



Commercial Litigation Association of Ireland

PRACTITIONER'S HANDBOOK FOR THE COMMERCIAL COURT

I. Introduction

1. The purpose of the Practitioner's Handbook is to provide a "best practice guide" to assist practitioners with practice and procedure in the Commercial Court.
2. It should not be understood to override in any respect the Rules of the Superior Courts or Practice Directions made thereunder.
3. This document generally follows the sequence of the Commercial Court Rules.

II. Entry in the Commercial List

1. Timing of Application for Entry

- (1) This application may be brought any time after proceedings have issued but before pleadings are closed.
- (2) In practice, the application should be brought as soon as possible.
- (3) Any delay in bringing the application will be relevant to the exercise of the Court's discretion and should, in so far as possible, be explained.

2. Papers for Entry

(1) Notice of Motion and Solicitor's Certificate.

(a) Solicitor's Certificate:

- (i) Identify category(ies) of "commercial proceedings" within which the proceedings fall;
- (ii) Includes background to the proceedings and any other information which would be of assistance;
- (iii) Should be signed by an individual solicitor and not in the name of a firm;
- (iv) Contains a solicitor's undertaking that the directions of the Court will be complied with in full. Clarification was provided to the Commercial Court User's Committee that undertakings will be accepted where a solicitor undertakes to use his/her best endeavours to comply with the Court's directions. This formulation has since been recommended by the Law Society Litigation Committee.

(b) Affidavit:

- (i) An affidavit is not necessarily required to ground an application for entry to the Commercial List, save where there are facts referred to in the solicitor's certificate which are not within the direct knowledge of the solicitor who signs the certificate;
- (ii) An affidavit will be required if the application for entry is accompanied by an application for summary or other relief, in which case the affidavit should contain a detailed account of the claim.

(c) Respondent Solicitor's Obligations:

- (i) At the hearing of the application for entry to the Commercial List, the name of the individual solicitor who will handle proceedings on behalf of the Respondent must be provided to the Court;
- (ii) No formal solicitor's undertaking is required.

3. Lodgement of Papers

- (1) The notice of motion seeking entry to the Commercial List must be issued and filed in the normal way in the Central Office in accordance with the Rules of the Superior Courts. If the motion is issued on or before Wednesday, the following Monday will usually be assigned as the return date, unless a later date is specifically requested. If the motion is issued after Wednesday, the following Monday week will usually be assigned as the return date.
- (2) Once issued and filed, all relevant papers must be lodged in the List Room before 4.30pm on the Wednesday of the week preceding the date on which the application for entry is to be listed. If the papers are not so lodged, the matter is marked "no papers/papers not filed", and it is likely that the motion will be struck out.
- (3) Relevant papers include:
 - (a) Notice of motion;
 - (b) Solicitor's Certificate;
 - (c) A Grounding Affidavit if required;
 - (d) Pleadings to date (to include copy appearance or, if no appearance has been entered, an appropriate affidavit of service. See also para. 4(3) below);
 - (e) Copies of any Orders;
 - (f) Any relevant correspondence exchanged;

- (g) Any other key documents.
- (4) Only papers directly relevant to the motion to be heard should be lodged in the List Room, together with any Court Orders which have already been made. Papers relating to motions which have already been heard should not be included, unless directly relevant.
- (5) The obligation to lodge papers rests on the Applicant's solicitor, typically the Plaintiff's solicitor, or in the case of an interlocutory application, the moving party.

4. Hearing of Application for Entry

- (1) It is at the discretion of the Judge whether to admit a matter to the Commercial List.
- (2) Where the Judge enters the proceedings in the Commercial List, he will usually treat the hearing of the application for entry as the initial directions hearing.
- (3) If summary relief is sought and there is no appearance on the part of the Respondent, the Court may, if satisfied as to service, enter judgment. An affidavit of service of the summons must be lodged in advance (see para. 3(3) above) and an affidavit of service of the motion and grounding affidavit shall be included. The inclusion of these affidavits ensures that the Judge in charge can read them in advance and not expend time reading them in Court. If the Respondent does appear, the Court will usually request an oral outline of the intended defence to the summary claim, failing which the Court may enter judgment.

III. Pre-Trial Procedure

1. Initial Directions Hearing

- (1) While provision is made in the Rules for a separate directions hearing, in practice, the initial directions hearing takes place at the time of the application for entry.
- (2) If the claim is entered, the Judge will issue directions regarding the exchange of pleadings, requests for discovery and other anticipated interlocutory applications.
- (3) It is advisable to have a timetable prepared and if possible agreed with the Respondent before making the application for entry.
- (4) Timetable:
 - (a) Ensure that it is realistic;
 - (b) Consider any request for and delivery of further particulars and any interlocutory applications, such as applications to join third parties;
 - (c) Allow sufficient time for preparing requests for discovery and considering any request received;
 - (d) Complete a thorough evaluation of the amount of discovery that may have to be provided, whether electronically or otherwise, so that an accurate estimate can be provided of the time required to gather the information and make discovery.

