THE SHORTER AND EARLIER TRIAL PROCEDURES INITIATIVE – RESPONSE TO CONSULTATION

Completed on behalf of the Property Litigation Association (PLA)

Please contact:

Mathew Ditchburn, Partner, Hogan Lovells International LLP (and member of the PLA's Law Reform Committee)

Tel 020 7296 2294

Email mathew.ditchburn@hoganlovells.com

The Property Litigation Association (PLA) responds to the consultation on the Shorter and Earlier Trial Procedures Initiative as set out below in our comments in red on the draft Practice Direction. PLA members specialise in all aspects of property litigation including commercial, residential and agricultural property law. We are (approximately 1200) lawyers who come from a variety of firms in terms of size and location.

By way of a general comment, we are broadly supportive of the concept of a Shorter Trial Scheme (STS) being available to litigants but have some concerns about the process as it is currently envisaged.

To encourage litigants to use the STS we would strongly recommend that a reduced set of court fees be introduced (particularly in light of the system of enhanced court fees recently introduced) for the scheme to reflect the lower burden on court time and resources that it represents.

We are also supportive of the Flexible Trial Scheme (FTS), although we would observe that it appears to reflect what is really just good case management which judges/masters should be following in any event. It should not be necessary for the parties to "agree" to adapt trial procedures to suit their particular case and confine their evidence to the issues in dispute. They should have an obligation to seek to reach such agreement and, in default of such an agreement, the judge/master should pro-actively manage the case applying the same principles laid out in the FTS.

APPENDIX 1

Draft Practice Direction

PRACTICE DIRECTION 51[*] – SHORTER AND FLEXIBLE TRIALS PILOT SCHEMES

This Practice Direction supplements various CPR rules.

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1) General

(1) This Practice Direction is made under rule 51 of the Civil Procedure Rules (CPR). It provides for a pilot of two schemes, the Shorter Trials scheme and the Flexible Trials scheme, to-

(a) operate from [***date***];

(b) operate in the courts situated in the Royal Courts of Justice, Rolls Building, Fetter Lane, London that is the Chancery Division (including the Patents Court and the Companies Court), the Commercial Court and the Technology and Construction Court ("the Rolls Building courts");

(c) apply to claims started on or after [***date***].

(2) Where the provisions of this Practice Direction conflict with the provisions of other provisions of the CPR or other Practice Directions, this Practice Direction shall take precedence.

(3) In calculating the time provided by any order fixing, extending or abridging time under the Shorter Trials Scheme the period from 24 December to 2 January next following (both days inclusive) is excluded.

(4) Where a case is agreed or ordered to be suitable for the Shorter Trials Scheme, the Court expects the parties and their representatives to cooperate with, and assist, the Court in ensuring the proceeding is conducted in accordance with the Scheme so that the real issues in dispute are identified as early as possible and are dealt with in the most efficient way possible.

2) The Shorter Trials Scheme

(1) Shorter Trials Scheme - general

(a) A claim in the Shorter Trials Scheme may be started in any of the Rolls Building Courts.

The PLA assumes that this is a misstatement in that it is not in the claimant's gift to "start" a claim in the STS but simply indicate an intention to adopt the scheme and, if this is disputed by the defendant, then the court will decide on the suitability of the STS at the first CMC (see PD 2(4)(n)).

The PLA would not support any process whereby the claimant could effectively choose to adopt the STS – perhaps as a tactical ploy to put pressure on the defendant – and the onus

would then be on the defendant to apply to court to have the proceedings transferred out (see PD 2(3)(a)).

(b) The Shorter Trials Scheme is for commercial and business cases.

(c) The Shorter Trials Scheme will not normally be suitable for:

(1) cases including an allegation of fraud or dishonesty;

(2) cases that raise complex disputes of fact, which are likely to require significant disclosure and/or reliance upon extensive witness evidence in order for such issues to be resolved;

(3) cases involving multiple issues and multiple parties, save for Part 20 counterclaim for revocation of an intellectual property right;

(4) cases in the Intellectual Property Enterprise Court.

