



GUIDE TO
COMMERCIAL LIST PRACTICE

SUPREME COURT OF VICTORIA

1992 (Revised 1996)

COMMERCIAL LIST GUIDE

This small handbook is intended to be a guide to the practice adopted by the Judges sitting in the Commercial List of the Supreme Court. It is not intended to be a substitute for the relatively few Rules of Court applicable to the List which appear in Order 2 of Chapter II of the Rules of the Supreme Court, nor is it intended to lay down with precision how the Judges in the List will exercise their discretionary powers on every occasion. Since 1986 the Commercial List has been a judge-controlled list, designed to provide speedy but fair resolution of commercial disputes, so far as that is practicable. To that end the judges sitting in the list have exercised a wide discretion as to the type of cases admitted to the list and as to the control both of interlocutory process and the mode of trial. This guide is designed to give some indication of the manner in which that discretion has been exercised in the recent past and of the manner in which it will be exercised in the future.

A. NATURE OF LIST

A.1.01 The difference between hearings in the Commercial List and in the ordinary lists lies principally in two aspects: constant judge-control at directions hearings intended to lay down an expedited time-table for all interlocutory steps and a shortened trial based on agreed Court Books of documents and the exchange of proofs of the statements of all witnesses.

In considering what appears below it should be remembered that the List is primarily intended for the resolution of real disputes between parties engaged in trade or commerce, who have the resources to incur the additional expenses caused by the procedures necessarily devised for a judge-controlled list intended to provide relatively speedy trial.

The Commercial List has not been devised for government or charitable bodies or for individuals not engaged in business, but if parties of that kind have genuine commercial disputes suitable for resolution in the List they can issue proceedings in the List so long as they are willing to carry out the comparatively rigorous directions customarily given. From time to time a party of that kind will be joined against its wishes: that may be a ground for removing the case from the List or for requiring the party joining it to bear any additional costs arising from their participation in a Commercial List case, but in other cases special consideration may be given to those unwillingly joined. Country, interstate and overseas litigants, if plaintiffs, are assumed to be willing to submit to the requirements of the List but if unwillingly joined may similarly be given special consideration, if they are not engaged in business on an extensive scale. Likewise

it should be understood that the List should not be used by plaintiffs who do not expect their claims to be defended or seriously contested even if their claims would otherwise found 'commercial proceedings'. The List is intended for disputed claims and the General Rules of Procedure in Civil Proceedings, especially those relating to default and summary judgment, have been devised to provide swift remedies for all claims, commercial or not, which are not defended or seriously disputed. Thousands of such claims are dealt with each year in the ordinary lists, but the Commercial List, and its Judges, do not have the resources or time to deal with all those cases, nor are litigants to be subjected to expedited timetables, giving advantages to only some plaintiffs, where no real dispute exists. If a real dispute is shown to exist which was not known to the plaintiff at commencement, application can be made later for admission to the List if made promptly.

Again cases should not be issued in the List if the parties, especially the plaintiff, do not wish the trial to come on for hearing as early as possible. If the plaintiff consistently fails to comply with directions on time the case will be removed from the List. Certain kinds of case will also be excluded because specialist lists (such as the Building and Industrial Property Lists) exist for the better management of those cases. Other kinds of case, such as negligence, conspiracy, conveyancing and will cases, are not considered suitable (as will be set out below) because they do not raise issues suitable for direction and trial in the List, but exception may be made if the issue is truly commercial and all parties are engaged in business on a substantial scale.

Finally the List provides for trial based on witness statements and Court Books. Although from time to time part of the evidence-in-chief may be required to be given viva voce, the exchange of witness statements and their adoption at the trial makes the List unsuitable for cases where parties are unable or unwilling to exchange statements or the nature of the allegations makes it desirable that all evidence be given orally. Thus claims which depend primarily on allegations of serious criminal conduct, such as fraud, forgery and conspiracy, are not usually considered suitable for hearing in the List.

B.1 **PROCEEDINGS ADMITTED TO LIST**

B.1.01 Proceedings of the kind ordinarily heard in the Commercial List may be commenced by issue out of the Registry without the need for any order by a Judge, but in certain circumstances referred to below a Judge may admit an ordinary proceeding upon application filed in the Registry [O.2.03]. **The Registry (with the Prothonotary's Office) is situated on Level 2, 436 Lonsdale Street, Melbourne.** Special fees, set out in the Supreme Court (Fees) Regulations, are prescribed for process filed in the List. A Summons for

Directions must also be issued when commencing proceedings in the List [O.2.04], which is discussed in Part D.1 of this guide.

B.1.02 Proceedings which usually will be heard in the List are those which arise out of 'ordinary commercial transactions' or in which there is a question 'that has importance in trade or commerce': O.2.01. A number of examples are given in the sub-paragraphs of the definition of 'commercial proceeding', as follows:

- (i) the construction of commercial, shipping or transport documents;
- (ii) the export or import of merchandise;
- (iii) the carriage of goods for the purpose of trade or commerce;
- (iv) insurance;
- (v) banking;
- (vi) finance;
- (vii) commercial agency;
- (viii) commercial usage.

B.1.03 Ordinarily proceedings in those eight categories will be tried in the List but some may be excluded if a judge considers that they are inappropriate for hearing in a judge-controlled list. Others may be removed later if the plaintiff fails without good reason to comply with the requirements of the List or the directions given. In practice, while there are only two judges regularly assigned to the List, cases likely to take more than two sitting weeks will not be tried by a judge in the List (save in exceptional circumstances), but directions will be given for those cases unless they are otherwise unsuitable.

B.1.04 Unlike the practice in certain other jurisdictions, the eight listed categories of cases are not intended to restrict the kinds of commercial cases heard in the List. Essentially the List is intended for the hearing of commercial disputes between persons engaged in business. Company disputes, claims on guarantees, claims as to sale of goods, commercial chattel leases, and priority of securities, and claims arising out of other commercial contracts are frequently heard, to name but a few kinds of case not specifically named but heard in the List. Some categories of cases, referred to below, are not suitable for the List, for reasons which ought to be apparent from the introduction to this guide, but other unlisted categories such as those just mentioned are regularly heard in the List. It is not practicable to set out all the kinds of cases which may be heard but the primary test is that both sides must be engaged in trade or commerce and the issues must arise out of a business dispute.

