

MERCANTILE COURT GUIDE
for
THE BIRMINGHAM MERCANTILE COURT

Background

For the most part the contents of this guide apply uniformly to all the Mercantile Courts in England and Wales. The differences arise from the need to insert information that is peculiar to the court in question such as how to contact those with special responsibility for a mercantile list. The mercantile list in the Central London County Court enjoys a particular status which is dealt with in the relevant guide.

As with the Commercial Court, Mercantile Courts function as specialist lists within the Queen's Bench Division of the High Court. Since 25 March 2002 the functions and procedures of the Mercantile Courts have been governed by Part 59 and its accompanying Practice Direction.

After consultation with the Deputy Head of Civil Justice it has been determined that, because of the use of the Commercial Court Guide in connection with the Mercantile Courts, it will not be necessary to produce a separate detailed Mercantile Guide.

Basic Principle

The basic principle will be that the practice and procedure set out in the Commercial Court Guide shall be deemed to apply to the Mercantile Courts, save to the extent that the respective Rules and Practice Directions under Part 58 (Commercial Court) and Part 59 (Mercantile Courts) differ. In most respects the two sets of Rules and Practice Directions follow the same course, but appended to this Guide is a comparative table so as to ease cross-referencing. References to the Clerk to the Commercial Court, Listing Office, Case Management Unit etc. in the Commercial Court Guide should be read as if they referred to the Specialist Lists Manager or similar person at the relevant court.

Object of this Guide

The object of this Guide is (a) to draw attention to areas where there are differences between the respective Rules and Practice Directions in the Commercial Court and the Mercantile Courts and (b) to highlight other areas where guidance is appropriate as to the practice and procedure in the Mercantile Courts. What follows is therefore by way of a commentary, adopting the same section and paragraph numbers as in the Commercial Court Guide.

A. Preliminary

A1. The Procedural framework

A.15 Pre-trial matters. All pre-trial matters in the Mercantile Court are dealt with by the Mercantile judges, not by district judges.

A2. The Mercantile Court Office

The administrative office for the Mercantile Court is located on the 4th floor of the Birmingham Civil Justice Centre, 33 Bull Street Birmingham B4 6DS, tel 0121 681 3035 fax 0121 681 3121 (this fax number **must** be used for all faxed documents. Other fax numbers of the Birmingham Civil Justice Centre should not be used, particularly for urgent communications as they may not be delivered promptly to the Specialist Section.) All communications should be addressed to the Clerk to the Mercantile Court quoting any appropriate case reference. Unless there is good reason (which should be identified) any such communication should be copied to all other parties to the proceedings, and the Court will assume that this has been done.

B. Commencement, transfer and removal

B1. Mercantile Cases

B1.1/2. Ambit of Mercantile Claim. There is no equivalent to the list of matters set out in Rule 58.1 (2). By Rule 59.1(1) it is provided that a claim may only be started in a Mercantile Court if it

- (a) relates to a commercial or business matter in a broad sense; and
- (b) is not required to proceed in the Chancery Division or in another Specialist List.

This is further qualified by PD59§2.1 which provides that a claim should only be started in the Mercantile Court if it will benefit from the expertise of a Mercantile judge. Notwithstanding point (a) above, the Mercantile Court has a wide jurisdiction in respect of Arbitration Applications: see Section O below.

B3 Part 7 Claims

B3.1 The Form. N1(MC)

B3.2 Marking. By PD59§2.2 (as adjusted by the relevant district registry) the Claim Form should be marked “ Birmingham District Registry, Mercantile List”

B3.3 Statement of Value. Rule 16.3, which provides for a statement of value to be included in the Claim Form, applies in the Mercantile Court.

B3.10 Interest. By Rule 59.4(1) passages in Rules 12.6(1)(a) and 14.14(1)(a) apply with the modification that references to the Particulars of Claim shall be read as if they referred to the Claim Form.

B3.11/4.4 Issue of a Claim Form when the issue counter is closed. The Mercantile Court has no formal facilities for issue of a Claim Form at such times. Nevertheless in case of urgency a party wishing to issue a claim form out of normal hours should contact the Clerk to the Mercantile Court or another member of the Specialist List team who, if available, may be able to arrange for issue.

B4. Part 8 Claims

Save for Case Management (see PD59§7.2(2), neither Rule 59 nor PD 59 refers to Part 8 claims. Part 8 claims may be begun in the Mercantile Court, but there are no special provisions which apply.