(d) The length of trials in the Shorter Trials Scheme will be no more than 4 days in court.

Would the 4 day trial include the judge's reading in time? The PLA would support a scheme that involved a 4 day trial plus one day's reading in for the judge, i.e. trials for one week in total.

(e) All Shorter Trials Scheme claims will be allocated to a designated judge at the time of the first case management conference (CMC) or earlier if necessary.

(f) All proceedings in the Shorter Trials Scheme will normally be heard or determined by the designated judge except that:

(1) another judge may hear urgent applications if the designated judge is not available;

(2) unless the court otherwise orders, any application relating to the enforcement of a judgment or order for the payment of money will be dealt with by a master of the Queen's Bench Division or of the Chancery Division or a district judge.

(g) Provisions in other rules or practice directions which refer to a master or district judge are to be read, in relation to claims in the Shorter Trials Scheme, as if they referred to a judge.

(2) Starting proceedings in the Shorter Trials Scheme

(a) Claims in the Shorter Trials Scheme must be issued in the appropriate registry in the Rolls Building, that is to say the Chancery Registry, the

Admiralty and Commercial Registry, and the Technology and Construction Court Registry.

(b) As appropriate, the claim form must be marked in the top right hand corner as follows:

(1) "Queen's Bench Division, Commercial Court, Shorter Trials Scheme";

(2) "Chancery Division, Shorter Trials Scheme", "Chancery Division, Companies Court, Shorter Trials Scheme", "Chancery Division, Patents Court, Shorter Trials Scheme" as appropriate; or

(3) "Queen's Bench Division, Technology and Construction Court, Shorter Trials Scheme".

(3) Transferring proceedings to or from the Shorter Trials Scheme

(a) An application by a defendant, including a Part 20 defendant, for an order transferring proceedings out of the Shorter Trials Scheme should be made promptly and normally not later than the first CMC. An application may be made on paper prior to the first CMC if appropriate.

(b) If a successful application is made to transfer a case out of the Shorter Trials Scheme, the case will then proceed in the court in which it was issued unless a judge otherwise orders;

(c) An application to transfer a case into the Shorter Trials Scheme must be heard by a judge. If a judge orders a case to be transferred into the Shorter Trials Scheme, he may give case management directions.

The application should be before a master. If the claim is allocated to the STS at the first CMC then this will be done by a master and there is no reason for it to be any different here.

(d) An application by any party for an order transferring proceedings into the Shorter Trials Scheme should be made promptly and normally not later than the first case management conference.

(e) In deciding whether to transfer a case into or out of the Shorter Trials Scheme, without prejudice to the generality of the overriding objective, the court will have regard to the type of case the Scheme is for, the suitability of the case to be a part of the Scheme and the wishes of the parties.

By this, the PLA assumes that the court would ask:

1. Whether it is anything other than a commercial/business case.
2. Whether it involved fraud or dishonesty.
3. Whether it raised complex issues of fact, requiring significant disclosure and/or witness evidence.
4. Whether it involved multiple issues or multiple parties (which we take to mean more than two parties).

5. Whether it was a case in the Intellectual Property Enterprise Court.

See PD (2)(b) and (c). If the answer to all these questions is "no" then, as we understand it, the court will consider the case suitable for STS. It is important to note that the court will not take into account whether it is an urgent case but whether "*speedy but fair justice at a reasonable and proportionate cost*" can be achieved. The PLA supports this as a concept, although it recognises that there will be a considerable grey area in deciding what is a "complex" dispute of fact and what is "significant" disclosure or witness evidence. If the test is simply whether the factual disputes and disclosure would take no more than 4 days to deal with at trial then query what the STS adds: the court should be ordering a 4 day trial in any event. The PLA also observes that it is conceivable that a complex issue of law would make the case unsuitable for a 4 day trial.

