The Rules Committee

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17 September 2019
Access to Justice 06/19

Circular 39 of 2019
Short Form Trial Procedure in the High Court

Tēnā koutou,

Please find attached, for your consideration, materials provided by Ms Davenport QC relating to a short form trial procedure for use in the High Court that has been proposed by the Bar Association's Short Causes Working Group (C 39 of 2019).

Members will please note that the included materials refer to a number of English decisions as being attached. I have decided to omit these from the circulation for reasons of brevity. If members are unable to locate copies of any of those cases, and wish to do so, please contact the Clerk.

Nāku iti noa, nā;

Sebastian Hartley
Clerk to the Committee

Memorandum

TO: The Rules Committee

DATE: 10 September 2019

The NZBA have been considering a short trial process which could be the subject of a High Court Pilot. It is closely modelled on the English system operating in the Business and Property Courts.

I attach:

1. Slides from presentation to profession by Clive Elliot QC.
2. Letter to Justice Venning reporting the meeting.
3. Draft practice note.
4. Letter to Justice Venning attaching all UK materials.

The NZBA considers that (subject to Rules Committee's view) that the pilot could be implemented in a similar manner to the UK rule.

The UK Rules read:

1.3 Where the provisions of this Practice Direction conflict with other provisions of the rules or other practice Directions, this Practice Direction shall take precedence.

Given that there is no equivalent New Zealand Rule we would propose:

1.3 Where the provisions of this practice note conflict with other provisions of the rules or other practice note, this practice note shall take precedence.

SHORT CAUSES PROCEDURE

An NZ Bar Association proposal to pilot a predictably faster procedure for resolution of appropriate claims before the High Court

The Justice Gap

- Corporates/legal aid
- SME's
- Small v mid-sized claims
- Worthy claims but limited means/modest damages
- Confined issues:
  - Trade mark infringement
  - Breach of contract
  - Defamation

- No “one size fits all” solution
- Commercial List
- Swift track (2008 – 2013)
- Profession/judiciary – joint enterprise
- Annual conference

Access to Justice Report – Aug 2018

Justice Winkelmann, "Access to Justice – Who Needs Lawyers" (Ethel Benjamin Address, 2014)

"It is for the profession to play its part, a critical part, in meeting the challenge to provide access to justice for all in our society. To do this, the profession will have to innovate. It will have to be prepared to initiate and engage in debate about these issues and to question, and if necessary change, its current way of doing business"

3.17 A shorter-trial scheme designed to resolve disputes on a commercial timescale, such as that currently being trialled in England and Wales, should also be considered. This uses the same judge from beginning to end of the proceeding and limits trials to four days, with judgment delivered within six weeks of conclusion of the trial. This streamlined procedure is not mandatory and claimants are required to “opt in”

Short Causes Procedure

- Based on **Shorter and Flexible Trial Schemes** in England and Wales
- Successful pilot ran from October 2015 for two years
- Schemes introduced into all Business and Property Courts from 1 October 2018
- One pilot case was dispute over USD 69 million

Translating the UK rules to an NZ practice note

- Leave out UK specific rules – eg pre-action protocol, costs
- Utilise existing NZ rules already adequately dealing with issues – eg initial disclosure, Schedule 5
- Otherwise translate UK procedure to NZ but in way that better fits existing rules

General

- Purpose - provide procedure for resolution of appropriate proceedings that is predictably simpler, faster, and less expensive and therefore better achieves objective in HCR 1.2

- Proposal for a pilot in Auckland

- UK have empowering provision for pilots that allows for variations in the rules. No equivalent here

Commencement

- Timetable from filing to First CMC unchanged
- Preference is to allow either party to instigate procedure before First CMC with Court making decision if contested
- If no power for pilot to vary rules, pilot may need to be on consent only basis

When is it appropriate

Cases not normally suitable for procedure:

- include allegation of fraud or dishonesty
- likely to require extensive disclosure
- where issues to be resolved not well refined
- likely require extensive witness or expert evidence; or
- involve multiple issues and multiple parties

Limits

Procedure imposes limits on:

- length of the trial (4 days)
- length of pleadings (20 pages)
- length of filed evidence (as below); and
- discovery (none or only tailored)

Proceeding timetable

- Procedure drives the timetable:
- first CMC date fixed promptly after filing (10 weeks)
- trial date set at First CMC (<8 months)
- judgment (<6 weeks); and
- costs (<4 weeks)

Evidence

- First CMC determines list of issues, and scope of evidence to be filed
- Can be by briefs (25 pages), statements (10 pages), or affidavits
- Expert evidence limited to identified issues
- Scope of evidence to be filed needs to be identified at first CMC

Interlocutories

- All interlocutory applications resolved on papers unless otherwise ordered and except for matters dealt with at CMCs

- Filing timetable for interlocutory applications / notice of opposition reduced

Pre-trial CMC and Trial

- At pre-trial CMC court will review proceeding and, with regard to list of issues, fix timetable for trial, including time for submissions and for any examination or cross-examination

- Court will manage trial to ensure that, save in exceptional circumstances, trial estimate is adhered to.

- Length of submissions and any examination or cross-examination controlled by court

Appeals

- UK pilot identified issue with appeals from scheme
- Cases which had been quickly resolved at first instance were held up on appeal
- Final implementation of UK scheme includes commitment from EWCA to take into account desire for expedition when timetabling steps before that Court
- We would propose a similar arrangement be sought in New Zealand, possibly building on the fast track procedure established in our Court of Appeal

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5 August 2019

The Hon. Justice Venning
Chief High Court Judge
Judges' Chambers
High Court
AUCKLAND

By Email: louise.hart@courts.govt.nz

Dear Judge

Short Cause Procedure proposal

By way of update, we had a successful meeting on 1 August 2019. Around 30 people gathered at Shortland Chambers to discuss the Short Cause Procedure proposal.

Felix Geiringer and I gave a short presentation outlining what we were proposing and why. That was followed by a lengthy discussion with the attendees.

Overall, the mood of the meeting was very supportive of the proposal and of the efforts in general to tackle the length and costs of various aspects of our court procedures. Some people noted that aspects of the proposal, if successful, might be capable of being applied more generally. We had useful comments from several experienced practitioners which, while not opposed to the proposal, challenged aspects of it.

One comment echoed by a few was that some of the potential benefits of the process could be diminished or lost altogether if the judge who heard the first CMC was not able to carry on with the procedure to trial. The feedback was that we should make an effort to follow the UK's aim of docketed judges, but at the least ensure that the judge who conducts the first CMC also does the trial, to ensure continuity.

Several participants commented that the procedure involved quite a significant culture shift, from both the profession and the judiciary. It was observed that the UK's pre-action protocols might have made the shift to the shorter trial scheme easier than it will be for us. However, another practitioner commented that there had been similar shifts to greater trial management in Australia, from a starting point closer to our own. A few stated that the procedure could only work with judges who understood the new procedure and had the appropriate attitude and skills to run it.

Another comment that was repeated around the room was the need for even greater certainty on costs. It was noted that even within the proposed process there could be significant variation in costs. Some practitioners advocated for a costs cap of some kind. However, another noted that too great a limit could drive away cases that fit the scheme but had a large quantum in dispute.