B.1.05 It is easier to list those kinds of case which will ordinarily not be heard in the List. Many do not raise commercial issues while others have individual defendants or raise no genuine dispute. Those cases involving individuals (not engaged in business) impose unfair burdens and expenses if heard in a controlled list such as the Commercial List. Likewise, if there is no genuine dispute,

unnecessary expense is incurred and the ordinary Rules of Court provide speedy and appropriate methods of redress. If all uncontested commercial claims were heard in the List there would be insufficient time for the limited number of judges to deal with the genuine commercial disputes for which the List is designed.

B.2 **CASES EXCLUDED FROM LIST**

B.2.01 The classes of case usually not allowed to remain in the List include:

- (a) Actions for the recovery of debts (including those arising pursuant to guarantees) unless there is a genuine belief that the debt is disputed and the defendant is engaged in business;
- (b) Actions for the enforcement of mortgages and other securities unless there is a genuine belief that the claim is disputed and the defendant is engaged in business;
- (c) Actions for the recovery of possession of land and other landlord and tenant claims, unless the claim raises an essentially commercial dispute;
- (d) Vendor-purchaser and other conveyancing disputes, unless essentially commercial issues are raised;
- (e) Trust and will disputes unless the trust is created for commercial purposes or is said to arise from commercial transactions. Thus ordinarily disputes concerning private unit trusts created only for investment or domestic purposes will not be heard;
- (f) Partnership disputes and claims between individuals not otherwise engaged in business. On the other hand joint-venture disputes between commercial organisations will ordinarily be heard;
- (g) Any other claim in which the taking of accounts is the primary relief sought or is required at an interlocutory stage;
- (h) Claims arising out of building, construction or engineering contracts. These should be entered in the Building List;
- (i) Taxation, customs, excise, rating and other revenue cases;
- (j) Valuation cases;
- (k) Claims brought by or against governments, government or local

government bodies or officers, unless the claim arises from a commercial transaction and raises ordinary commercial issues;

- (l) Intellectual property disputes of the kind which are ordinarily heard in the Industrial Property List. At present this would not exclude copyright or confidential information claims, but these will only be heard in the Commercial List if arising out of ordinary business dealings;
- (m) Negligence, including professional negligence, claims, unless questions of commercial practice or commercial law are the principal subject of the dispute, or unless arising out of alleged misstatements in the course of commercial transactions;
- (n) Claims involving allegations of fraud, forgery, conspiracy or other criminal acts. These claims are inherently unsuitable for hearing in a list where informal discovery is preferred (by means of document lists) and witness statements are exchanged before trial, but exceptions may be made, as with all other excluded groups, e.g. when the claim is made by the defendant and appears to be incidental to the primary dispute;
- (o) Industrial disputes or claims related to industrial disputes;
- (p) Claims where the amount in issue is \$200,000 or less and which may be heard in the County Court. If the case raises some question of general importance to the commercial community, it may be retained in the List but otherwise it will be either removed from the List or transferred to the County Court by the Judge, of his own motion, pursuant to the Courts (Case Transfer) Act 1991 and the rules thereunder;
- (q) Finally, claims which are **STALE** will not be heard in the List, which is designed primarily to enable the 'fast-tracking' of proceedings. If a plaintiff, or applicant for admission, sits on his rights, then that party cannot expect the Court to compel the other parties to submit to expedited time-tables or to try the case ahead of proceedings in the ordinary lists. What is stale will depend on many circumstances, but in general claims brought more than a year after the dispute arose will be removed from the List, or refused admission. Even a shorter delay may result in removal if the other party has clearly invited resolution by the courts at an early stage. On the other hand some modest time will be allowed for negotiation or the use of mediation, but merely because a case might have been compromised will not of itself entitle a party to enter the case in the List late. Negotiations may and should occur while the interlocutory steps are being completed.

B.2.02 At one time cases expected to take 10 sitting days or more were excluded from the List from the outset. The present practice is to allow those cases to remain in the List for directions, so that some control may be exercised over complex cases by a Judge, unless it is thought that those directions hearings will be so lengthy that they cannot conveniently be heard during the normal Friday directions. In the latter, exceptional class of case an attempt will be made to find a Judge willing to hear all directions. **OTHERWISE** directions will be given in the ordinary way and any limited issues heard in the List and, if the case is still expected to take 10 days or longer, then it will be transferred to the Long Cases List for trial [see below].

B.3 **APPLICATIONS FOR ADMISSION TO LIST**

B.3.01 Where a defendant, or other party, considers a case to be of the kind which ought to be heard in the List, a summons seeking that the proceeding be entered in the List may be issued within 14 days after appearance: O.2.03(2). Likewise where the plaintiff believes that no defence or no arguable defence is likely to be made to what would otherwise be a commercial proceeding, but discovers later that there is a genuine dispute between the parties, a summons seeking entry to the List may be issued within the same time: *ibid*. Some generosity (as to time) is usually allowed to applicants in the second category as the circumstances in which it may become apparent that there is a real dispute are infinitely varied. For example, a real dispute may only become clear upon the hearing of a summary judgment application and, in order to discourage the entry of claims to which there is no genuine defence, a proceeding may then be admitted to the List even some months after issue (and notwithstanding more than 14 days from appearance have gone by), if the plaintiff then applies promptly. Likewise, for similar reasons, a wide discretion is exercised in relation to delay in the case of defendant's and other parties' applications for admission. On the other hand parties cannot allow months or years to go by and expect to have a case admitted merely because some matter of urgency has then become apparent. There will be little point to entry into the List where most of the interlocutory steps have been taken. Applications for urgent hearing in the Causes List may always be made to the Listing Master.

B.3.02 Parties are not entitled to an order for admission as of right and a very wide discretion is exercised upon the hearing of these applications. Consequently orders for admission will **NOT** be made by consent on a directions or any other day. The respondent's attitude to the application will be taken into account but it is for a Commercial List Judge to decide if the proceeding ought to be entered in the List. ALL orders for admission must be made by a Commercial List Judge. [O.2.02(2) and 2.03(2)]

B.4 **REMOVAL FROM THE LIST**

B.4.01 If there be any doubt as to the suitability of a case for the List an affidavit should be filed with the summons for directions justifying its entry in the List. If not, a Judge may direct the filing of such an affidavit for the adjourned directions hearing and the plaintiff may be deprived of its costs. Sometimes cases on the fringe will be allowed to remain in the List temporarily, either to enable the issues to be clarified on the pleadings etc or to see if the plaintiff complies efficiently and promptly with directions.