(4) Proceedings in the Shorter Trials Scheme

(a) The procedure set out in this paragraph shall be substituted for any applicable pre-action protocols.

The PLA strenuously objects to the notion of dispensing with the pre-action protocols. The aim of the scheme is to deal with claims at a reasonable and proportionate cost. The protocols achieve this by encouraging an open exchange of information prior to issuing proceedings enabling the parties to narrow the issues in dispute. There is no suggestion that the purpose of the STS is to deal with urgent cases which might justify dispensing with the protocols.

Paragraphs (b) to (d) below are simplistic and not a fair substitute for the protocols. The Dilapidations Protocol, for example, is frequently used by PLA members in proceedings that would ultimately be issued in one of the Rolls Building courts (particularly the Technology and Construction Court). The protocol was refined over a ten year period before being adopted into the CPR in 2012. It includes a great many technical matters that are specific to dilapidations claims.

(b) Save in cases of urgency, a letter of claim should be sent giving succinct but sufficient details of the claim to enable the potential defendant to understand and to investigate the allegations.

(c) The letter of claim should notify the proposed defendant of the intention to adopt the Shorter Trials Scheme procedure.

(d) The proposed defendant should respond within 14 days stating whether it agrees to or opposes that procedure, or whether it has insufficient information to commit itself either way.

(e) Particulars of Claim must be issued and served with the Claim Form.

The PLA do not understand the reason for this. The rationale of the STS is to deal with claims at a reasonable and proportionate cost, not deal with them as a matter of urgency. It is entirely possible, for example, that a protective claim form may be issued in view of an impending limitation date and the parties may then seek to negotiate or mediate. Why, in those circumstances, should a claimant be forced to issue Particulars of Claim with the claim form? That is adding to the cost, not reducing it.

(1) The Particulars of Claim should include:

(a) a brief summary of the dispute and identification of the anticipated issues;

(b) a full statement of all relief or remedies claimed;

(c) detailed calculations of any sums claimed.

The Particulars of Claim should also include a concise list of issues. There is no reason why the Claimant should not be able to do this if the relevant pre-action protocol has been followed.

(2) The Particulars of Claim should be no more than 20 pages in length. The court will only exceptionally give permission for a longer statement of case to be served for use in the Shorter Trials Scheme and will do so only where a party shows good reasons.

We assume that the 20 page limit does not include schedules (such as schedules of loss) and appendices. In that case, the PLA agrees with this as the Claimant will have decided that the claim is suitable for STS in which case it should be able to limit the Particulars of Claim to 20 pages. If it cannot then plainly it does not think the case is suitable for STS.

(3) The Particulars of Claim should be accompanied by a bundle of core documents on which the Claimant relies but also documents on which the other side is likely to rely.

The PLA agrees that this is a sensible idea, although such documents should already have been exchanged if the relevant pre-action protocol has been complied with.

(f) The Claim Form and Particulars of Claim shall be issued and served promptly following the 14 day period allowed for the defendant's response to the letter of claim, or the defendant's response, if a longer period for response is agreed between the parties.

The PLA strenuously objects to this suggestion, which appears to force parties into full blown litigation when the aim of STS is supposed to be dealing with claims at a reasonable and proportionate cost. The reality is that the defendant's response will either lead into a negotiation (or mediation) or further correspondence between the parties with a view to narrowing the issues. The STS is not designed to deal with urgent claims so there is no reason to require proceedings to be commenced when the claimant is satisfied that it is getting a sufficient level of engagement from the defendant.

(g) The Claimant shall, promptly after issuing the Claim Form and Particulars of Claim take steps to fix a CMC for a date approximately (but not less than) eight weeks after the Defendant is due to acknowledge service of the Claim Form.

Whilst the PLA recognises that this may help avoid some of the delay, on balance, this is likely to be problematic in practice. For example, if the defendant seeks and/or the claimant agrees to allow more time to file the defence, or if the defendant disputes jurisdiction, then the

CMC will have to be vacated. That would be a waste of court time and the parties' costs. It would be better to fix the first CMC after the defendant has filed its defence.