B6 Service of the Claim Form

B6.1 Service by the Court/ Parties. Service is governed by Rule 6 and its accompanying Practice Direction. As to service within the jurisdiction, the Court will serve a document that it has issued or prepared unless:

- (1) the party on whose behalf it is to be served notifies the Court that he wishes to serve it himself;
- (2) the Court orders otherwise; or
- (3) a Rule or Practice Direction provides otherwise.

It may be anticipated that in practice Court users will wish to continue to serve their own documents but where this is done the Specialist Lists manager must be informed.

B8 Acknowledgment of service

B8.2(a)/9.2(a) Part 8 claims. See under B4 above.

B12 Transfer of cases into and out of the Mercantile Court

B12.1 Transfer from and to the Commercial Court and between Mercantile Courts. By Rule 59.3 a Commercial Court judge may transfer a claim from the Commercial Court to a Mercantile Court; and a Mercantile judge may transfer a

mercantile claim to another Mercantile Court (if he so wishes, on his own initiative: see PD59§4.3). By PD58§4(1) a Mercantile judge has no power to transfer proceedings to the Commercial Court: the judge may adjourn the application to be heard by a Commercial Court judge or he may dismiss the application.

Transfer from other Courts to a Mercantile Court. By PD59§4.1, if a claim which has been issued in any other Court is thought suitable to continue as a mercantile claim in a Mercantile Court, application may be made direct to that Mercantile Court. In the event that transfer is sought by consent, the application may be made by letter stating why the case is suitable for transfer and enclosing the written consents of the parties, the Claim Form and Statements of Case. If an application for transfer to a Mercantile Court under Rule 30.5 is made to a Court other than the Commercial Court or another Mercantile Court, that Court has no power conclusively to effect transfer: by PD59§4.2 it may adjourn the application to be dealt with by a Mercantile judge or it may dismiss the application.

C. Particulars of Claim, Defence and Reply

C1.10/C2.3/C3/C4.C4.4. Service. See B6.1, above. It is only in respect of service of a Reply that proceedings in the Mercantile Court fall within category (3) above: see Rule 59.9(1).

C5.1 Amendment. PD17§2.2 applies, and thus, unless the Court otherwise orders, there is no requirement that an amended Statement of Case should show the original text.

D. Case Management in the Mercantile Court

D1.2 Multi-track. While all mercantile claims are allocated to the Multi-track, in practical terms, if the claim is less than £15,000 (see B3.3 above), the Mercantile judge may well transfer the claim to the County Court allocating the same to the fast track or give directions more akin to those which would operate under the Fast-track regime.

D2. Key features of Case Management. Not all of the ten key features apply or apply with the same rigour where Case Management is in the Mercantile Court. Thus:

-- By PD 59§7.7(1)(a) the Case Management Information Sheet should be substantially in the form set out at Appendix A thereto.

-- By PD59§7.7(2) it is sufficient that there be a simple non-controversial concise List of Issues prepared by the Claimant. It is not necessary for that to be exhaustive or even for it to be prepared in consultation with

other parties. It is sufficient if the List provides a general idea of the principal issues in the case.

-- By PD59§7.8 it is not mandatory that there should be a formal Case Management conference by way of a hearing, and in a straightforward case it should be possible for the parties to avoid the need for attendance by submitting agreed directions in advance. Where such course has not been taken, the parties may be visited with an adverse costs order.

-- Whether agreed or not, by PD59§7.7(2)(b) the Claimant or other party applying for a Case Management conference must file and serve a draft order substantially in the form set out at Annex B thereto, setting out the directions which that party thinks appropriate. The Court is not obliged to accept agreed directions and may alter them. It should be noted that in any event the Court may as part of its general Case Management power make an order of its own initiative and dispense with attendance. In either case any party objecting to a direction which has not been agreed or proposed by that party may apply within 7 days of receiving the order that it be varied or revoked.

-- Even where a Case Management conference does take place by way of a hearing, while desirable, it is not necessary that attendance should be by the advocates retained in the case; it is enough that there be attendance by a legal representative familiar with the case with authority to deal with any issues likely to arise.

D3. Fixing a Case Management Conference.

D3.4 Time for application. If proceedings have been transferred to the Mercantile Court, by PD59§7.3 the Claimant must apply within 14 days of receiving an acknowledgment of transfer from the Clerk to the Mercantile Court, unless the transferring Court itself held or gave directions for a Case Management conference when it made the order transferring proceedings.