B.4.02 In summary the following circumstances may justify the removal of a case from the List, but the Judges exercise a wide discretion as to the making of an order for removal:

- (i) Cases which are not appropriate for hearing in the List [see above];
- ii) Cases where the plaintiff has failed to take sufficient steps to serve any party against whom it wishes to proceed. Reference is made below to the practice as to substituted service;
- (iii) Cases where the plaintiff, or other party who has brought the Case into the List, has been guilty of excessive delay in complying with directions;
- (iv) Cases where the plaintiff, or other applicant for entry, has failed to co-operate with other parties or otherwise has frustrated the procedures in the List;
- (v) Cases where a defendant, or unwilling plaintiff brought into the List, is being caused excessive cost or great inconvenience by reason of the procedures in the List where they are individuals or persons not engaged in business in a substantial way. Occasionally, where there are other parties, the problem may be dealt with by requiring the plaintiff etc to pay any additional costs incurred by reason of entry in the List;
- (vi) Cases where no appearance is entered by any party and can be dealt with on a default basis;
- (vii) Cases where the parties, especially the plaintiff or other applicant for entry, fail to attend on directions hearings;
- (viii) Cases where the only defendants are insolvent and represented by a liquidator, receiver, administrator, trustee in bankruptcy etc and cannot afford or do not wish to comply with the requirements of the List. This will not ordinarily apply where there are other solvent parties engaged in trade

or commerce, but the ordinary procedures and times may be modified for the insolvent parties;

- (ix) Cases in which there are country, interstate or foreign defendants where it becomes apparent that those defendants have only modest means and that the procedures in the List are unduly burdensome or lead to communication difficulties. Of course, the discretion to remove will be exercised variously according to the place where the party carries on business. E.g., in Victoria only parties engaged in business in a very small way may succeed in having a case removed.

C. INTERIM OR INTERLOCUTORY RELIEF

C.1.01 Although it is not presently practicable to have a Commercial List Judge available to hear urgent interim and other applications for interlocutory injunctions and similar relief, **ALL** summonses for such relief in cases in the List **MUST** be made returnable at a suitable time (chosen after consultation with the Registrar) before a Commercial List Judge, who, if he cannot hear the application, will adjourn it as soon as practicable to the Practice Court with a **REQUEST** for a Judge sitting there to hear the application. The **ONLY** exception to this practice is where **NO** Judge in the List is present at the Court, e.g. in vacation, when the Registrar will direct that the summons be returnable before a Practice Court Judge. If there be doubt practitioners should not issue the proceeding in the List, but every attempt will be made to ensure that urgent applications in the List are heard promptly, and the practice will be moulded to that end. From time to time applications will be retrieved from the Practice Court Judges, to relieve their work-load.

C.1.02 Where urgent applications are referred out, it is not reasonable or appropriate to ask other Judges to deal with anything other than the specific application and in particular to give general directions. Directions should be given at the first directions hearing in the List. If necessary, that hearing can be brought forward.

D. INTERLOCUTORY PROCEDURES IN LIST

D.1 DIRECTIONS HEARINGS

D.1.01 As the Commercial List is a judge-controlled list, **ALL** interlocutory steps in cases in the List are taken in accordance with directions given by a Commercial List Judge. To that end plaintiffs must issue a summons for directions at the same time as the proceeding is issued and must serve it together

with the originating process: O.204. A summons for entry into the List shall be treated as a summons for directions (O.2.04(3), even if directions are not explicitly sought in the summons, and thereafter all steps shall be taken in accordance with directions given by a Judge.

D.1.02 Directions hearings are conducted at 10.00 a.m. on every Friday in the year other than on public holidays and during the Long Vacation. The first return date for a summons for directions should ordinarily be fixed, after consultation with the Registrar, for the first Friday after the expected expiry of the time for appearance. If a date is chosen less than 10 days (or other relevant period) from issue of the originating process, and the defendant does not attend, the plaintiff's costs will not ordinarily be reserved. However, if the plaintiff has obtained the defendant's consent, any earlier date may be chosen, as long as the summons is issued before 4.00 p.m. on the preceding Tuesday and the Registrar is satisfied that the matter can be fixed for the chosen date. Exceptions may also be made for urgent cases, and the practice where a plaintiff wishes to obtain an interlocutory injunction or similar relief is discussed above.

D.1.03 In the ordinary course of events each case will come on for directions before any pleading is served or any other interlocutory step is taken by the parties. A time-table for pleadings and discovery will usually be laid down by the Judge at the first hearing. Thereafter the summons for directions will be adjourned from time to time until the case is ready to be set down for trial. Sometimes, very occasionally, only two directions hearings will be necessary, but normally there will be at least 4 to 6 hearings and in more complex, or badly run, cases there may be a dozen or more directions hearings which may extend over many months. On each occasion the summons for directions must be adjourned to a fixed date, which should be a short time after the final step ordered at that directions hearing, but so that **ALL** relevant documents can be filed [in accordance with the practice direction] no later than 4.00 p.m. on the Tuesday preceding the adjourned directions hearing. A directions summons will **NOT** be adjourned sine die [to a date to be fixed], unless in exceptional circumstances.

D.1.04 The object of having regular directions is to ensure constant control of the proceeding by a Judge, to the end that the trial may be brought on as quickly as fairness will permit.

D.1.05 It is impossible here to deal with every aspect of interlocutory procedure in the Commercial List. So a number of the more significant aspects will be chosen for comment. The first aspects relate to direction hearings in general and then there will be described aspects of the application in the Commercial List of the ordinary rules in Chapter I.

D.2 GENERAL

D.2.01 LISTING of directions hearings: Dates for the first hearing of directions are fixed by consultation with the Registrar, and are made returnable at 10.00 a.m. on an appropriate Friday. The directions hearings will be adjourned to a date fixed by a Judge's order. However directions summonses may be brought back for hearing on an earlier date if application is made to that effect on reasonable notice to the other parties and the Court: O.2.04(4). Urgent applications for specific relief may also be brought on by summons. In each case, unless exceptional circumstances exist, such a summons must be filed and served by 4 p.m. on the preceding Tuesday [see below as to the requirements as to filing].

Matters will usually be listed in numerical order and **NO** matters are listed for fixed times, as practitioners are allowed to appear in both directions lists on the same day. Consequently there is considerable flexibility in the order of hearing. Usually consent orders are taken first [see below] and complex matters are stood down to the end of the day's list.