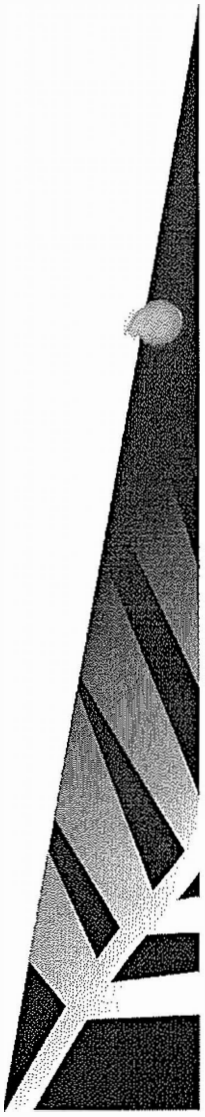
The meeting discussed whether the procedure would work if it required the consent of both parties. The question of jurisdiction for the procedure was raised and the possible need for a change in the rules. The feedback was that we should proceed with a pilot on a consent only basis if that were the only option. However, it was noted that, in reality, it is common for one party to be motivated not to agree with an expedited process and that a process that could be initiated by one party only was highly preferable. There was, therefore, support for pursuing the possibility of a change in the rules.

So, an overall positive response from the meeting. The comments have given us a few things to consider, but nothing that suggests we cannot develop a successful procedure worth piloting. Interestingly, there was no pushback on our proposal to include "will say" statements as an option or to having significantly reduced discovery.

We can discuss these issues at our session at the Queenstown conference. After that, if Your Honour's timetable would allow it, I would propose a further meeting with the committee, for you to provide feedback on our draft proposal.

Yours sincerely

Clive Elliott QC
Chair | New Zealand Bar Association Short Causes Working Group



SHORT CAUSES PROCEDURE

1. Introduction

1.1. This practice note sets out the terms for the pilot of a new trial scheme to be known as the Short Causes Procedure ("**SCP**").

1.2. The purpose of the SCP is to provide a procedure for the resolution of appropriate proceedings that is predictably simpler, faster, and less expensive and therefore better achieves the objective in HCR 1.2.

1.3. The SCP pilot will –

1.3.1. operate from [pilot start date] until [pilot start date plus one year]; and

1.3.2. be available for any new civil matter commenced in the Auckland Registry of the High Court during the first 6 months of the pilot period.

1.4. Where the provisions of this practice note conflict with other provisions of the rules or other practice note, this practice note shall take precedence.

1.5. Where a proceeding is agreed or ordered to be suitable for the SCP, 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 procedure so that the real issues in dispute are identified as early as possible and are dealt with in the most efficient way possible.

2. Commencing a procedure under the SCP

2.1. A proceeding under the SCP pilot may be commenced in the Auckland Registry of the High Court.

2.2. The SCP will not normally be suitable for—

2.2.1. proceedings including an allegation of fraud or dishonesty;

2.2.2. proceedings which are likely to require extensive disclosure;

2.2.3. proceedings where the issues to be resolved are not well refined;

2.2.4. proceedings which are likely to require extensive witness or expert evidence; or

2.2.5. proceedings involving multiple issues and multiple parties.

2.3. The length of trials in the SCP will be no more than 4 days and a proceedings will not be suitable for the SCP if it appears that it will require a longer trial.

2.4. All SCP proceedings will, to the extent practicable, be allocated to a designated judge at the time of the first case management conference (first "**CMC**") or earlier if necessary.

2.5. A proceeding commenced under the SCP pilot must comply with High Court Rule 5.1, and the Auckland Registry must therefore be the proper registry under that rule.

2.6. In order for a plaintiff to commence a proceeding under the SCP the heading for the statement of claim and notice of proceeding must include, under the English and te Reo Maori names for the registry in which it is filed, the words "Short Causes Procedure". In addition, the following words must be added to form G 2 on the first page above the first date:

> "This proceeding has been commenced under the Short Causes Procedure as described in [name of this practice note] and the terms of that practice note apply."

2.7. A defendant may apply to transfer a proceeding into the SCP pilot by memorandum filed no later than on the due date for the statement of defence.

2.8. A defendant seeking to have a proceeding transferred out of the SCP pilot should do so promptly by memorandum and at least by the due date for the filing of a statement of defence. Any such memorandum should state the grounds upon which the SCP is not considered appropriate for determination of the proceeding.

2.9. A plaintiff seeking to oppose an application by a defendant to have a proceeding transferred into the SCP pilot should do so promptly by memorandum and at least 5 working days before memoranda are due to be filed for the first case management conference. Any such memorandum should state the grounds upon which the SCP is not considered appropriate for determination of the proceeding.

2.10. If a successful application is made to transfer a proceeding out of the SCP, the proceeding will continue in accordance with the High Court Rules.

2.11. The court may, of its own initiative, suggest that a proceeding be transferred into the SCP pilot. The court will aim to make any such suggestion at least 5 working days before memoranda are due to be filed for the first CMC.

2.12. In addition to the matters set out in Schedule 5 of the High Court rules and below, if any party has applied to have a proceeding transferred into or out of the SCP pilot, or the court has suggested that the proceeding be transferred into the SCP pilot, the position of every party with respect to the use of the SCP must be addressed in memoranda filed for the first CMC.

2.13. If the suitability of the SCP is disputed then that issue will be determined at the first CMC and further directions given in the light of that determination.

2.14. In deciding whether to transfer a proceeding into or out of the SCP pilot, without prejudice to the generality of the objective under High Court Rule 1.2, the court will have regard to the purpose of the SCP, the type of proceeding the SCP is for, the suitability of the proceeding to be determined under the SCP and the wishes of the parties.

3. Pleadings

3.1. The statement of claim should be no more than 20 pages in length. The court will only exceptionally allow a longer statement of claim to be used in the SCP and will do so only where a party shows good reasons.

3.2. The statement of defence together with any counterclaim should be no more than 20 pages in length including any counterclaim. The court will only exceptionally allow a longer statement of defence to be used in the SCP and will do so only where a party shows good reasons.

3.3. The time for filing a defence to a counterclaim under High Court Rule 5.56 is 10 working days.

3.4. If a proceeding is transferred into the SCP pilot, the court will consider whether it is necessary to require that the pleadings which have already been filed should be amended to put them in the form they would have been in had the proceeding commenced under the SCP. Pleadings which have already been served will not normally need to be amended and the court will have regard to the purpose of the SCP and whether that purpose is served by requiring any amendment notwithstanding whether any pleading is technically compliant with the requirements of this practice note.

4. Initial disclosure

4.1. The parties are reminded of the obligations for service of initial disclosure under High Court Rule 8.4. For a proceeding under the SCP, the parties compliance with this rule will be particularly important.

5. First case management conference

5.1. The plaintiff shall, promptly after serving the statement of claim and notice of proceeding, take steps to fix a first CMC for a date approximately (but not less than) 10 weeks after the defendant was served with the statement of claim form.

5.2. At the first CMC the court will, in addition to matters addressed in High Court Rule 7.3 and Schedule 5, or elsewhere in this practice note —

5.2.1. approve a list of issues;

5.2.2. fix a trial date (which should be not more than 8 months after the first CMC); and

5.2.3. fix a date for a pre-trial CMC.

