maker of the statement or document, and the court may make such order upon such conditions, if any, as it thinks fit.

151F. Customs of trade

(1) This rule applies to a commercial action in which a custom of trade or commercial usage is pled.

(2) Where objection is taken at any hearing by order to the legality or validity of a custom of trade or commercial usage pled, the court shall appoint a hearing on such objection.

(3) At a hearing appointed under paragraph (2), the court –

- (a) may sustain, repel or reserve the objection;
- (b) where the objection is repelled or reserved, shall make a remit to which paragraph (5) shall apply and, where facts require to be ascertained to determine the legality of an alleged custom or usage, may include the determination of the dispute on the facts in the remit; and
- (c) shall make such other order as it thinks fit for the further progress of the action.

(4) Where no objection is taken to the legality or validity of a custom or usage pled, at any hearing on the commercial roll, the court –

(a) The Table of Fees in rule 347 was last substituted by S.I. 1988/684.

(b) Rule 95A was inserted by S.I. 1972/2021 and amended by S.I. 1987/1206.

(c) 1972 c.59.

- (a) may make a remit to which paragraph (5) shall apply; and
- (b) shall, where it makes such a remit, make such other order as it thinks fit for the further progress of the action.

(5) Where a remit is made under paragraph (3)(b) or (4)(a), it shall be made to any person or persons engaged in the particular trade in question to report on the existence and scope of the custom or usage; and the report shall be conclusive of the existence and scope of the custom or usage.

(6) Where a remit is made under paragraph (3)(b) or (4)(a), the party who pleads the custom or usage shall instruct the reporter within 14 days of the date of the remit and be responsible, in the first instance, for payment of his fees.

(7) The reporter shall lodge the report, together with a copy for each party, with the Deputy Principal Clerk of Session.

(8) On receipt of a report, the Deputy Principal Clerk of Session shall –

- (a) intimate the receipt of the report to each party;
- (b) request the party responsible under paragraph (6) for payment of the fees for the report to produce to him a discharge in respect of those fees; and
- (c) on sight of the discharge mentioned in sub-paragraph (b) –
 - (i) lodge the report in process; and
 - (ii) intimate to each party that this has been done.”.

Edinburgh
1st September 1988

Emslie
Lord President, I.P.D.

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt amends the Rules of the Court of Session by introducing new rules for commercial actions.

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