D4. Case management system.

There is no formal system for team case management applicable to the Mercantile Court, Birmingham. Ordinarily the Court will endeavour to list any case management conference and all applications before the judge who it is anticipated will be the trial judge. The permanent Mercantile Judge at Birmingham is currently Her Honour Judge Alton. His Honour Judge McCahill QC also sits from time to time as a judge of the Mercantile Court. In addition the Court operates a Shared List system pursuant to which trials may be given a fourth or fifth fixture and be heard by any of the Specialist Judges ticketed for mercantile work including His

Honour Judge Norris QC (Chancery) and Her Honour Judge Kirkham (TCC). Details of the Shared List are set out in the attached appendix. Consideration as to whether a case should be placed in the Shared List will generally be given at the case management conference.

D5. Case Memorandum

As set out under D2 above, there is no need to prepare a Case Memorandum for claims in the Mercantile Court.

D6. List of Issues

As set out under D2 above, it is sufficient that there be a simple List of Issues. If it be suggested that there be a trial of a preliminary issue, the parties should seek to agree whether costs should be in the issue or in the case.

D7 Case Management bundle

D7.2(iii) Case Memorandum. See D5 above.

D7.5 Revision and upkeep. The Case Management bundle should be revised from time to time, but in cases in the Mercantile Court there is no requirement for continuous revision of the bundle.

D8 Case Management conference

D8.2/3. Attendance. See D2 above

D8.4 Applications. If a party wishes to apply for an order in respect of a matter not covered by the Case Management Information Sheet, an application should be issued to be dealt with at the Case Management conference.

D8.5 Materials. By PD59§7.7(1)(a) the parties are required to employ a case management information sheet substantially in the form set out at Appendix A to PD59.

D8.7(i) The hearing. As to attendance at the hearing, see again D2 above.

D10 Part 20 claims

D10.6 PD20§5 applies, but wherever possible the parties should try to coordinate Case Management, so that directions in the main action and any Part 20 proceedings are considered on the same occasion.

D14 Pre-trial checklist

This should be substantially in the form set out in Appendix C to PD59: see PD59§8.2.

D16 Fixed Trial Dates

D16.1 The parties should attend at the case management conference with dates to avoid in the expectation that the case will be given a fixed trial date at the conference. If that is not possible or is inappropriate then the parties will be required to lodge dates of availability by fax sent to the Specialist List number set out above within a stipulated time after the conference absent which the court will proceed to fix the trial date without further reference to the parties. In case of listing difficulties a telephone listing appointment made may be necessary in which case it will be fixed by the Court.

D17 Estimates of Length of Trial

D17.1 and 6 Maximum/minimum length. In many cases the Mercantile judge will stipulate what time will be allowed for the trial, which may well be less than the parties' estimates.

D18 Pre-trial review and trial timetable

D18.3 Attendance. It is desirable but not essential that attendance should be by the advocates who are to represent the parties at the trial, but any representatives must be fully informed and authorised for the purpose of the review (PD59§8.4). Unless the review is merely for timetabling purposes, the Mercantile judge should be provided at least one clear day in advance with a list of matters which the parties consider should be canvassed, together with a bundle of documents, including where necessary witness statements, which will assist in such rulings as he is liable to make.

D18.4 Timetable. PD59§8 contains no provisions equivalent to PD58§12. Nonetheless, as is clear from what is set out above, appropriate timetabling is often of importance upon a pre-trial review, and in practice adherence to the guidelines in D18.4 should be the norm in any case liable to last longer than 5 days.

D19 Orders

D19.2 Time for compliance. In the Mercantile Court the latest time for compliance is 4.00 pm on the day in question.

E. Disclosure

E4 Specific disclosure

E4.4 Ships papers. The Mercantile Courts Rule and PD contain no provision equivalent to Rule 58.14, but in an appropriate case the Mercantile judge may well make a wide-ranging disclosure order.

F. Applications

F1 Generally

F.1 Generally. By PD59§1.3, in the event that an application (a) is urgent and no Mercantile judge is available to hear it or (b) a Mercantile judge so directs, the application may be dealt with by any other judge who, were it not a Mercantile claim, would have jurisdiction to determine it.

F1.4 Service. See B6.1 above.