5.3. Given the added importance of the first CMC for the SCP, the Court will expect the parties to adhere strictly to the requirements of High Court Rule 7.3 and Schedule 5 both in relation to the steps taken before the CMC and the detail of matters that need to be resolved at the CMC, and the attendance of lead counsel for each party at the CMC will be expected.

Discovery

5.4. Discovery orders made under the SCP will be limited to tailored discovery. A party seeking tailored discovery from another party must identify in the memorandum filed for the first CMC the particular documents or classes of documents sought and the particular issue in the list of issues to which each document or class of document relates.

5.5. Where there is a dispute as to whether requested disclosure should be provided, in deciding whether the proceeding can be justly disposed of without the requested discovery order the court will have regard to how narrow and specific the request is, whether the requested documents are likely to be of assistance resolving the identified issue and the reasonableness and proportionality of any related search required.

5.6. Unless agreed by the parties or otherwise ordered at the first CMC, the following provisions for discovery will apply—

5.6.1. the parties shall, within 4 weeks of the first CMC, make and serve an affidavit of documents and schedule in accordance with High Court Rules 8.15 and 8.16;

5.6.2. the documents to be listed in the disclosure list are—

5.6.2.1. the documents on which they rely;

5.6.2.2. the documents requested by the other party under paragraph [5.1] above that it agreed to produce or was ordered to produce by the court.

5.7. Applications for particular discovery or variation of a discovery order made after the first CMC are discouraged under the SCP and should not be made without good reason.

6. Evidence

6.1. The Court will consider at the first CMC whether witness evidence shall be served by way of:

6.1.1. briefs;

6.1.2. statements;

6.1.3. affidavits; or

6.1.4. some combination of the above.

6.2. A statement must set out the material and relevant facts that the party expects to adduce from that witness at trial, but it does not need to contain a full narrative of events surrounding those facts. A statement must comply with the requirements for a brief as set out in High Court Rule 9.7(4).

6.3. Unless otherwise ordered, a brief that has been served will stand as the evidence in chief of the witness at trial. No brief should, without good reason, be more than 25 pages in length.

6.4. Where a witness's evidence has been served on the other party by way of a statement, the evidence from that witness will be expected to be led orally at trial without the witness referring to the statement. No statement should, without good reason, be more than 10 pages in length.

6.5. The court will consider at the first CMC whether to order that witness evidence shall be limited to identified issues (from those set out in the list of issues) or to identified topics.

6.6. Expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues (from those set out in the list of issues), as directed at the first CMC or as subsequently agreed by the parties or directed by the court.

6.7. Save in exceptional circumstances, the court will not permit a party to submit material at trial in addition to that permitted at the first CMC or by later court order.

7. Interlocutories

7.1. High Court Rules 7.19-7.52 apply with the modifications set out below.

7.2. The court will determine all interlocutory applications (save for those resolved at the first or pre-trial CMC) without a hearing in accordance with the following directions:

7.2.1. the time for filing and service of a notice of opposition under High Court Rule 7.24(1)(a) is 5 working days;

7.2.2. the time for filing and service of applicant's synopsis under High Court Rule 7.39(2) is the same as for any affidavit in reply under High Court Rule 7.26 or, if no notice of opposition was filed and served, 5 working days after the notice of opposition was due to be filed and served under 2.48.1;

7.2.3. the time for filing and service of a respondent's synopsis under High Court Rules 7.39(5) is 2 working days after service of the applicant's synopsis;

7.2.4. the applicant may, 2 working days after service of the respondent's synopsis, file and serve a reply to the respondent's synopsis of no more than 5 pages in length;

7.2.5. if, notwithstanding the above, any party contends that the interlocutory application needs to be determined after a hearing they must say so and state their reasons in their synopsis;

7.2.6. the court will determine the interlocutory application without a hearing unless the court considers it necessary to hold a hearing; and

7.2.7. in accordance with High Court Rule 7.34(2), in appropriate cases any hearing may be conducted by telephone or video link.

8. Pre-trial case management conference

8.1. At the pre-trial CMC the court will review the proceeding and, with regard to the list of issues, will fix the timetable for the trial, including time for submissions and for any examination or cross-examination.

9. Trial

9.1. The court will manage the trial to ensure that, save in exceptional circumstances, the trial estimate is adhered to. The length of submissions and any examination or cross-examination will be controlled by the court.

9.2. When determining the scope of matters upon which a witness must be cross-examined in accordance with s 92 of the Evidence Act 2006, and the consequences of any failure by a party to cross-examine on such matters, the Court will have regard to the purpose of the SCP and the limitations that the SCP imposes on the parties including the time available for the cross-examination of the witness in question.

10. Judgment and costs

10.1. The court will endeavour to deliver judgment within 6 weeks of the trial or (if later) final written submissions.

10.2. The court will endeavour to issue a decision on costs within 4 weeks of the judgment and will make directions in the judgment for the filing of costs submissions in accordance with that time frame.

10.3. Steps undertaken under the SCP are intended normally to fit within time band A for costs purposes.

11. Appeal

11.1. [We need to include here a statement about the position yet to be agreed with the Court of Appeal as to how appeals from the SCP are intended to be handled by that Court].

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14 December 2018

By email: Louise Hart - Associate to Hon Justice Venning
<louise.hart@courts.govt.nz>

The Honourable Justice Venning
Chief High Court Judge
Auckland High Court
AUCKLAND

Dear Justice Venning,

Shorter and Flexible Trial Procedures Scheme (Scheme)

1. We refer to our letter of 2 October 2018 regarding the New Zealand Bar Association's (**Bar Association**) commitment to improving access to justice for litigants throughout New Zealand and our recent discussion regarding the above Scheme.

2. On 11 December 2018 Kate Davenport QC and the writer had a telephone discussion with Justice Birss, who is one of the judges involved in the pilot and the subsequent introduction in England and Wales of the Shorter and Flexible Trial procedures. The pilot comprised the Shorter Trial Scheme and the Flexible Trial Scheme, which we have referred to for convenience as the "Scheme". In our discussion the Judge referred to a report "Paper to CPRC on Shorter and Flexible Trial Schemes" (**Paper to CPRS**).

3. A copy of the Paper to CPRS is **attached**. It has not been publicly released and was supplied to us on a confidential basis, but on the understanding that a copy may be supplied to your Honour for the purposes of our discussion.

4. The Scheme started in 2014 when judges from the Commercial Court, the Technology and Construction Court, the Chancery Division and Queen's Bench Division general list were asked by the Chancellor to investigate possible procedures which could be adopted in order to achieve shorter and earlier trials. A report and recommendations were made earlier this year. They included the Paper to CPRS. This led to the formal implementation of the Scheme in October 2018.

5. Birss J provided some background on how the Scheme was conceived and the extent to which it has been endorsed and accepted by the Judiciary and legal profession. He indicated that the courts have good statistics and a range of anecdotal evidence, relating to how the Scheme is going. He indicated that approximately 50 cases had been filed in the first two years of the pilot and that while this was not a huge uptake, it was regarded as a success and in line with the Financial List, which was set up to deal with disputes in the financial markets area.