D.2.02 ATTENDANCE of practitioners: It is expected that at every directions hearing **EACH PARTY** will be represented by the solicitor in control of the file or counsel retained in the matter. Orders for costs may be made if this requirement is not complied with. Signed consent orders will not ordinarily be accepted, as under Chapter I, although occasionally simple orders for adjournment, removal or striking out will be made if **NO** other order is or could be sought. Where solicitor or counsel is engaged in the other directions list [but **NOT** in other courts], it is accepted by the List Judges that a matter may be stood down until all practitioners are present.

D.2.03 FILING AND SERVICE: In accordance with the published direction **ALL** documents for each Friday's directions hearings must be filed and served by 4 p.m. on the Wednesday preceding the return date or adjourned return date of the summons, **UNLESS** the need for late filing has arisen as a matter of urgency **AND** an affidavit, or paragraph of an affidavit, contains an appropriate explanation. This requirement is primarily to give the Judges time to read all listed files for the Friday's directions, but it is also common fairness to each other party. **NO** document will be looked at if filed after 4 p.m. on Thursday, nor may any document (other than an appearance) be filed in Court on Friday in respect of that day's directions, unless exceptional circumstances are shown.

As a matter of practice it is undesirable that contentious applications or affidavits should be filed and served on the Wednesday before a directions hearing. As a matter of fairness the other side must have an opportunity to respond in accordance with the present direction described above and that cannot be done on the Thursday before the hearing without some sworn explanation.

D.2.04 **TIMES for compliance with directions:** In fixing dates for service and filing of pleadings, particulars, document lists and the like, Commercial List Judges will usually fix times much shorter than those allowed under the Rules in Chapter I. Much will depend upon the particular circumstances of the case but normally no more than 7 to 14 days will be allowed for each step in the proceeding, and often 3 to 5 days will be considered sufficient, especially for later pleadings and particulars.

If the plaintiff seeks, or concedes, longer times, some explanation will be sought, except in the most complex of cases, and, if the plaintiff is unwilling to comply with the customary faster times, the case will be removed from the List. On the other hand greater consideration will be given to defendants, especially where they have been unaware of the likelihood of the issue of the writ or where they are in business only in a small way. It is assumed, however, that all parties to a commercial dispute will engage solicitors and counsel familiar with the List's practices and who are capable of complying with fast time-tables. A party will not ordinarily be allowed longer times merely because it chooses to engage a small firm who cannot comply with the customary timetables and procedures.

Practitioners are encouraged to work out timetables [preferably typed], even if all orders are not consented to. Judges will usually accept what the parties have worked out, so long as the overall timetable is not too long and in broad terms satisfies the requirements set out above. For precision each step be ordered to be carried out by a **SPECIFIED DATE** and it is not acceptable to fix merely a period after another step has been taken.

D.2.05 **CONSENT ORDERS:** As a matter of practice these are frequently made and are taken at the beginning of each Friday's directions hearings (or some later convenient time), but practitioners ought not to assume that every consent order will be approved by the Judge who will check each such order before it is made. [All orders should provide that each document, including particulars, should be 'filed and served'. The requirement for filing is for the information of the Court and less formal procedures will not normally be allowed.]

No consent order will be made [before its turn in the list of directions) in the absence of any party who has been served, and who therefore must be called, unless it is not a general directions hearing and relief is sought against only the consenting party or parties. As stated above under "Attendance of Practitioners" [D.2.02], written consent orders will only be accepted in limited circumstances.

D.2.06 **SUMMONSES:** Most matters can be dealt with informally at the first or an adjourned directions hearing. A further summons is only required if it is sought to bring on the proceeding on some other Friday **OR** if some consequence is desired other than the giving of further directions. In particular a summons

should be issued if any party is seeking to terminate the other side's case, either by striking out or staying its claim or by seeking default judgment, including applications for self-executing orders.

D.2.07 **EXHIBITS:** All exhibits to affidavits, whether in support of specific applications or filed generally for directions hearings, **MUST** be filed together with the affidavit and in a separate envelope, which will be kept in the custody of the Registrar or a Judge's Associate for the duration of the directions, unless released by order.

D.2.08 **OPPOSED APPLICATIONS:** If likely to take more than half an hour to hear, opposed applications will be stood down to the end of directions hearings. Extended hearings may be adjourned to a fixed date in the List, referred to a Judge in the Practice Court or referred to a Master, depending on the nature of the application. The Judges in the List prefer to keep control of all interlocutory process, so it is not uncommon to adjourn longer applications to another directions hearing with a direction to counsel to deliver **WRITTEN SUBMISSIONS** to the Judge's Associate so as to reduce the time required for hearing. Such a procedure will not deprive parties of the right to make oral supplementary submissions.

D.3 **APPLICATION OF CHAPTER I RULES IN LIST**

D.3.01 **SUBSTITUTED SERVICE:** The need for substituted service will often indicate that a matter is not suited for the List, as it is assumed that there is a genuine dispute and the defendant will have no reason to avoid service. But from time to time it will be necessary to obtain orders for substituted service, e.g., where other defendants are alleged to be guarantors. This should be mentioned at a directions hearing, but the application will usually then be referred to one of the Masters, who obligingly give Commercial List applications some priority.

D.3.02 **DEFAULT JUDGMENTS:** Although it is not expected that plaintiffs will enter proceedings in the List if it is believed that default judgment is likely to be sought, occasionally particular parties may fail to appear or file a defence. Then default judgment may be sought in the ordinary way: see O.2.04 (5). Entry should either be effected at the Registry or application made to a Commercial List Judge on a Directions day, in accordance with O.21 of Chapter I. The latter kind of application should NOT be made to a Master unless referred under O.2.02(4).

D.3.03 **SUMMARY JUDGMENT:** Summary judgment applications in the List are discouraged, as it is assumed that the parties have a genuine commercial dispute. If not, the proceeding should be brought in the ordinary list and application made thereafter to have the case entered in the List when a real

dispute is revealed by the summary judgment application. Very occasionally a summary judgment application may be appropriate for hearing in the List, but in each case it should be returnable before the Judge at a Friday directions hearing: O.2.04(5) and 2.02(3). It may, if likely to take a substantial time to hear, be then referred to a Master for determination pursuant to O.2.02(5). Preferably, to avoid delay, the questions for separate trial under appropriate, move for judgment under parties should identify a question or O.47.04 [of Chapter I] and then, if O.47.05.