F1.9 Hearings. The Mercantile judges are very happy to deal with applications by means of a telephone conference call and in the interest of saving costs would encourage a more widespread use. Those arranging such applications should ensure and seek confirmation that the judge has a consecutively numbered bundle. Video-conferencing facilities are also available at the Birmingham Civil Justice Centre. Parties wishing to use such facilities should contact the Mercantile Court Clerk as far in advance of the hearing as possible in order to check availability and to obtain the necessary information to arrange for the setting up of such hearing. These facilities are available both for pre-trial hearings and for the taking of evidence.

F2 Applications without notice

F2.5(b) Mercantile judge unavailable? See under F1 above.

F5 Ordinary Applications

F5.2 Hearing days. In the Mercantile Court Friday is generally allocated to the hearing of applications and case management conferences. Where parties or their legal advisors have significant travelling time and a telephone conference is not appropriate they should contact the Clerk to

the Mercantile Court with a view to obtaining a late morning or afternoon appointment. Otherwise applications estimated to last for no longer than 20 minutes will ordinarily be fixed for 10am (or earlier) and may be heard on any day of the week. It is important that any 10am application takes no longer than the estimate since if it does so it may imperil the start or continuation of a trial. Urgent applications will be heard as soon as practicable whatever the day or time.

F5.5 The Application bundle. The bundle should be indexed and consecutively numbered and attached thereto should be an estimate of the reading time required by the judge (PD59§10)

F5.6 Skeleton arguments. They may be lodged by fax as set out in A2 above. In some cases, with permission of the judge, e-mail may be used.

F15 Interim Injunctions

F15.8/12 Freezing injunctions/ Search Orders. Only the permanent Mercantile judge(s) or judges ticketed for mercantile work are authorised to grant or otherwise deal with freezing injunctions or search orders, and that jurisdiction is limited to cases that are properly issued in, or are appropriate to be transferred to, the Mercantile Court.

F15.8(a) Return date for freezing injunctions. There is no presumption of any particular day of the week for the return date.

G Alternative Dispute Resolution

G1.9 The Birmingham Civil Justice Centre provides accommodation and the introduction of an independent mediator for all types of claim where the sum exceeds £5000. This takes place in conference rooms in the court building starting at 4.30pm and continuing until at latest 7.30pm. Each party has to make a contribution to the fee of the mediator, which is calculated on a rising scale between £75 to £250 per party dependant upon the amount at issue, together with the costs of his own lawyer if asked to attend. An information pack is available from the Clerk to the Mercantile Court who will also provide contact details for the mediation clerk if parties wish to avail themselves of this option.

J Trial

J2.1 Split trials. Assessment of damages will ordinarily be dealt with by the trial judge, but he may refer it to a non-Mercantile Judge including a District Judge.

J7.1 Trial sitting days These are normally Monday to Thursday though, where necessary and subject to the specific direction of the Mercantile Judge Friday may be treated as a trial sitting day. Normal hours for the hearing of trials are 10.30 to 1pm and 2pm to 4.30 but the Court may sit at other or for additional hours to suit the convenience of the parties or to complete the hearing without need for further adjournment.

J12.1 Reserved judgments. Unless the matter is commercially or otherwise sensitive, with a view to saving costs, a copy of an intended judgment may be passed to the parties or their legal representatives in advance of any date for its delivery being fixed. Any such judgment will be confidential to the parties and their legal representatives until after it has been formally delivered.

J.12.2(a) Approved texts. There is no system of lodging approved texts with any Mechanical Recording Department. Any enquiries about the final form of any judgment should be made of the Specialist Lists Manager.

K After Trial

K2.1 Accounts and Enquiries. Accounts and enquiries will normally be dealt with by the trial judge but he may refer it to a non-Mercantile judge including a District judge.

K3.1/2 Enforcement Unless the Court otherwise orders, all proceedings for the enforcement of any judgment or order will be handled by a district judge. Unless there is good reason, applications in connection with enforcement should be directed to the Clerk to the Mercantile Court and marked for the attention of DJ Cooke.

K.4.1 Assessment of damages or interest after a default judgment. See K2.1 above.

M Litigants in person

M3.1 Companies without representation. Whether a Mercantile judge gives permission to an employee of a company or other corporation to represent his employer depends upon a number of factors, including the complexity of the case.