6. The Scheme is aimed at mid-level business related cases such as contractual disputes and the like. A number of the cases list have been in the IP area. Birss J felt that this was because the IP profession was familiar with this type of list and was more willing to use it. However, it has been used in a wide range of commercial disputes, including a high-profile contract dispute. At paragraph 18 of the Paper to CPRC reference is made to the first high-value case determined under the Scheme, *National Bank of Abu Dhabi PJSC v BP Oil International Limited* [2016] EWHC 2892; 2016 WL 06697143 Commercial Court, 18 November 2016, Carr J. A copy of the decision is **attached**.

7. For completeness, we mention that the decision was successfully appealed, see *First Abu Dhabi Bank PJSC (formerly National Bank of Abu Dhabi PJSC) v BP Oil International Limited* [2018] EWCA Civ 14; 2018 WL 00453516, Court of Appeal (copy **attached**).

8. In terms of process, the Scheme is voluntary, in so far as at least one party must "opt in". Birss J said that in his experience, an aspect which will dictate whether a scheme of this type is successful or not is whether it is trusted by the profession and in particular whether it is possible to get cases on and off the list without too much difficulty, depending of course on the circumstances. He mentioned the regime that was set up about 20 years ago with the Patents County Court (a specialist IP court). It was not entirely successful, largely because it was difficult to get cases off the list. That is, because of a perception in the profession that the judges were overly reluctant to permit transfer to the Chancery Division. He felt that this was a failing which needed to be recognised. He also observed that there are often two sides to the coin; judges hanging on to cases when they should transfer, and parties gaming the system.

9. He indicated that when in 2010 the Enterprise Court (a specialist court) was set up, the procedural rules were clearly set out, including how matters could be entered on to and removed from the list. Most of the removal decisions were made by Masters, were robust and in general were accepted by the profession. This meant that the regime worked well.

10. Birss J was of the view that there is an important psychological aspect to these procedures and that when a party signs up, they know what to expect and can't subsequently feign surprise when they are required to toe the line.

11. Equally, while making it clear, it was not for him to tell us what to do, he felt that it was important that the Judiciary bought into the idea and he felt that without such "buy in" it was unlikely the scheme would succeed. In other words, he felt that judicial support and indeed enthusiasm was important, because it could only work with the right judicial approach, particularly as robust and pragmatic case management was an inherent part of the process.

12. When asked whether the Scheme was a true docket scheme, he said it was more of an "aspirational docket system" and that most cases where docketed to a significant extent, but even so, some cases were not docketed all the way through.

13. In terms of the process generally, he felt that it was a really good one, and he was very positive about it, but he accepted it did put a fair bit of pressure on the judges. The rule that judgments are issued in six weeks is not mandatory, it is described in the practice note as a "should" not a "must". Nevertheless, he accepted it does require discipline on the part of the Judiciary. He also noted however that it gives judges a tool to be able to say to the schedulers that they need adequate time to be able to produce judgments in short order and he sees this this as a positive outcome.

14. In terms of managing to complete trials in up to four days, he indicated that this can sometimes be a challenge. He acknowledged that not all judges are the same - some saying, it is not my job to manage these things, whereas other judges are more than happy to do so. He indicated that it really came down to a question of mindset and to some extent training. For example, he regards himself as organised and a procedural interventionist and says that it's not rocket science, the judge simply need to tell counsel in very clear terms, they have, for example, two hours to cross examine a particular witness and if they are going about it too slowly or dealing with peripheral issues to warn them that they are running out of time, rather than leaving it until the last minute.

15. In terms of discovery, he accepted that everyone has to be realistic - that there are realities that a party may not find the smoking gun. If counsel raises this issue with him, he tends to say well that is the reality of a scheme like this and you have to take the good with the bad.

16. In short trials, he said that written witness statements can be problematic. His view is that the ability to cross examine remains critical to our justice system. The Scheme limits the length of written statements, they are taken as read and counsel are required to only cross examine on important issues. The rule in *Browne v Dunn* has been watered down in these types of cases. Counsel does not need to put the whole case to a witness. This is referred to in paragraph 22 of the Paper to CPRC. Reference is made to *L'Oreal SA v RN Ventures Ltd* [2018] EWHC 173 (Pat); [2018] FSR 20 **(copy attached)**. At [7] Carr J states:

> By agreement between the parties and as approved by the Court, the action, which was commenced on 4th March 2016, has proceeded under the pilot for the Shorter Trials Scheme (see CPR PD51N), resulting in a one day hearing on 7th November 2016. There has been very limited disclosure and there are no witness statements and there has been no oral evidence. The parties and their lawyers are to be congratulated for the co-operative spirit in which the litigation has been conducted which has resulted in an effective and speedy process, all as envisaged by the Shorter Trials Scheme. The total costs of the action on each side are estimated to be approximately £350,000. This judgment has been handed down within two weeks of the hearing.

17. Importantly, Birss J felt that the Scheme was very good in terms of dealing with mid-range disputes, where small companies for example could simply not afford to litigate otherwise. In that respect, it is a major advantage and fills a yawning gap in the system. He described the Scheme as a hybrid between the common law and the best features of European civil law.

18. He felt that the multi-nationals had resources and the right mindset, and they would not be advantaged or disadvantaged by the Scheme and in the case of small claims these were dealt with at a micro level pretty well already. He is a keen proponent of the Scheme and would be happy to come to New Zealand to talk about it. He is in Singapore in August next year and suggested it might be possible to come to New Zealand as part of that trip.

19. In the Paper to CPRC the following concluding remarks are made:

> The STS achieves its objectives of allowing cases to be resolved on a commercially realistic timescale. It is popular and the feedback is positive. The concerns raised are not all trivial but none of them individually or in aggregate suggest that the STS should not continue. They are addressed at ways of improving it. Publicity continues to be a problem and the working group are committed to trying to get the message out.

20. The comment that the pilot achieved the objective of allowing cases to be resolved on a commercially realistic timescale and that it was popular and had received positive feedback is encouraging. It suggests it is worth looking at whether a similar scheme could be implemented in New Zealand. There is a need for mid-range commercial disputes to be better catered for in New Zealand. The Bar Association supports such an initiative as part of its

Access to Justice program and welcomes the opportunity to work with the Judiciary and the wider profession to investigate whether a similar scheme could be introduced in New Zealand.

21. We have set up a small working group and would appreciate the opportunity of discussing the matter further with your Honour in the New Year.

Yours faithfully

Clive Elliott QC

Civil Procedure Rules Committee

Shorter and Flexible Trial Pilot Schemes

Report and Recommendations

1. In Autumn 2014 judges from the Commercial Court, the Technology and Construction Court, the Chancery Division and Queen's Bench Division general list (Hamblen J, Edwards-Stuart J, Birss J and Jay J) were asked by the Chancellor to investigate possible procedures which could be adopted in order to achieve shorter and earlier trials. Part of the impetus for the review came from the detailed consultation with court users which led to the Financial List initiative. Consultees had expressed a need for such procedures. However rather than limit the proposals to the Financial List alone, the view was taken that such procedures may have a value across the Rolls Building jurisdictions. Detailed work was done at the time and the results and proposals presented to the CPRC.

2. The result was the Shorter and Flexible Trial Pilot Schemes. These schemes are governed by Practice Direction PD51N under CPR Part 51 Transitional Arrangements and Pilot Schemes. The pilot schemes came into force on 1st October 2015. The pilot was to have run for two years but was extended for a further year. Accordingly the pilot expires on 30th September 2018.

