

## **The New Practice Direction 57AB**

### **Permanent Implementation of the Shorter Trials Scheme and Flexible Trials Scheme**

The Shorter Trials Scheme ('STS') and Flexible Trials Scheme ('FTS') will become permanent on 1<sup>st</sup> October 2018, three years after their pilot phases began. Both Schemes will operate in the Business and Property Courts, and apply to claims issued on or after 1<sup>st</sup> October 2015. The Schemes are intended to streamline the trial process.

#### The Shorter Trials Scheme

The STS is suitable for relatively simple claims, and aims to bring cases to trial within 10 months of issue. The trial must be capable of being heard within 4 days, including reading time for the judge. Claims involving fraud or dishonesty are unlikely to be suitable, nor those requiring extensive disclosure, lay witness evidence, or expert evidence. Claims involving multiple issues or parties, those being heard in the Intellectual Property Enterprise Court, and public procurement cases, are also likely to be excluded.

If parties wish to use the STS, they must consider it at an early stage. The relevant letter of claim should notify the defendant of any intention to use the scheme, and claim forms should state that the claim is being issued under the Scheme. Similarly, the defence should address whether the claim is suitable for the Scheme. Statements of case should not exceed 20 pages, and any applications to transfer the claim into or out of the STS should be made before the first CMC.

At the first CMC, the claim will be allocated to a designated judge, who will normally determine any issues arising in those proceedings, including – if there is dispute - whether the claim should be transferred into the Scheme. The court can suggest of its own initiative that the claim be transferred into the Scheme, but cannot force the parties to use it if neither party consents. Any interim applications or hearings will, where possible, be conducted by the allocated judge, and are likely to be determined on the papers or heard by telephone with a view to saving costs. Importantly, costs budgeting will not apply to cases heard under the Scheme, and costs will instead be summarily assessed shortly after the conclusion of the trial.

So far, the pilot phase of the STS has been used primarily for claims heard in the Commercial Court and in the Chancery Division. Two of the most interesting cases are First Abu Dhabi Bank PJSC v BP Oil International Limited [2018] EWCA Civ 14 and L'Oréal SA v RN Ventures Ltd [2018] EWHC 173 (Pat).

First Abu Dhabi concerned the construction of a receivables financing contract. The claim was issued in March 2016 and heard in the High Court in November 2016, merely 8 months later. There was very limited disclosure and no witness evidence. Mrs Justice Carr determined the case within a day, awarding damages to the claimant of over \$68m. The defendant appealed, and the case went before the Court of Appeal in July 2017, less than 18 months after issue.

L'Oréal SA involved technical issues of patent infringement and required evidence from 3 different experts, including evidence of experiments to demonstrate patent infringement. However, the trial was still heard within the 4-day time limit, and only the principal issues were put to witnesses in cross-examination. Mr Justice Henry Carr was critical of the procedural disputes which had taken up most of the first morning and warned that, for other cases using the Scheme, such disputes should be resolved before trial if at all possible.

### The Flexible Trials Scheme

The FTS allows parties to adapt the trial procedure to suit their particular case. This includes the scope of pre-trial disclosure, witness evidence, expert evidence, and submissions at trial. Although parties can agree the trial procedure between themselves, the court retains ultimate discretion and can direct that the case be heard in the usual manner where there is 'good reason' to do so.

Similarly to the STS, if parties wish to adopt the FTS this should be agreed in advance of the first CMC. It is particularly envisaged that, under the FTS, parties can agree for identified issues to be determined by written statements and submissions, thus avoiding the need for oral evidence. A default Flexible Trial Procedure is set out at 3.9 of PD57AB.

The FTS has so far proved less popular than the STS, perhaps because of the degree of uncertainty surrounding its use. The new Practice Direction does not provide any guidance on which cases, or types of cases, might be suitable to be heard under the FTS. It might also be thought that similar results could be achieved through other means such as arbitration or adjudication.

## What We Can Expect

Now that the Schemes have been permanently implemented:

- Both claimants and defendants will need to have the Schemes in mind at the very beginning of any claim, including pre-action;
- The STS is likely to be suitable for a very broad range of cases. Following First Abu Dhabi and L'Oréal SA, it seems that high-value claims and complex technical claims can still be heard under the Scheme, providing that the trial lasts no longer than 4 days;
- The STS also holds the potential for claims to be dealt with far more quickly, and at lower cost, than before. This is good news for clients;
- Due to tight time constraints, judges are likely to criticise parties who have agreed to use the STS but insist on fighting procedural points at trial;
- It is likely that there will be a considerable number of early applications regarding whether claims should be transferred into or out of the STS. Parties disputing the applicability of the Scheme should be able to give good reasons why the Scheme is not appropriate where it could save time and money for their clients;
- Litigators might be pleased to avoid costs budgeting under the STS, but should be cautious. Costs bills will still be subject to judicial scrutiny when the time comes for summary assessment.

A link to the new Practice Direction (set out as Annex C to the 100<sup>th</sup> update to the Practice Directions) can be found here:

<https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-100th-pd-update.pdf>

**Note by Clare Elliott**

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