N Admiralty

The Mercantile Court has no Admiralty jurisdiction, so if it is desired to start an Admiralty action *in rem* in order to obtain security for a claim, the Claim Form should be issued from the Admiralty Court. Where security for the claim is not a problem or has been provided voluntarily, there is no reason why proceedings *in personam* should not start in or be transferred to the Mercantile Court, provided that they are in respect of a mercantile claim.

O Arbitration

O1 Arbitration Claims / the Arbitration Act 1996.

Subject to the limitation in respect of s9, the Mercantile Court may deal with arbitration applications under the Arbitration Act 1996 (the 1996 Act).

Proceedings under s9 of the Act (stay of legal proceedings) must be started in the court in which the legal proceedings are pending (art 3 of the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (the Order) and Rule 62.3(2).

Those contemplating arbitration proceedings in order to challenge an award under ss.68 and 69 of the Act should appreciate that the Court's powers are very circumscribed: the burden on the applicant is far heavier than under the appeal regime that operates within the Court system: as to s.68, see in particular the observations of Tuckey J in *Egmatra v Marco Trading Corp.* [1999] 1 Lloyd's Rep. 862 at 865.

O4 Service of the Arbitration Claim form

See B6.1 above.

O10-17 Claims under the Arbitration Acts 1950-1979

By PD62§14.1, save for claims in existing proceedings (Rule 62.13(2) and under s.12(4) of the Arbitration Act 1950 (Rule 62.14), an arbitration claim under the old law must be started in the Commercial Court and the Mercantile Court has no jurisdiction to deal with any such claim, unless it is transferred into the List by a judge of the Commercial Court.

O18 Enforcement

By reason of express provision under art 4 of the Order in respect of ss 66 and 101 of the 1996 Act and the absence of prohibition under Part 62 and

PD62, it would appear that the Mercantile Court has jurisdiction in respect of arbitration enforcement proceedings under both the 1950-1970 Acts and the 1996 Act.

Registration of foreign awards is governed by Rule 62.20.

O19 Transfer of Arbitration Claims

The Commercial Court and the Technology and Construction Court can transfer any arbitration claim out of its list and into that of a Mercantile Court (Rules 59.3(b) and 62.3(4)).

Provided that it has the necessary jurisdiction to deal with the matter, the Mercantile Court may order that an arbitration claim be transferred to its list (PD59§4).

The Mercantile Court may transfer proceedings to another Mercantile Court. Transfer to another specialist list or to the Commercial Court will require the consent of the receiving court (Rules 59.3(a) and 30.5(3)).

O20 Appointment of Judge as Sole Arbitrator or Umpire

Only a judge of the Commercial Court or the Technology & Construction Court may accept such appointment.

P Miscellaneous

The provisions are inapplicable to the Mercantile Court.

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APPENDIX

THE MERCANTILE COURT, BIRMINGHAM :SHARED LIST

A. Shared Listing

1. The Shared List is primarily for use by the three specialised lists in Birmingham District Registry – those operated by the Mercantile, Chancery and Technology and Construction courts.
2. The Shared List is an addition to the normal lists of those courts and allows better use to be made of judicial resources. Given the settlement rate of trials in the three courts, additional cases will be listed alongside the three cases listed before the three specialist Judges. The additional case/s will be allocated to any of the Specialist Judges who becomes available when the main fixture has settled or been vacated.
3. An important requirement for allocating a case to the Shared List is that the case is suitable for hearing before any of the Section 9 Specialist Judges and that, in the case of the Mercantile Court, the case is not one where trial by a mercantile

judge or the judge responsible for case management is desirable. For example, a trial of preliminary issues where it is anticipated that there may be need for continued judicial involvement by the same judge would ordinarily not be suitable for the Shared List. Another consideration is that the case should be estimated to last no more than 3 to 4 days. Cases carrying a 4 day time estimate may be listed with a “floating” start commencing either Monday or Tuesday and finishing either Thursday or Friday so as to ensure that the Court’s directions and applications day (currently Friday for both Mercantile and TCC courts and Monday for the Chancery Court) can be accommodated.

4. In the Mercantile Court use of the Shared List may be suggested by the Mercantile Judge at directions stage, or by the parties. It is likely that a case entered in the Shared List will be allocated an earlier trial date than a case which has to be heard by the appropriate Specialist Judge.

5. The final decision to list a case in the Shared List will lie with Judge Alton or Judge McCahill QC for Mercantile cases, (and with Judge Norris QC for Chancery cases and Judge Kirkham for TCC cases).