3. The schemes operate in all the courts in the Rolls Building (including the Chancery Division, the Commercial Court, the TCC and the London CCC). The schemes commenced before the introduction of the Business and Property Courts but in effect were introduced into what are now the B&PCs. The pilot consists of two schemes, the Shorter Trial Scheme (STS) governed by para 2 of PD51N (paragraphs 2.1-2.59) and the Flexible Trial Scheme (FTS) governed by para 3 of PD51N (paragraphs 3.1-3.9).

4. The working group which implemented the schemes was chaired by Hamblen J (as he then was). It was responsible for monitoring the pilot. Following Hamblen J's appointment to the Court of Appeal the group has been chaired by Birss J.

5. The STS provides for a trial of no more than four days in length within 6 months of the case management conference. The aim is to provide cost effective dispute resolution on a commercial timescale. The STS has been a success. Just over 50 cases have been issued in the scheme or

transferred into it. Despite the fact the scheme still seems not to be very well known in the wider legal community, it has demonstrated that suitable cases can be dealt with in a more efficient manner than hitherto. Counsel in an STS case which went to the Court of Appeal described the case as *"litigation conducted by adults"*.

6. The working group recommends is that both schemes should be continued on a permanent basis in the courts in which they operate (with minor adjustments). That is the B&PCs in the Rolls Building. In addition the working group recommends that certain restrictions in the schemes be removed. These restrictions limited the STS to only part of the work of the Chancery Division and limited both schemes only to the Rolls Building. The schemes ought to be available to all cases in the B&PCs of any type and whether they are in London or elsewhere.

7. The views of the Chancellor Sir Geoffrey Vos, the Judge in Charge of the Commercial Court (Popplewell J) and Judge in Charge of the TCC (Fraser J) have been sought. They all support this proposal. Fraser J expressed the view that the STS saves the parties time and cost: they receive a first instance decision much sooner than otherwise and the judicial time required to resolve the dispute is correspondingly reduced.

8. Unlike the STS, the FTS has not been used. Nevertheless the recommendation applies to the FTS as well. That is because the availability of the FTS sends an important message to users about the procedural flexibility which is available. Moreover we think it is likely that the solicitors and clients may begin to take advantage of the FTS as they become used to the idea of managing cases outside the norm, which the STS highlights and provides a particular framework for. The Chancellor wishes the FTS to remain available in the B&PCs as well as the STS for these reasons.

9. The simplest mechanism to make the schemes permanent features of the B&PCs would be to make a fresh PD under the new part of the CPR for the Business and Property Courts which the Committee passed at the October 2017 meeting. It is not clear whether that new Part has been enacted.

10. The remainder of this paper addresses various detailed points:

    a. Report on the STS
    b. Drafting of the new version of the PD for the schemes
    c. Extending to the regions

11. The Committee is invited to adopt the recommendation.

The Shorter and Flexible Trial Working Group
Birss J (Chair)
Jefford J
Cockerill J
Ed Crosse (Simmons & Simmons)

Annex A – Terms of the proposed new Practice Direction

(a) Report on the Shorter Trial Scheme

12. The number of cases issued in or transferred into the STS is 51. This consists of 33 cases in the Chancery Division, 13 cases in the Commercial Court (inc CCC) and 5 in the TCC. By comparison the Financial List, which started at about the same time, has had 50 cases issued or transferred in.

13. The court records allow a reasonably clear picture to emerge without spending undue time chasing down every reference. This review shows the following:

    a. 26 cases have ended by settlement (including discontinued);

    b. 7 cases have gone to a contested trial;

    c. 3 cases have been disposed of at summary or default judgment;

    d. 2 cases have been stayed;

    e. 1 case was transferred out of the scheme;

    f. 12 cases can be identified as outstanding. Of those 6 have a trial date fixed in the future. The others have a CMC or summary judgment hearing fixed. All bar one date is fixed before the end of July 2018. One is a trial in November.

14. In terms of dates, the average number of days between issue and conclusion across the whole scheme for all cases which have now ended is 178 days (about 6 ½ months). The average number of days between issue and trial when the trial was contested is 195 days (about 7 months). We suggest this shows that the scheme provides for efficient resolution of disputes.

15. All kinds of cases have been issued in the STS including general commercial contract cases, cases about corporate or business acquisition agreements, carriage of goods, construction contracts, trust property and disputes about land (including an ownership dispute, disputes about contracts of sale and a possession claim). It is notable that in the Chancery Division a large number of STS cases (23) have been intellectual property (IP) matters. There have been cases about patents, designs, copyright and trade marks. These are IP cases which are not suitable for the Intellectual Property Enterprise Court (IPEC).

16. A specialist intellectual property barrister Douglas Campbell QC explained that most of his non-IPEC cases have been heading for the STS and that "*everyone*" likes the idea of a four day trial if it means you can get your trial on earlier. He also noted a concern that in his experience many of the detailed provisions in PD 51N were not adhered to. He said "*there is more effort to cut back on disclosure than usual but otherwise many people just run it like a normal trial and then are taken by surprise by provisions such as the prohibition on extending deadlines by more than 7 days without permission*". We suggest that this observation is not a reason to alter the existing rules although it may be an indication that even more engagement with user groups is worthwhile.

17. The STS cases include a high proportion (at least 40%) of cases which can be identified as having one international litigant (identified simply as a non-UK company). The proportions are similar in the Chancery Division and Commercial Court (at least respectively 34% and 42%).

18. The highest value case (as far as one can tell) was *First Abu Dhabi Bank v BP Oil*. The sum at stake was US $ 69 million. The proceedings were issued in the Commercial Court on 4th March 2016. Trial under the STS was on 7th November 2016 with judgment given on 18th November 2016 (note paragraph 2.55 of PD 51N which provides that the court will endeavour to hand down judgment within 6 weeks of trial). When the matter went to the Court of Appeal the case was not initially identified as within the STS and as a result the practices in the Court of Appeal have been adjusted to ensure such cases are identified in future. The appeal hearing was in July 2017. The outcome was announced at the hearing. The reasoned judgment was handed down on 8th Jan 2018.

19. Combar received feedback on the schemes. One respondent specifically drew attention to the absence of distinct procedures on appeal saying that "*in short the appeal process took some of the gloss off the success of the first instance procedure*". Another respondent also raised a concern about appeals, noting that the *First Abu Dhabi* matter had been longer in the Court of Appeal than in the Commercial Court. Combar's suggestions about appeals are addressed in more detail below.

20. Another respondent to Combar simply expressed "*strong enthusiasm*" while another said:

"1) We could have greater clarity as to the role of expert evidence in STS. Some sols have read the STS scheme meaning expert evidence would not be allowed in STS (or could not be used usefully). However, expert evidence is allowed as long as confined in nature. This is in fact in the relevant STS provisions: nevertheless, as I have come across solicitor confusion about this, the matter should perhaps be clarified?
2) My perception is that STS is really not as widely known as it needs to be. Greater publicity may be needed. The message has not got through to solicitors on a wide scale for some reason. I have to raise it with them in appropriate cases. Sometimes solicitors are unclear what it is and/or worry that clients will see it as a less thorough procedure. It is has been my personal (positive) experience that has then encouraged others of my sols towards it. They then see the benefits (largely those set out in point (3) below).
3) Very good feedback indeed on the instance when we did STS. The perceived upsides have been:

- *allocated judge*
- *quicker time scales (huge advantage)*
- *no Precedent H*
- *costs savings*

We estimate that we saved over £70 000.00 in costs on one case by using STS.
I am a proponent of the system, hope that it continues and achieves greater take-up. My suggestion would be greater publicity of the system and its advantages."