(h) The Defendant shall be required to file an acknowledgement of service within the time periods prescribed by the CPR.

(i) If the Defendant files an acknowledgement of service stating that he wishes to dispute the court's jurisdiction, the period for serving and filing a defence is 28 days after filing of the acknowledgement of service (unless an application to challenge the jurisdiction is made on or before that date, in which case no defence need be served before the hearing of the application: see CPR 11(7) and (9)).

(j) Cases where the jurisdiction of the Court is challenged may not be assigned to the Shorter Trials Scheme unless and until the question of the Court's jurisdiction has been resolved.

(k) The Defence and any Counterclaim must be served within 28 days of acknowledgment of service of the Claim Form.

The PLA queries this 28 day time limit when the STS is intended to be an expedited process. CPR Part 15.4(1)(b) requires the defence to be filed within 28 days of the service of the Particulars of Claim if an acknowledgment of service is filed.

(1) The Defence should include:-

(a) a statement indicating whether it is agreed that the case is appropriate for the Shorter Trials Scheme and, if not, why not;

(b) a summary of the dispute and identification of the anticipated issues (if different to that of the Claimant).

(2) The Defence and Counterclaim should be no more than 20 pages in length. The court will only exceptionally give permission for a longer statement of case to be served for use in the Shorter Trials Scheme and will do so only where a party shows good reasons.

This should not be required if the Defendant disputes the suitability of STS. If the court ultimately directs that the claim is suitable for STS then the Defendant could be directed to serve a shortened defence at its own cost.

(3) The Defence should be accompanied by a bundle of any additional core documents on which the Defendant intends to rely.

(l) Unless such extension would require alteration of the date for the CMC if it has already been fixed, the Defendant and the Claimant may agree that

the period for serving and filing a defence shall be extended by up to 14 days. However, any such agreement and brief reasons must be evidenced in writing and notified to the court.

This rather underscores the above point about a CMC not being listed until after a defence has been filed.

(m) Reply and Defence to Counterclaim to be served within 14 days thereafter.

(n) If the suitability of the Shorter Trials Scheme procedure is disputed then

that issue will be determined at the first CMC, if not before, and further directions given in the light of that determination.

The PLA agree that the first CMC is the correct point to decide whether the claim is suitable for STS. This should be the court's decision, if the parties do not agree. It should not be at the claimant's election. Query whether, if the court decides that the claim is not suitable for STS, the claimant should be given the option of serving longer Particulars of Claim at its own cost.

(o) Each party should serve a Case Management Information Sheet adopting the modified form at Appendix [ ] to this Practice Direction.

(p) The solicitors for the Claimant will be responsible for producing and filing the Case Memorandum and List of Issues, and where appropriate for revising it.

The PLA wholeheartedly agrees with greater emphasis being placed on the use of lists of issues as a means of controlling the costs of proceedings. Claims can be dealt with at a more reasonable and proportionate cost if the court identifies, at an early stage, what are the true issues in dispute between the parties and tailors its directions for disclosure, witness and expert evidence and trial to those issues. This is a far more sensible and proactive approach than the rather blunt instrument of costs budgeting.

(q) The Claimant’s solicitors shall provide a draft the Case Memorandum and List of Issues to the Defendant’s solicitors in sufficient time to enable the parties to use their best endeavours to discuss and agree the contents thereof prior to filing the CMC bundle at Court.

(r) At the CMC the Court will:

(1) review the issues;

(2) approve a List of Issues;

(3) give directions for trial;

(4) fix a trial date (or window), which should be not more than 9 months after the CMC and with a trial length of not more than 4 days (excluding reading time);

(5) fix a date for a Pre Trial Review.