D.3.04 **PLEADINGS:** All pleadings are filed and served in the Commercial List pursuant to a Judge's direction. Otherwise the ordinary rules [from Chapter I] apply to the form and substance of pleadings in Commercial List cases. However, it is essential that the real issues are made clear as soon as practicable, so that sufficient particulars of each allegation should appear in the statement of claim, in particular, and that the substance of the defendant's case appears in its defence. It is expected that pleadings will be drawn by counsel experienced in the List. As a matter of practice, defences which merely deny or not admit all allegations will be struck out by a Judge, without application, and the defendant will be required to plead again and pay any costs thrown away. Times for service and filing are dealt with above [See para D.2.04].

Applications to strike out pleadings otherwise should be made on summons identifying the grounds relied upon. However it is assumed that in cases in the List the Bar's customary practice will be adopted of giving fair and clear informal warning of any pleading defects, so as to avoid any unnecessary waste of time. Even where the objection is based on the absence of any cause of action, consideration should be given to separate trial of the question based on agreed facts.

D.3.05 **PARTICULARS:** It is expected that pleadings will either include or append all necessary particulars of a party's case. Times fixed for pleadings will not usually allow for the provision of particulars before defence, or any other pleading, but exceptions may be made, e.g., where the relevant pleading has no particulars at all or the defendant could not reasonably know the basis of the plaintiffs claim.

Further and better particulars are usually the subject of specific directions, and **BOTH** the request and the particulars are directed to be filed. It is not intended to discourage the informal obtaining of particulars, but if they are to be relied upon at trial they should be filed and served in the customary form. If no order is sought at first a request may be filed and served and an order will usually be made at the next directions hearing for the filing and service of the particulars if that has not occurred.

Disputes over particulars are ordinarily decided at directions hearings unless likely to take more than two hours, when they may be referred to a Master or set down for hearing in the List. Summonses are not usually required except where default orders are required, but an **AFFIDAVIT** setting out the principal complaints should be filed and served in good time for the hearing.

D.3.06 THIRD PARTY CLAIMS and CLAIMS BETWEEN PARTIES:

Although under Chapter I these may be issued and served within specified times or by consent, it is the practice in the List to seek directions requiring these steps to be taken, if at all, at an earlier time. If directions are not sought, leave should be sought as soon as possible to avoid delaying the conduct of the principal claim. If not sought promptly, a defendant may be left to pursue the claim separately or outside the List.

D.3.07 AMENDMENT:

Leave must be sought for any amendment of pleadings in proceedings in the List as the procedures under O.36.03 and 36.06(1) are not suited to a controlled list. In particular the period for answer in the latter paragraph is too long and a specific direction is required. Moreover a plaintiff, or other applicant for entry, who wishes to make substantial alteration to its pleading may have the case removed from the List if no adequate reason is given for the delay in formulating its case. Consequently in every case, except where the amendment is formal, an affidavit must be filed explaining the delay or other reason for amendment and a draft of the proposed amended pleading or amendments must be exhibited.

D.3.08 DISCOVERY OF DOCUMENTS:

The practice in the Commercial List is **NOT** to require affidavits of documents in the conventional form or to permit parties to serve notices for discovery under O.29.02 of Chapter I. Instead specific directions are given for the filing and serving of **LISTS OF DISCOVERABLE DOCUMENTS**. Those lists should usually, unless there is a direction to the contrary, take the form of **UNSWORN** lists, but otherwise following the conventional form of Form 29B in Chapter I. So far as practicable documents should be listed in chronological order. Parties are encouraged to agree on orders for limited discovery or for means of discovery which will save time and expense. In most cases document lists will be ordered to be served and filed either contemporaneously with the close of pleadings or within a week thereafter.

Occasionally affidavits of discovery will be ordered from the outset, especially where 'hard swearing' at the trial may be anticipated, but more often affidavits will be ordered at a later stage, either in general or limited form, only if one or both parties seem unwilling to provide full discovery. Such an order will sometimes be made as soon as a dispute as to discovery is raised, in the hope that the parties will then realise their responsibilities and to avoid further interlocutory disputes.

D.3.09 **PRELIMINARY AND THIRD PARTY DISCOVERY:** The procedures under Order 32 are available in the Commercial List, with summonses returnable on directions days. They are to be preferred to the use of subpoenas for production which should NOT be returnable at directions hearings, unless related to a specific application.

D.3.10 **DISCOVERY BY INTERROGATORIES:** As a general rule service of interrogatories is NOT permitted in cases in the List. If sought, specific application must be made on summons, exhibiting a draft of the proposed interrogatories. Service of interrogatories will normally only be permitted if there is some fact or facts which cannot satisfactorily be obtained from the other party by admission. It is not permitted merely to see how the other side puts its case or to obtain material for cross-examination. It should be remembered that the almost invariable practice of the List is to order the exchange of witness statements [see below] which ought to give each side fair notice of the other's case. If necessary that exchange may be brought forward.

Exception may be made where a party has been brought unwillingly into the List, especially where a plaintiff has commenced proceedings outside the List with the object of administering interrogatories. Likewise defendants, such as those sued on guarantees and insurers, may not be aware of all relevant facts and may be given a limited right of interrogation. Oral interrogatories may be directed [by consent] in urgent cases.

E.1 **TRIAL**

E.1.01 When all interlocutory steps have been completed to the satisfaction of a Judge, the proceeding may be set down for trial and a date fixed. At present that trial date is likely to be 2 to 3 months from the last directions hearing, but occasionally more urgent fixtures may be ordered.

E.1.02 The practice relating to trials in the List will be described, first, by considering the usual orders made on setting down for trial, secondly, by dealing with the preparation of materials for use at the trial and, thirdly, by describing the normal course of a trial in the List.

E.2 **DIRECTIONS FOR TRIAL.**

E.2.01 When a proceeding in the List is ready for trial, application for a fixture should be made at the adjourned directions hearing. It is **NOT** necessary to file a certificate of readiness: O.2.05. On the other hand counsel will be asked for an assurance that **ALL** interlocutory steps have been completed. If that assurance

cannot be given by all parties the case will not ordinarily be set down until those steps are concluded. It is not satisfactory to have last minute applications for adjournment because some step has been overlooked or some oversight has produced the need to amend pleadings or take some additional step, so leaving a gap in the List of Fixtures.