21. In an article about the STS in the Law Soc Gazette (26th Feb 2018) Georgina Squire of the London Solicitors Litigation Assoc explained that following the conclusion of the *First Abu Dhabi Bank* trial the STS *"attracted praise for the increased cooperation between the parties to limit disclosure and bring proceedings to an accelerated close"*. In the article she also said *"The STS is fostering a change in litigation culture"*. The article draws attention to the benefits of the streamlined procedures, limited disclosure, the limitations on written and oral evidence and the summary assessment of costs (with no budgeting). Ms Squire refers to another case in the STS (*First Names v IFG*) noting that the case was streamlined with a three day trial, limited disclosure, a couple of witness statements but no oral evidence, experts (including hot tubbing). She observed that the STS *"drove that case to a very speedy solution, resolving key issues in dispute and thereby assisting the parties business needs."* The article ends with the following:

"It is currently unclear if the scheme will become embodied in the CPR long-term, further extended or indeed whether it remains in its current format. What is certain, however, is the STS has clear advantages for all involved and it is hoped that it will be preserved and become a routine feature of dispute resolution."

22. An aspect of the STS is that it is only necessary for a party to put the principal parts of its case to a witness (paragraph 2.54). This provision arises from experience in IPEC and helps to focus cross-examination on the essentials. It was described as a positive advantage of the STS by Henry Carr J in *L'Oreal v RN Ventures* [2018] EWHC 173 (Pat) (para 7).

23. A concern raised a number of times by the Intellectual Property Lawyers Association (IPLA) both at the IP Court Users Committee meetings and otherwise is that the CMC under the STS can be too late to fix the trial and facility should be made to make it possible to fix the trial date at an earlier stage. A respondent to Combar made the same point, suggesting it should be possible to have an earlier listing hearing. Being able to approach the listing office for a trial date before the full CMC can be done in appropriate cases outside the STS. The concern is that the terms of paragraph 2.38, which expressly refer to fixing the trial date at the CMC, make the STS less flexible than the normal arrangements. Our view is that while this ought not to be routine, provision should be made to allow for the possibility in a proper case. A proposal to address this is made below.

24. Feedback presented to Cockerill J included some detailed points on the rules which are addressed in the drafting section below. Also some concerns:

    a. The aspiration of fixing a CMC 12 weeks after acknowledgment of service (PD51N, §2.25) is not always achieved.

    b. Disclosure: consideration should be given to the request based model in PD51N and changes that are likely to be made elsewhere in the CPR because at the moment it is unclear that it sits on all fours with the present position or the anticipated position.

    c. Assigned judges: reports indicate that does not always seem to be the case in practice. "If it is not possible to have case assigned judges because of the current pressures on the judiciary, the rules may need to be changed to reflect this to manage expectations."

d. Some feedback indicated that appeals were no quicker despite PD51N, §2.60.

e. Lack of clarity as to what constituted "sufficient detail" in a schedule of costs (PD51N, §2.58).

25. As to these point: (a) does not call for comment. On (b) we suggest that no change be made to the disclosure provisions of the STS at least at this stage. They have been found to work. Once the proposals made by the Disclosure Working Group chaired by Gloster LJ have been in place for a while the matter can be reviewed. Another scheme which is likely to run in parallel with the STS is the Fixed Costs pilot following from Jackson LJ's report. That is likely to commence sometime this year in the designated courts (London and Manchester CCCs). We suggest again there is no reason to change the provisions of the STS nor any reason not to expand the STS to include the regions. The Fixed Costs pilot will already take place in parallel with the STS in the London CCC in any event.

26. On topic (c), experience does suggest that while it is possible to maintain the case before the designated judge most of the time, it is not possible all the time and not in every case. It was envisaged from the outset that this would not always be possible in every case and so the relevant provision (para 2.8) refers to the designated judge "normally" dealing with all matters. We recommend the provision is kept as it is. On (d) this is addressed elsewhere. On (e) there is no clear experience showing this is actually a problem so we suggest leaving it unchanged.

27. Another issue raised to Cockerill J by a major city firm was about the four day limit. The concern is that important new information can become apparent, requiring more time and so some people are reluctant to commit to the STS. The suggestion was to submit any transfer into the scheme to a test along the following lines:

> "Is the case one where at least two out of the claimant, defendant and judge agree at the beginning that it is much more likely than not that justice will be properly served by an actual trial of up to 3 days and without the reasonable prospect of going beyond 4 days, and where no better counterargument is put forward by any of the claimant, defendant and judge?"

28. However we believe that part of this concern reflects a learning curve on how best to make use of the 4 days. If, from the outset, users treat the 4

days as if it is a conventional trial, then this sort of concern may loom in their thinking. However, as experience in the STS (and also in IPEC) has shown, with planning ahead there are many cases where what one might have instinctively said required a much longer trial can be brought within the 4 day period perfectly effectively and fairly.

29. The particular concern raised may have been driven in part by experience in arbitrations in which a party's ability to set out a complex case if it had already agreed to a three day hearing was severely limited. But this ought not to be such a concern with the STS. For one thing a case can always be transferred out of the STS or the case could be run under the FTS.

30. Master Marsh, Chief Master of the Chancery Division expressed the view that there was no reason to limit the STS in the Chancery Division only to business cases. It should apply to all cases in the Division. The Chancellor supports this proposal and we recommend it.

31. Master Marsh also suggested that in the Chancery Division every claim in the STS should go before a Master when issued. The background to this is as follows. The relationship between Masters and the STS is only a consideration in the Chancery Division. When the STS was first implemented Masters had no jurisdiction. Then in 2016 the STS was amended to include Masters: Master could transfer cases into the STS and give directions (para 2.12) and, with the parties' consent, the trial in the STS could be before a Master (para 2.6(c)). Neither the Chancellor nor the working group support the proposal that every claim in the STS should go before a Master when issued. What we propose (with the Chancellor's support) is that for cases in the STS issued in the Chancery Division the provisions make clear that just as the trial can be before a Master, so they can be case managed by a Master with the parties' consent. An amendment to paragraph 2.6(c) is proposed. Parties wishing to do this can inform the court at the allocation stage.

