



RESPONSE
BY THE COMMERCIAL JUDGES OF THE COURT OF SESSION
TO THE SCOTTISH CIVIL JUSTICE COUNSEL CONSULTATION
ON CHANGES TO THE INNER HOUSE RULES

Summary

Since 2010, it has been a fundamental principle of commercial actions that interlocutors which do not dispose of the case cannot be appealed against without leave of the commercial judge. The SCJC now proposes to alter this so that other interlocutors of commercial judges can be repealed without leave. The Commercial Judges are strongly opposed to this fundamental change to the procedure for commercial actions.

The existing procedure

Rule 38.3 provides:

“ (5) 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.

(6) An interlocutor pronounced on the Commercial Roll, other than an interlocutor which makes such disposal as is mentioned in rule 38.2(1) [interlocutor disposing of case], may be reclaimed against only with the leave of the commercial judge within 14 days after the date on which the interlocutor was pronounced.”

The policy reason behind the existing procedure

Rule 38.3(5) and (6) were introduced in 2010. One of the purposes of reforms to Court of Session procedure in commercial actions has been to answer the perception of the business community that in commercial litigation the court's procedures were slow. Accordingly commercial court procedure is designed to ensure speedy and efficient determination of commercial actions. To that end the Rules were amended in 2010 to provide that there was to be no appeal

against an interlocutor of a commercial judge unless the interlocutor disposed of the case or the commercial judge granted leave. This aids the speedy determination of commercial actions as it prevents delays caused by appeals.

The policy behind the existing rules has recently been endorsed by the Inner House in a case where leave was granted to reclaim against an interlocutory matter:

“[8] By way of a postscript, the court adds that it is surprised that leave was granted for this reclaiming motion. It will only be in a clear case that this court will interfere with an interim order of a commercial judge. And speaking more generally, given the potential for delay, when commercial procedure is designed for a speedy resolution of business disputes, the court expects leave to be granted in respect of an interlocutory matter only when such delay is outweighed by compensating benefits which further the just and effective disposal of the case at hand.” (*Highlands and Islands Enterprise v CS Wind Ltd* [2020] CSIH 48)

The proposed change

The SCJC proposal, as set out in its tracked changes version of the Rules, is to repeal Rules 38.3 (5) and (6).

The SCJC policy behind the proposed change

The policy reasons behind the change would appear to be to increase the interlocutors that can be reclaimed without leave.

Rule 38 is considered in paragraphs 12 and 13 of the Consultation Paper which state:

12.The main outcomes are:

- An increase in the specified interlocutors that can now be reclaimed, without leave, within 21 days.....

13. The ongoing requirement to seek leave when reclaiming procedural decisions is in line with a policy objective for ‘discouraging unmeritorious appeals’.

The Commercial Judges' position on the SCJC policy

The Commercial Judges are strongly opposed to the SCJC policy of removing the requirement to seek leave in commercial actions.

The consultation paper does not explain why the SCJC proposes to depart from the long-established practice in commercial actions. It is not enough just to endorse an outcome that there should be an increase in interlocutors which can be reclaimed without leave. In a consultation document we would expect to see a discussion of the existing policy and the reasons why the SCJC thought that the existing policy was no longer appropriate. It is not at all clear to us why the SCJC thinks that the existing practice, which has been fundamental to the operation of commercial actions since 2010, was brought in to allay concerns from the business community, and has recently been endorsed by the Inner House, should be abolished. The existing procedure is in accordance with the policy objective set out in para 13 of discouraging unmeritorious appeals, and we do not understand how that policy will be achieved by removing the requirement for leave.

We would welcome the opportunity to discuss this matter further with the SCJC. Indeed, in this and other matters, the Commercial Judges will always be pleased to discuss any proposals to change the procedure in commercial actions informally with the SCJC before the proposed changes are sent out for formal consultation.

Lord Clark
Lord Ericht
Lord Braid
Lord Harrower

10 October 2022