E.2.02 Consequently on application to set down counsel will be asked at least four questions:

- (i) Have all interlocutory steps been completed?
- (ii) What is the estimated duration of the trial?
- (ii) Are any proposed witnesses unable to be present at the time when the trial may be expected to be listed? If so when will they be available?
- (iv) Will any witness be called on subpoena?

Counsel are expected to have full instructions as to each of these matters and it is desirable that counsel generally retained (or the solicitor in charge of the file) should be present for this purpose. In particular they should consult beforehand in order to provide an **ACCURATE ESTIMATE**. If it is discovered at trial that the estimate has been understated, the case may be refixed or removed from the List, depending on the party who is responsible for the underestimate.

In accordance with **Practice Note 3 of 1993** counsel for the plaintiff will be required to give an undertaking as to the payment of the court's transcript at trial which will be recorded in the setting-down order in the following terms:

"Upon the PLAINTIFF by its counsel undertaking to the Court that it will forthwith file an agreement indemnifying the Court against the cost of the transcript of the whole of the proceeding at trial for the use of the Trial Judge ORDER THAT....."

E.2.03 **THE CONVENTIONAL ORDER FOR SETTING-DOWN:** This takes the following form (of which copies are available at each directions hearing):

- “1. That the proceeding be set down for trial and fixed for hearing on an estimate of duration of days [but limited only to questions of liability].
2. That the plaintiffs solicitor shall by serve on the solicitors for each other party a draft index for the proposed Court Book listing only those relevant documents which are intended to be or form part of an exhibit ("proposed

exhibits") and each of those other solicitors shall send a list of proposed exhibits to be included or documents to be excluded from the proposed Court Book and shall consult with the plaintiffs solicitors as to the contents of the Court Book by .

3. That the plaintiffs solicitors shall serve on each other party and file for the use of the Judge by a paged and indexed Court Book comprising the current pleadings and particulars and one copy only of each of the proposed exhibits.
4. That the plaintiffs solicitor have available at the hearing a copy of the Court Book for the exclusive use of witnesses during their examination.
5. That each party file and exchange with each other party by a list of the witnesses to be called at the hearing and a copy of a statement in the form of a proof of relevant and admissible evidence of each witness, with references where appropriate to the Court Book (by page number) and the unsigned original of each statement shall be produced at the hearing.
6. That the plaintiffs solicitors file and serve upon each other party not later than the day before the day the proceeding is listed for hearing an appropriate chronology of the relevant facts and events, for the use of the Judge.
7. Save with the leave of the Court or by consent of the parties, no party shall, except in cross-examination, adduce from any witness at the trial of the proceeding any evidence to which this order applies unless that party shall have filed and served a statement of evidence of the witness in accordance with this order.
8. As the proper dispatch of business in the Commercial List has been gravely affected by adjournments necessitated by amendments made at trial, and the resulting mischief has become so serious that leave to amend may have to be refused notwithstanding the importance of the amendment leave to amend may not be granted if an adjournment would result, and it is directed that each party forthwith give careful attention to his pleadings with a view to avoiding an application for leave to amend which might result in an adjournment.
9. That the costs of this application be reserved.
10. That if he has not already done so the plaintiff's solicitor forthwith request authentication of this order."

[N.B. the dates usually fixed in paras. 2, 3 and 5 will ordinarily be dates 4 and 3 weeks (in the case of paragraph 2) 2 weeks (in the case of paragraph 3) and 1 week (in the case of paragraph 5) before the date fixed for trial.]

E.2.04 The following observations relate to particular trial directions:

E.2.04.1 [1] **TRIAL.** In the usual case the trial will be directed only as to liability in the first place and any issues as to damages will be referred to a Master after the trial. The words in square brackets in Order No. 1 reflect that ordinary practice and any party which seeks to have the issue of damages heard at the trial must seek a specific direction to that effect.

E.2.04.2 [2] **COURT BOOKS.** The order for trial will invariably include an order requiring the preparation of a Court Book. It requires by its terms that the solicitors on each side will consult as to its contents, especially as to proposed exhibits, and it is expected, as in all stages of a Commercial List proceeding, that all practitioners will co-operate to this end. All parties should be aware of the contents of the Court Book well in advance of the date fixed for filing.

To that end the customary order on setting down will in future lay down a time-table for preparation and filing of Court Books as follows:

- (1) **FOUR WEEKS BEFORE THE DATE FIXED FOR TRIAL** the plaintiffs solicitor shall serve on the solicitors for each other party a draft index for the proposed Court Book for their consideration. It should ordinarily not contain any documents other than those to which the plaintiff is likely to refer, unless the plaintiff already knows that the defendants and other parties will wish specific additional documents to be included.
- (2) By a date **THREE WEEKS BEFORE THE DATE FIXED FOR TRIAL** each of the solicitors for the defendants and other parties shall send a list of documents to be included or excluded from the proposed Court Book and shall consult with the plaintiffs solicitor as to the contents of the Court Book. Again the object is to ensure that each document likely to be referred to at trial, whether in the witness statements or in cross-examination or otherwise shall be included in the Court Book but also so that there shall not be any unnecessary duplication of documents which no party intends to refer to at trial.
- (3) **TWO WEEKS BEFORE THE DATE FIXED FOR TRIAL** the plaintiffs solicitor shall serve on all other parties and file for the use of the Judge the final version of a paged and indexed Court Book containing both current pleadings and particulars and a copy of each

proposed exhibit. The Court Book should then be in a form which will enable reference to be made to it in each of the witness statements.

- (4) It will be noted that under the draft order Court Books will now be ready and served **ONE WEEK BEFORE** the date fixed for the exchange and filing of witness statements, which as usual will ordinarily be one week before the date fixed for trial.

In heavy cases earlier dates for preparation and filing of Court Books may be directed, especially where the parties' need for extensive preparation make that desirable.

As to the form and contents of Court Books, see below [E.3.02].

E.2.04.3 [3] **WITNESS STATEMENTS.** The usual order for witness statements requires each party to file and exchange a list of the witnesses each proposes to call at the trial, together with a copy of a statement in the form of a **PROOF** of evidence of each witness. That will ordinarily be directed to be done **ONE WEEK** before the date fixed for trial, unless the nature of the case is so heavy that an earlier date is desirable. It is expected, pursuant to the order made, that a completed copy of the Court Book will be in the hands of all solicitors before the date for filing of witness statements. The book must be made available if the witness statements are to contain an **EXACT** reference to each document referred to by the witness.