Appeals

32. Proposals to address appeals from the STS made in Combar's response are:

    a. *"The appeal process is an important factor in the overall attractiveness of the scheme. In Commercial Court cases, there can be a good deal at stake in even a short trial, so applications for permission and appeals are to be expected. There is then a real*

risk that, after swift progress at first instance, the appeal may take much longer than the whole period from issue to first instance judgment.

b. *Thought should be given to a separate process for appeals from the scheme with a view to dealing promptly with both permission applications and appeals. It may be that cases from the scheme are not thought to justify any favours from the CA but the point should be addressed and a clear answer given one way or the other.*

c. *That said, none of us could see any reason for applying a different test from the normal one on the question of whether permission should be given.*

d. *When an appeal is heard, the CA should give its judgment promptly – with reasons. If the judgment is prompt, there is no real gain (normally) in announcing the result on the day and confidence is better maintained if reasons and decision arrive together."*

33. We suggest that work is done with the Court of Appeal to identify whether any further provisions need to be made in the STS beyond the terms of paragraph 2.60 of PD51N which provides:

> "The Court of Appeal will seek to take into account the fact that a case was in the Shorter Trials Scheme and the desire for expedition in deciding when applications for permission to appeal will be considered and when appeals will be listed."

Conclusion of report

34. The STS achieves its objectives of allowing cases to be resolved on a commercially realistic timescale. It is popular and the feedback is positive. The concerns raised are not all trivial but none of them individually or in aggregate suggest that the STS should not continue. They are addressed at ways of improving it. Publicity continues to be a problem and the working group are committed to trying to get the message out.

(b) Drafting of the new version of the PD for the schemes

35. The proposal is to simply transpose PD 51N to become a PD under the new Part of the CPR specific to the Business and Property Courts. Only modest further amendments should be necessary to achieve that.

36. It is proposed to make a few further minor amendments to the provisions:

    a. *Time for filing the Defence*. Para 2.29 provides a time for serving the Defence but does not mention filing it at court. There are a couple of provisions in PD51N (at para.s 2.27 and 2.33) which suggest that the date for filing and serving the Defence is the same – i.e. 28 days after the Acknowledgement of Service – but those only expressly apply in certain specified situations. There is some uncertainty as to whether the Defence can be filed at the same time as it is served in all cases, or whether the earlier deadline at CPR 15.4(1) applies (so that the Defence must be filed 28 days after the Particulars, rather than the Acknowledgement of Service, even if it is served later). To resolve the ambiguity we suggest making clear that subject to paragraphs 2.27 and 2.33, CPR r15.4(1) applies.

    b. *Fixing trial dates.* To address the concern raised by a number of users about having to wait until the CMC before a trial date is fixed an amendment to paragraph 2.38(e) is proposed.

37. The other amendments are to refer to all the B&PCs and remove the restriction on the kinds of case within the B&PCs which can be done in the scheme.

38. A further point raised was about paragraphs 2.21(a) and 2.30(b). These provide that the Particulars of Claim must to include a summary of the dispute and identification of the anticipated issues and the Defence should also contain both (if different from that of the claimant's). Some parties suggest that in cases where the pleading is short adding a summary/list of issues upfront would lengthen the document unnecessarily and so they query if this requirement apply in all cases. We believe these are useful provisions and should be kept.

Extending the schemes to the regions

39. The view was taken at the outset to restrict the pilot to the Rolls Building. Nevertheless when the schemes were introduced some judges sitting in other centres outside London (e.g. in Manchester) in the B&PCs (as they were not then called) expressed a concern that the pilot schemes did not include the courts outside London. They felt the schemes would be attractive to users and wanted the same schemes to be available in their local courts. As another example of the same idea, at a recent TecBar meeting in Birmingham the local TCC judge (HHJ Watson) explained that even before any formal roll-out, there was no reason at all why the court should not informally adopt aspects of the scheme locally in the TCC.

40. The idea of extending the schemes to B&PCs outside London has been universally supported by those involved with the B&PCs outside London. The one caveat – and it is not trivial – is the interaction between the STS and other developments – such as the Fixed Costs Pilot Scheme and the results of the Disclosure Working Group, mentioned already. These issues are not specific to the courts outside London (see paragraph 25 above).

41. Discussions have taken place a number of local user group meetings. The reaction is always positive. When the idea was mooted at a meeting of Birmingham B&PC users, the attendees were positive about the idea. After the meeting Paul Barker of Higgs & Sons in his capacity as Property Litigation Association Chair of the Regions wrote to Birss J to express the PLA's support for extending the schemes to all of the B&PCs, in other words all the B&PCs across the country.

42. Barling J, the Vice Chancellor of the County Palatine and Supervising Judge for the B&PCs in the Northern and North Eastern Circuits has explained that the Presiders, DCJs and local judges in his circuits support the extension. The point most often made in support is that there should be no difference between London and elsewhere in terms of case management tools. The Presiders and local judiciary in the circuits for which Birss J is the Supervising Judge for the B&PCs (Midland, Wales and West) also support the proposal.

43. The local staff responsible for the B&PCs will need to be aware of the scheme but beyond that, there is no reason to think the scheme should cause any listing problems.

44. In extending the scheme to include the relevant Chancery District Registries, the position of District Judges in those courts ought to be the same as Masters in the Rolls Building. An amendment to paragraph 2.6(c) to address that is proposed.

45. It is not suggested at this stage that the scheme be extended to the County Court.

100th UPDATE – PRACTICE DIRECTION AMENDMENTS

The new Practice Directions and the amendments to the existing Practice Directions, supplementing the Civil Procedure Rules 1998, are made by the Master of the Rolls under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and are approved by Lucy Frazer QC MP, Parliamentary Under-Secretary of State for Justice, by the authority of the Lord Chancellor.

The new Practice Directions and the amendments to the existing Practice Directions come into force as follows—	
Revocation of 99th Update – Practice Direction Amendments	With immediate effect
Practice Direction 2B – Allocation of cases to levels of judiciary	1st October 2018
Practice Direction 51O – The Electronic Working Pilot Scheme	1st January 2019
Practice Direction 51U – Disclosure pilot for the Business and Property Courts	1st January 2019
Practice Direction 57AA – Shorter and Flexible Trials Schemes	1st October 2018
Practice Direction 81 – Applications and proceedings in relation to contempt of court	1st October 2018
Practice Direction relating to the use of the Welsh language in cases in the civil courts in or having a connection with Wales	1st October 2018

The Right Honourable Sir Terence Etherton
Master of the Rolls and Head of Civil Justice
Date:

Signed by authority of the Lord Chancellor:

Lucy Frazer QC MP
Parliamentary Under-Secretary of State for Justice
Ministry of Justice
Date:

ANNEX C

"PRACTICE DIRECTION 57AA – SHORTER AND FLEXIBLE TRIALS SCHEMES

This Practice Direction supplements CPR Part 57A

Contents of this Practice Direction

General

1.1 This Practice Direction provides for two schemes, the Shorter Trials Scheme and the Flexible Trials Scheme.

1.2 The schemes will—

(a) operate from 1 October 2018;

(b) operate in all the Business and Property Courts including those in the Rolls Building and those situated outside London;

(c) apply to claims issued on or after 1 October 2015.

1.3 Where the provisions of this Practice Direction conflict with other provisions of the rules or other practice Directions, this Practice Direction shall take precedence.

1.4 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.

1.5 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.

The Shorter Trials Scheme

Shorter Trials Scheme – general

2.1 A claim in the Shorter Trials Scheme may be started in any of the Business and Property Courts.

2.2 The Shorter Trials Scheme will not normally be suitable for—

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

(b) cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence;

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

(d) cases in the Intellectual Property Enterprise Court;

(e) public procurement cases.