2. Delay on Compliance with Directions

- (1) An application for an extension of time should be made by way of mention to a Commercial List Judge on notice to the Commercial List Registrar, who will suggest an appropriate time to mention the matter.
- (2) If it appears that a time limit will not be complied with, an extension of time should be sought from the Court prior to the expiry of the time limit, which extension will be at the discretion of the Court. When making such an application, it is advisable to have agreed a timetable which accommodates the extension, if granted, but does not disturb any proposed trial date.
- (3) It will be necessary to provide an explanation to the Court for any failure to comply with time limits, whether agreed between the parties or set by the Court.

3. Exchange of Pleadings

- (1) Pleadings are exchanged in the normal way in accordance with the Rules of the Superior Courts.
- (2) Where the directions of the Court provide for the exchange or delivery of pleadings or other documents, these do not need to be lodged in the List Room.
- (3) As per II.3. above, papers should only be lodged in the List Room on the Wednesday preceding the date on which the case is next listed before the Commercial Court in accordance with the Commercial Court Practice Directions, and only papers directly relevant to the motion to be heard should be lodged in the List Room, together with any Court Orders which have already been made. It is not necessary to lodge any papers relating to motions which have already been heard.

4. Discovery

- (1) It is recommended that practitioners explore the possibility of obtaining information which they hope to glean from discovery by alternative means which may be cheaper and more expeditious, for example by way of notice to admit facts and/or interrogatories both of which can be served without leave of the Court.
- (2) The parties should address their minds to agreeing protocols which will keep the cost of the discovery process to a minimum.
- (3) When engaging in extensive electronic discovery, consideration should be given to agreeing a list of key search terms in advance.
- (4) Where possible, it is recommended that the parties agree to provide access to documentation in electronic format.

5. Interrogatories

- (1) The rules allow for the delivery of interrogatories without obtaining leave of the Court.
- (2) Delivery of interrogatories is recommended as they can cut down the ambit of discovery and thereby serve to reduce costs and the time at hearing.

6. Preparation for Trial

- (1) While provided for under the rules, pre-trial conferences are not held in practice due to the level of case management operated by the Court.

- (2) Typically after a matter has appeared in the Commercial List and directions and/or Orders made, it will be listed again for mention so that the Court can be updated on how the matter is progressing.
- (3) While the rules provide for a case summary and pre-trial questionnaire, in practice they are not required to be completed.
- (4) The trial books identified for the pre-trial conference should be prepared for the hearing of the action as follows:
 - (a) Book of pleadings, to include updated particulars (together with the question and answer to interrogatories and notice to admit facts and replies, if any) - (motion papers should be excluded once an order has been made);
 - (b) All Court Orders;
 - (c) Book of witness statements;
 - (d) Book of Key Documents or extracts thereof (as agreed between the parties);
 - (e) Book of general discovery (not lodged but available in Court);
 - (f) Book of relevant correspondence not expressed to be "*without prejudice*" (as agreed between the parties);
 - (g) Book containing Legal Submissions;
 - (h) Agreed List of Issues (if directed by the Court).
- (5) Solicitors for the respective parties should engage constructively and sufficiently in advance of the hearing dates to agree and finalise the books to be lodged for use at hearing.
- (6) Documents should be indexed, in chronological sequence, tabbed and each page paginated.
- (7) The obligation to lodge papers rests on the Applicant's solicitor.
- (8) In practice, a copy of the book(s) lodged in the List Room are also furnished to the Respondent's Solicitor.

- (9) Papers are lodged (excluding the book of general discovery) by delivering them to the List Room.
- (10) The List Room does not retain a copy of the papers and it is the responsibility of the Applicant's solicitor to ensure that papers are lodged each time that the case appears in the Commercial List.
- (11) After the application or hearing, papers before the Court are retained by the Registrar of the Commercial Court in order to draw up any necessary orders and are thereafter returned to the List Room for collection by the parties.

IV. Witness Statements

1. Purpose of Witness Statements

- (1) They provide the "essential elements" of the evidence a witness intends to give at trial.
- (2) They are not necessarily admissible to establish the truth of any part of the statement.
- (3) They can be admitted as the evidence in chief of the witness where directed by the Court or agreed between the parties.
- (4) They can be relied upon to demonstrate an intention to call a particular witness. Consequently, if a party decides not to call a particular witness, this may be subject to comment and in an appropriate case, adverse inference.

2. Preparation of Witness Statements

- (1) The language and style of a witness statement should reflect the witness's own words.

- (2) The role of the lawyer in the preparation of a witness statement should be primarily to assist with matters such as structure, chronology, headings, clarity of presentation and advice on legal issues, for example hearsay.
- (3) It may be helpful to consider employing the services of a stenographer to assist with an initial draft.
- (4) Where practical, documents referred to ought to be appended to the witness statement.
- (5) When determining the level of detail to put into the statement, the parties should bear in mind that the statements might be admitted as evidence in chief, when directed or agreed.
- (6) Parties should bear in mind the differences between expert statements and statements from witnesses of fact.
- (7) Parties should ensure formalities are properly complied with such as occupation of the deponent, means of knowledge paragraphs, signing, date etc.