The same date is fixed for the provision, by **EXCHANGE**, of each party's statements to the other. The object is to avoid revision and editing of statements to answer the evidence of the opposing party. Very occasionally one party will be directed to file and serve its statements before those of the other party. This will only occur where manifest unfairness will be caused by an order for exchange, in particular where one party has not been able to interrogate.

The customary directions for trial order that, if no statement of evidence of a proposed witness is filed and served, no evidence shall be adduced from that witness. However, an order for exchange will not be made in every case, and in particular will not be made in the rare case where allegations of fraud or other serious criminal conduct are made and the case has been allowed to stay in the List. To do so might require a party to incriminate himself before the other party has made out a case to answer. The customary order will then be adapted so as to direct the provision of information on a basis fair to both sides.

Further there are a few cases in the List where evidence can only be obtained by serving a subpoena on an unwilling witness. The usual order will be adapted in those cases also, so as to require the exchange only of a summary of

the evidence the witness is expected to give. The summary should be as extensive as possible, so as to provide advance notice equivalent to that provided by the usual witness statement.

As to the form and contents of witness statements, see below [E.3.03].

E.2.04.4 [4] **CHRONOLOGY.** The usual order as to a chronology requires the plaintiffs solicitors to file and serve upon each other party not later than the day before the day the proceeding is listed for hearing an appropriate chronology of the relevant facts and events, for the use of the Judge.

E.2.04.5 **OTHER ORDERS:** From time to time additional orders will be required, e.g, where evidence is to be taken on commission, by video-recording or by video satellite. Evidence on commission is usually a lengthy process, so that it is preferable that the parties agree on one of the other two methods for obtaining evidence from other countries. Likewise specific orders may be necessary for the return of **SUBPOENAS FOR PRODUCTION**, but, as stated above, it is preferable that third party discovery be obtained.

E.2.06 **AFTER** setting down **NO** further interlocutory orders will be made, except by leave seeking also the reinstatement of the directions summons. However, if a party wishes to amend pleadings, such an application should be made as soon as practicable on appropriate material and exhibiting the proposed amendments. Even then the case may be removed from the list if the plaintiff, or applicant for admission, is to blame. If left to trial the usual **WARNING** applies and the application may be rejected or the case may be removed, again if the plaintiff (or applicant) is to blame.

E.2.07 If a party fails to comply with the directions as to Court Books or witness statements, that should be drawn to the Court's attention as soon as possible. The case will be then listed for mention either on a directions day (preferably) or on another date convenient to a Judge. A mention will not be necessary if the parties can resolve their differences, so long as the books and statements can be filed 2 days before the trial date.

E.3 **PREPARATION FOR TRIAL**

E.3.01 Some additional comments should be made as to preparation for trial, especially as to Court Books and witness statements.

E.3.02 **COURT BOOKS:** Court books are intended primarily for the use of the Judge, as well as the parties, and are required to include the pleadings and particulars, as well as the proposed exhibits. The pleadings should be confined to

the **CURRENT** pleadings and all pleadings **BEFORE AMENDMENT** should be omitted, nor should any other interlocutory documents [orders, document lists etc] be included. The Judge has all those documents available to him from the court file in the unlikely event that they are referred to. In the rare case when other court documents will be referred to, such as answers to interrogatories, a specific direction for inclusion should be sought. If unnecessary materials are included in the Court Book, orders disallowing the relevant costs have been and will be made.

Every document, if any party **MAY** refer to it, should be included in the Court Book, but that should not require the inclusion of every document discovered. Documents should not be excluded merely because one party or the other may **OBJECT** to its admissibility - that must be left to the trial Judge who should be able to examine each document in the Court Book. It should be noted that objections on technical grounds are not encouraged in the List and should only be taken if there is genuine doubt as to authenticity, or otherwise. In general, however, practitioners should exercise carefully their discretion as to the selection of documents, as it is important that the Court, and the litigants, should not be overwhelmed with waste paper.

Documents should be included in the Court Book in chronological order, where that is practical. In more complex cases an attempt should be made to divide documents into categories, again in chronological order. It is most undesirable that documents from different parties should be placed in separate categories merely because of their source, although there may be logical exceptions. Correspondence should always be included in chronological order.

Every Court Book should be properly indexed, with a table of documents at the beginning of each volume. The book should be properly paginated, that is, every page should bear a number, not merely every document. Page numbering in each version of the Court Book should be identical. It is desirable, but not mandatory, that separate documents, though not necessarily all correspondence, should be divided by numbered or lettered tags, corresponding to a number or letter in the Index.

There should be some provision made for the inclusion of additional documents, although, if the solicitors have performed their tasks properly, there ought not to be many and they can be added at the end of the book, or even in a supplementary book. Thus the use of **LEVER-ARCH FILES** for Court Books is not essential and practitioners are encouraged to use less cumbersome devices for putting Court Books together. It may be that counsel will be provided with Court Books in lever-arch files for their convenience, but the filed copy and that available for use of the witnesses should be easier to handle and bound by spirax or other methods.

E.3.03

WITNESS STATEMENTS: The form of proofs or witness statements, as they are commonly called, is largely left to practitioners' common sense. They should be double-spaced and on one side of the paper only. They should be headed with the name and Commercial List Folio number of the proceeding. The full name of the witness should appear clearly, together with his address and occupation. The paragraphs should be numbered for easy reference. It should be remembered that the **FILED** witness statements are for the use of the Judge **ONLY**. So they ought not to be signed and the original should be retained for tendering at trial.

ALL references to documents should specify the page of the Court Book, or books, where the documents can be found. There should be **NO** references to any other documents and, in particular, no copy documents (or originals) should be appended to statements. That only leads to useless duplication and often causes confusion. It is expected that every witness who refers to a document in his statement will have inspected that document in a copy of the Court Book. If the plaintiff refuses to include such a document in the Court Book, directions should be sought and as a last resort a party will be directed to file a separate Court Book.

All witness statements should be produced on word processors, as objections to admissibility will only be resolved at trial, if not agreed between counsel. The statement may then have to be reproduced quickly so that it may then be put to the witness with the inadmissible parts removed. At other times the inadmissible material may be so small that it can be struck out by hand and initialled by the witness.