(s) Disclosure

(1) CPR r31.5(2) will not apply;

(2) If and insofar as any party wishes to seek disclosure from another party of particular documents or classes of documents or of documents relating to a particular issue, they must write to the other party to make such requests not less than seven days in advance of the CMC and, absent an agreement regarding the extent of the disclosure to be given, raise such requests at the CMC.

(3) Unless agreed by the parties or otherwise ordered at the CMC, the following provisions for disclosure will apply:

(a) The parties shall, within 4 weeks of the CMC, make and serve a disclosure list in accordance with rule 31.10 and serve copies of all documents in the list, inspection of which is not objected to.

(b) The documents to be listed in the disclosure list are:

(i) The documents on which they rely as supporting their case;

(ii) The documents requested by the other party under 2(4)(r)(2)

above that it agreed to produce or was ordered to produce by the Court;

(iii)Any documents the existence and contents of which they are aware and which would fall to be disclosed under CPR 31.6(b).

(c) Each party must also provide a Disclosure Statement containing a brief description of the steps the party has taken to locate the documents disclosed.

The PLA agrees that this is a more sensible approach than "standard" disclosure and is one of the key areas that is likely to lead to more reasonable and proportionate costs being incurred. It is supportive of a more modern and issue specific approach to disclosure.

(4) Applications for specific disclosure and further information are discouraged under the Shorter Trials Scheme and should not be made without good reason.

The quid pro quo for giving limited disclosure at the outset is that the parties should be entitled to make applications for specific disclosure. Disclosure should be a staged process. It is entirely possible that the disclosure one party gives alerts the other party to a document that it was not previously aware of and has not seen but is critical to their case. Indeed, until the first raft of disclosure is given, the parties may not be in a position to identify what documents they need to see. The PLA recognises, however, that this must not be allowed to lead to delay so (a) any application for specific disclosure should be made promptly (and not shortly before trial as is often the case), and (b) increased emphasis should be placed on compliance with the pre-action protocols to ensure that there is a proper exchange of

documents prior to the commencement of proceedings and less chance of new documents "coming out of the blue".

(t) Witness statements

(1) Unless otherwise ordered, witness statements will stand as the evidence in chief of the witness at trial.

(2) The court will consider at the CMC whether to order that witness evidence shall be limited to identified issues and/or to identified topics.

The PLA supports the strict limitation of witness statement to the identified issues in dispute. Again, this is another key area that should lead to claims being dealt with at a reasonable and proportionate cost.

(u) Experts

(1) Expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues, as directed at the case management conference or as subsequently agreed by the parties or directed by the court.

The PLA agrees, although this should also extend to written expert's reports.

(v) Applications

(1) Part 23 applies with the modifications set out in this paragraph.

(2) The court will deal with all applications (save for the case management conference and pre-trial review) without a hearing in accordance with the following directions:

There should not be any assumption that interim applications are dealt with without a hearing. This is liable to lead to a greater number of applications to vary/set aside and appeals. It should be left to the judge to decide whether the application is suitable to be dealt with on paper or requires a hearing.

(a) All applications and documents filed in support must be concise;

(b) The respondent must answer in writing within 7 days. The

response must consist be concise;

(c) Any reply from the applicant must be provided within 2 Business days and be concise;

(d) If any party contends the application should be dealt with at a hearing, they must give an explanation in writing;

(e) The court will deal with an application without a hearing unless the court considers it necessary to hold a hearing.

(3) The period in CPR r23.10(2) within which a party may apply to vary

an order made under r23.9 is 3 business days.

Whilst the intentions behind this proposal are good, the PLA considers that it may be impractical to make applications within 3 business days and the time saving of this as opposed to, say, 7 days (as it currently is under CPR Part 23.10(2)) is not significant enough to justify the risk of parties missing the deadline and having to appeal, or being forced to apply to vary an order due to having insufficient time to take proper advice.

(w) The periods set by this practice direction and any other time limits applicable to a case in the Shorter Trials Scheme under any rule, practice direction or order of the court may be extended by agreement by up to 7 days. In all other cases, such time limits many only be extended beyond 7 days by order of the court and for good reason.