3. Time for Delivery/Exchange

- (1) The delivery/exchange of witness statements will be directed by the Court at a further directions hearing.
- (2) The Court will usually direct a sequential exchange, whereby the Applicant delivers its statements first (often considerably earlier but rarely later than one month prior to the date of trial).
- (3) The Respondent will deliver its statements (usually not more than 7 to 14 days after delivery by the Applicant and under the rules not later than 7 to 14 days prior to the date of trial).

4. Evidence in Chief

- (1) A witness statement can be admitted as evidence in chief where agreed between parties or directed by the Court.
- (2) It is common practice for parties to agree that statements can be admitted as evidence in chief.
- (3) Adverse costs consequences may potentially arise if a party unreasonably refuses to agree to this course of action.
- (4) The rules provide that in “exceptional circumstances” the Court can direct that a witness statement be treated as evidence in chief.
- (5) It is common practice for the Court to urge the parties to consider the status of witness statements and agreement as to their status will be required not later than the Friday call over prior to the trial of the action.

5. Use of statements at trial

- (1) Witness statements are not admissible to establish truth of their contents.
- (2) They are not admissible to prove what a witness will say.
- (3) They cannot be used to refresh memory in *viva voce* evidence as they are not contemporaneous documents.
- (4) While in practice they are frequently referred to in opening statements, it is not clear whether this is appropriate given their lack of contemporaneity.
- (5) Parties should attempt to agree, subject to the Trial Judge, the parameters of the use of the statements at trial. For example, parties can address:
 - (a) The legal status of the statements;
 - (b) Whether statements are to be treated as evidence in chief (see section (4) above);
 - (c) If not to be treated as evidence in chief, whether statements can be referred to in the opening statements;
 - (d) Whether witnesses can refer to their statements whilst giving evidence *viva voce*.
- (6) At the outset of their evidence, a witness will usually be required to verify on oath the accuracy of the contents of their statement.

6. Witness Summaries

- (1) Where a witness is not willing to furnish a statement, it is common practice for the party intending to call that witness to provide a witness summary setting out an outline of the evidence which that party intends to elicit from the said witness.

- (2) This can be done by agreement between the parties or on the direction of the Court.

V. Hearing

1. A hearing date will be assigned at one of the directions hearings, usually once discovery has been exchanged.
2. All books for the hearing must be lodged by the Applicant four days in advance of the hearing.
3. If the Applicant fails to lodge papers in a timely manner, the matter will not be heard.
4. A copy of all books lodged with the List Room should be provided to the Respondents.
5. At 11.00am on the Friday preceding the trial date, the case will be called over. Motions for hearing will not be called over.

VI. Costs

1. Generally the costs of any motion for entry to the Commercial List, directions hearing or for-mention listing shall, unless otherwise ordered, be deemed to be costs in the cause.
2. A costs award shall be made upon the determination of any interlocutory application unless it is not possible to justly adjudicate upon liability for costs on the basis of the interlocutory application.
3. If a party fails to comply with any direction of the Court, cost sanctions may be imposed.

VII. Alternative Dispute Resolution

1. The proceedings or any issue arising therein can be referred to mediation, conciliation or arbitration.

2. A referral may be made on the application of any party or by the Court of its own motion.
3. Order 63A rule 6(1)(b)(xiii) provides that the proceedings or any issue can be adjourned for any period not exceeding twenty eight days. It should be noted that Order 56A(2)(1)(i) of the new mediation rules provides that proceedings can be adjourned “*for such time as the Court considers just and convenient*”.

(1) Mediation and Conciliation

- (a) Generally it is appropriate to consider mediation or conciliation after the exchange of pleadings, but before the costs associated with the discovery process are incurred.
- (b) Order 56A provides that such an application shall be made 28 days before the hearing date, unless for special reason to be recited in the Court’s order.
- (c) Where the parties decide to use mediation or conciliation, the Court may make an order extending the time for compliance with any provision under the Rules or make such order as may facilitate the effective use of the process.
- (d) If the Court makes an ADR Order pursuant to Order 56A and a party refuses to participate, it is recommended that they write to their opponent setting out their reasons for such refusal. Pursuant to Order 99 rule 1B, any refusal or failure to participate without good reason may give rise to adverse cost consequences, regardless of the outcome of the litigation.

(2) Arbitration

- (a) Arbitration is very rarely directed by the Court.
- (b) Typically, disputes which are suitable for arbitration are already governed by an arbitration clause and are not entered into the Commercial List.

VIII. Vacation Practice

1. The practice to date has been that Commercial List business will be dealt with during the Long Vacation, and urgent applications, including applications for entry to the Commercial List, have been dealt with on specifically assigned dates fixed towards the end of Trinity term.
2. Parties seeking to be heard on those dates have first been required to obtain a Certificate of Urgency from the Commercial List Registrar before they will be listed.

IX. Settlement

1. In the event of a case settling prior to its hearing date, it is the responsibility of the solicitors for the parties to inform the Court of that fact immediately.