The **CONTENTS** of witness statements must again be largely left to practitioners. Each should be a **FULL** statement of the witness' evidence-in-chief. The standard direction for trial precludes the adducing of evidence which has not been included in a witness statement, except by leave of a Judge or by consent. On the other hand there is a tendency for some witness statements to be so discursive as to make it very difficult to find the relevant evidence relating to the matters in issue. This **MUST** be avoided. Some history of the parties relationship may be relevant, but it should not be included merely because the statement is written and will not be given orally.

Witness statements are exchanged so no party will ordinarily have the advantage of seeing and replying to the other's witness statements except at trial. This direction may be varied by order but that will occur rarely. Parties should have obtained all necessary details of the other parties' cases by requests for particulars.

E.4 **CONDUCT OF TRIAL**

E.4.01 The proceedings at trial of a Commercial List case are different in a number of ways from those in the ordinary lists, although most of those differences have already been foreshadowed in what has been set out above, especially in those paragraphs dealing with directions and preparation for trial. In particular the use of properly prepared witness statements and Court Books, although expensive, should reduce the duration of the hearing. The parties may expect that the Judge hearing the trial will have perused the pleadings and have read the witness statements before the trial, so far as is practicable. On the other hand, except in short cases, parties cannot assume that the Judge has had the time to read all documents referred to in the witness statements, especially if they are voluminous. The extent of preliminary reading will depend on the size of the case. In many cases the Judge may defer extensive reading until after the case is opened, although only in rare cases will it be necessary for the statements to be read aloud in court.

E.4.02 For obvious reasons it would be appreciated if, when **SETTLEMENT** of a listed case has occurred, counsel, with the consent of the other parties, would notify the Associate of the Judge to whom the case has been allocated, or if it has not been allocated, the Associate of the Judge in charge of the List. This will avoid the need for much unnecessary reading. Ordinarily a settled case will be listed for any necessary orders on the day fixed for trial, but, if there is special urgency, it will be listed on an earlier date where a request to that effect is made to the Associate of the Judge in charge of the List.

E.4.03 Although certain aspects of a trial in the List will be the same as in trials in other lists, the differences show an attempt to mould the procedures to suit commercial disputes, but other orders and directions may be given to assist the resolution of particular disputes. Some of the principal differences are set out below.

E.4.04 As stated above in the ordinary case the trial will be confined to questions of liability only and issues as to damages will usually be referred to a Master after trial. In exceptional cases it may be desirable for the question of damages to be tried together with the questions of liability and orders will be made accordingly.

E.4.05 **MATERIALS AVAILABLE IN COURTROOM:** In accordance with the customary directions contained in the order setting down for trial, the plaintiff should have an additional copy of the Court Book or books solely for the use of witnesses at the trial. It should be put in a place in the court-room near the witness box where the Tipstaff can conveniently hand the book to the witness. All parties should have the unsigned originals of their witnesses statements ready to be handed to the witness during his evidence-in-chief.

Any other documents which a party is likely to hand to the Judge (whether as a document for filing or a late exhibit etc) should be prepared with sufficient copies for provision to each other party and an additional working copy for the Judge.

E.4.06 **OPENING:** There will be a conventional opening in each case by counsel for the plaintiff, though adapted to make allowance for what the Judge may be expected to have read. Detailed reading of full pleadings is unnecessary, but in more complex cases and in cases where the parties have agreed that certain issues are no longer alive some description of the issues on the pleadings will be expected. Again it will not be expected that the whole of any witness statement will be read, but where the statement refers to many or complex documents it may often be necessary to take the Judge to particular parts of those documents relied upon and relate them to the statement.

In complicated cases the Judge may direct that an outline of the opening or a detailed chronology be delivered to his or her Associate and served on other parties. In other cases the Judge may direct that counsel for the defendant and other parties should give an outline of their cases before any evidence is heard or deliver copies of that outline.

Unless ordered to the contrary, documents referred to in opening will be treated as having been tendered, unless specific objection is taken [see below].

E.4.07 **ORAL EVIDENCE:** Evidence-in-chief will ordinarily be given by reference to the filed witness statements. The witness should be shown the statement, which he is expected to have read, and asked whether it is true and correct. He should then be asked to sign and date the document. If there are corrections each should be initialled. In the rare case where a document is appended it should also be initialled on the last page. Each statement should then be tendered and it will be marked as an exhibit.

Where **OBJECTIONS** are made to the admissibility of any evidence, it is expected that they will first be communicated between counsel and, if possible, resolved. If not resolved, each objection should be raised **BEFORE ANY** witness has given evidence, so that steps may be taken to overcome any technical deficiencies. Objections are not encouraged, in particular where the facts can be proved from other sources, but proper objections will usually be resolved before the statements are tendered, so that the objectionable material can be deleted from the statements.

Additional evidence-in-chief can only be adduced by leave and will ordinarily be confined to the making of corrections and the answering of particular allegations which could not reasonably have been anticipated.

Where evidence as to events or conversations is hotly contested or allegations connoting impropriety are made, witnesses will almost invariably be asked to give that particular evidence **ORALLY** without reference to their statements. That will not usually result in all their evidence-in-chief being given orally. Preferably the witness statement will delete that part of the evidence, merely making reference to the conversation in general etc, but much will depend on circumstance.

Cross-examination and re-examination will take the ordinary course, although any document to be put to a witness should, as far as practicable, be included in the Court Book.

E.4.08 TENDERING OF DOCUMENTS: The existence of Court Books will ordinarily obviate the necessity for tendering large numbers of documents singly. The parties' counsel will be expected to note all Court Book documents referred to in opening or evidence, which are not explicitly ruled inadmissible. At the end of the evidence from **ALL** parties the Court Book should be edited by excluding all documents not referred to in opening or in evidence and the edited Court Book tendered as a single exhibit by the plaintiff. Counsel will be expected to consult so as to reach agreement as to the contents of the edited Court Book to be tendered. The transcript will reveal who relied upon any particular document. Usually the only other exhibits will be the witness statements, but other exhibits may be tendered in the usual way.

It should be emphasised that in the Commercial List objections on technical grounds, e.g. as to authenticity, are **NOT** encouraged. If such objections are to be made they should first be communicated to the other side, which may be able to provide an authentic version of the document or prove the relevant matters in other ways. This should obviate the wasting of unnecessary time on such matters, but if the objection is persisted in, it should be raised when the document is first referred to whether in opening or later. There are, of course, cases where issues as to proof of documents must be fought out, but in the Commercial List these should be rare, or the case may not be suited for trial in the List.