(x) Save in exceptional circumstances, the court will not permit a party to submit material at trial in addition to that permitted at the CMC.

(y) Pre-Trial Review

(1) At the Pre-Trial Review the court will review the case and will fix the timetable for the trial, including time for speeches and for crossexamination.

(z) The Trial

(1) The judge hearing the trial will be the designated judge unless it is impractical for that judge to do so.

(2) The court will manage the trial to ensure that, save in exceptional circumstances, the trial estimate is adhered to. Cross-examination will be strictly controlled by the court.

(3) The court will endeavour to hand down judgment within six weeks of the trial or (if later) final written submissions.

(aa) Costs

(1) CPR rule 3.12 shall not apply to cases in the Shorter Trials Scheme.

The PLA supports the proposal to exclude claims proceeding under the STS from the costs management provisions under CPR Part 3.12.

(2) Save in exceptional circumstances:

(a) the court will make a summary assessment of the costs of the party in whose favour any order for costs is made; and

(b) rules 44.2(8), 44.7(b) and Part 47 do not apply.

The PLA disagrees with this. The costs of a 4 day trial justify a detailed assessment if the parties cannot agree costs. As a general observation, it is not the cost of detailed assessment

proceedings which are generally seen to be unreasonable and disproportionate but the cost of trial.

(bb) Appeals

(1) The Court of Appeal will take into account the fact that a case was in the Shorter Trials Scheme when listing any appeal from such a case.

The PLA views this as an extremely dangerous idea insofar as it is suggested that a case will be more "appealable" if it proceeded under the STS. If that is the case then the case is plainly not suitable for STS. At the very least, it is likely to deter parties from using STS (or encourage unscrupulous defendants from using STS as a means of prolonging the proceedings).

3) The Flexible Trials Scheme

(1) Flexible Trials Scheme - general

(a) The Flexible Trials Scheme applies to a claim started in any of the Rolls Building Courts.

(b) The Flexible Trials Scheme enables parties by agreement to adapt trial procedure to suit their particular case. Trial procedure encompasses pretrial disclosure, witness evidence, expert evidence and submissions at trial.

(c) The Flexible Trials Scheme is designed to encourage parties to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of their disputes. Its aim is to reduce costs, reduce the time required for trial and to enable earlier trial dates to be obtained.

(d) The Flexible Trials Scheme provides a standard trial procedure as set out in paragraph (3) below, the Flexible Trials Procedure. This may be varied by agreement between the parties.

(2) Adoption of the Flexible Trials Scheme

(a) If the parties wish to adopt the Flexible Trials Scheme they should agree to do so in advance of the first case management conference and inform the court accordingly.

(b) If the parties wish to adopt a variation of the Flexible Trials Procedure such variations should be agreed in advance of the first case management conference and the court informed accordingly.

(c) Unless there is good reason to order otherwise, where the parties have adopted the Flexible Trials Scheme the court will give directions in accordance with Flexible Trials Procedure and any agreed variations of it.

(3) Flexible Trials Procedure

(a) Unless otherwise ordered, the following directions apply where the Flexible Trials Scheme is adopted:

(1) Each party will be required to disclose the documents on which it relies and documents which are known to be adverse to its case. At the same time it may request any documents or classes of documents it requires from any other party. If the parties wish to agree that there be wider disclosure in accordance with CPR 31.5(7)(a) to (f) they should seek to do so in relation to limited and defined issues.

(2) Witness evidence at trial will be given by written statements and oral evidence shall be limited to identified issues or identified witnesses, as directed at the case management conference or as subsequently agreed by the parties or directed by the court.

(3) Expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues, as directed at the case management conference or as subsequently agreed by the parties or directed by the court.

(4) Submissions at trial will be made in writing with oral submissions subject to a time limit, as directed at the case management conference or as subsequently agreed by the parties or directed by the court.