2.3 The length of trials in the Shorter Trials Scheme will be no more than 4 days including reading time (and a case will not be suitable for the Scheme if it appears that it will require a longer trial).

2.4 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.

2.5 All proceedings in the Shorter Trials Scheme will normally be heard or determined by the designated judge except that—

(a) another judge may hear urgent or vacation applications if the designated judge is not available;

(b) 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;

(c) a case may be case managed and tried by a Master in the Chancery Division, or a District Judge in a Chancery District Registry, with the consent of the parties.

2.6 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.

Starting proceedings in the Shorter Trials Scheme

2.7 Claims in the Shorter Trials Scheme must be issued in the appropriate registry in the appropriate Business and Property Court.

2.8 As appropriate, the claim form must be marked in the top right hand corner as follows—

(a) "Business and Property Courts of England and Wales, Commercial Court, Shorter Trials Scheme";

(b) "Business and Property Courts in Wales, Shorter Trials Scheme", "Business and Property Courts in Manchester , Companies Court, Shorter Trials Scheme", "Business and Property Courts of England and Wales, Patents Court, Shorter Trials Scheme" as appropriate;

(c) "Business and Property Courts of England and Wales, Technology and Construction Court, Shorter Trials Scheme";

(d) "Business and Property Courts of England and Wales, The London Circuit Commercial Court, Shorter Trials Scheme".

Transferring proceedings to or from the Shorter Trials Scheme

2.9 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.

2.10 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.

2.11 An application to transfer a case into the Shorter Trials Scheme must be heard by a judge, save that in the Chancery Division it may be heard by a Master, or a District Judge in a Chancery District Registry. If a judge or Master orders a case to be transferred into the Shorter Trials Scheme, he may give case management directions.

2.12 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 CMC.

2.13 The court may, of its own initiative, suggest that a case be transferred into the Shorter Trials Scheme.

2.14 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.

2.15 If a case is transferred into the Shorter Trials Scheme, the court will consider whether it is necessary to require that Statements of Case which have already been served should be amended to put them in the form they would have been in had the case commenced in the scheme. Statements of Case which have already been served will not normally need to be amended.

Proceedings in the Shorter Trials Scheme

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

2.17 Save where there is good reason not to do so, as in a case 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.

2.18 The letter of claim shall notify the proposed defendant of the intention to adopt the Shorter Trials Scheme procedure.

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

2.20 Particulars of claim must be served with the claim form.

2.21 In addition to the requirements of rule 16.4, 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.

2.22 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.

2.23 The particulars of claim should be accompanied by a bundle of core documents.

2.24 The claim form and particulars of claim shall be served promptly following—

(a) the 14 day period allowed for the defendant's response to the letter of claim; or

(b) the defendant's response, if a longer period for response is agreed between the parties.

2.25 The claimant shall, promptly after serving the claim form and particulars of claim, take steps to fix a CMC for a date approximately (but not less than) twelve weeks after the defendant is due to acknowledge service of the claim form.

2.26 The defendant shall be required to file an acknowledgment of service within the time periods prescribed by the rules.

2.27 If the defendant files an acknowledgment 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 acknowledgment 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 rules 11(7) and (9)).

2.28 In cases where the jurisdiction of the court is challenged these provisions will not apply until the question of the court's jurisdiction has been resolved.

2.29 The defence and any counterclaim must be served within 28 days of acknowledgment of service of the claim form. Subject to paragraphs 2.27 and 2.33 of this Practice Direction, CPR r15.4(1) applies to the period of filing the defence.

2.30 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).

2.31 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.

2.32 The defence should be accompanied by a bundle of any additional core documents on which the defendant intends to rely.

2.33 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.

2.34 Any reply and defence to counterclaim must be served within 14 days thereafter.

Case Management Conference

2.35 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.

2.36 The legal representatives for the claimant will be responsible for producing and filing a list of issues, and where appropriate for revising it.

2.37 The claimant's legal representatives shall provide a draft 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.

2.38 At the CMC the court will—

(a) review the issues;

(b) approve a list of issues;

(c) consider ADR;

(d) give directions for trial;

(e) (if it has not already been done before the CMC,) fix a trial date (or window), which should be not more than 8 months after the CMC and with a trial length of not more than 4 days (including reading time);

(f) fix a date for a Pre-Trial Review.

Disclosure

2.39 Rules 31.5(2) and 31.7 do not apply.

2.40 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 14 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.

2.41 Where there is a dispute as to whether requested disclosure should be provided, in deciding whether it is necessary so to order the court will have regard to how narrow and specific the request is, whether the requested documents are likely to be of significant probative value and the reasonableness and proportionality of any related search required, having regard to the factors set out in rule 31.7(2).

2.42 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 paragraph 2.40 above that it agreed to produce or was ordered to produce by the court;

(c) each party must also provide a disclosure statement containing a brief description of the steps the party has taken to locate the document agreed or ordered to be disclosed.

2.43 Applications for specific disclosure and further information made after the CMC are discouraged under the Shorter Trials Scheme and should not be made without good reason.

Witness statements

2.44 Unless otherwise ordered, witness statements will stand as the evidence in chief of the witness at trial. No witness statements should without good reason be more than 25 pages in length.

2.45 The court will consider at the CMC whether to order that witness evidence shall be limited to identified issues or to identified topics.

Experts

2.46 Expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues, as directed at the CMC or as subsequently agreed by the parties or directed by the court.

Applications

2.47 Part 23 applies with the modifications set out in this paragraph.

2.48 The court will deal with all applications (save for the CMC and pre-trial review) without a hearing in accordance with the following directions—

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

(b) the respondent must answer in writing within 7 days of service of the application notice. The response must be concise;

(c) any reply from the applicant must be provided within 2 business days of service of the response 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. In appropriate cases that may be a hearing by telephone.

2.49 Save as otherwise provided herein 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.

2.50 Save in exceptional circumstances, the court will not permit a party to submit material at trial in addition to that permitted at the CMC or by later court order.

Pre-Trial Review

2.51 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 cross-examination.

The Trial

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

2.53 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.

2.54 The trial will be conducted on the basis that it is only necessary for a party to put the principal parts of its case to a witness, unless the court directs otherwise.

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

Costs

2.56 Rule 3.12 shall not apply to cases in the Shorter Trials Scheme, unless the parties otherwise agree. If at the outset of the proceedings the parties agree that Costs Management should apply, they should seek an order to that effect at the CMC and apply for directions as to when budgets should be subsequently exchanged, discussed and submitted for the court's approval.

2.57 Within 21 days of the conclusion of the trial, or within such other period as may be ordered by the court, the parties shall each file and simultaneously exchange schedules of their costs incurred in the proceedings.

2.58 Such schedules should contain sufficient detail of the costs incurred in relation to each applicable phase identified by Precedent H to the Costs Budgeting regime to enable the trial judge to be in a position to make a summary assessment thereof following judgment.

2.59 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;

(b) rules 44.2(8), 44.7(1)(b) and Part 47 do not apply.

Appeals

2.60 The Court of Appeal will seek to take into account the fact that a case was in the Shorter Trials Scheme and the desire for expedition in deciding when applications for permission to appeal will be considered and when appeals will be listed.

The Flexible Trials Scheme

Flexible Trials Scheme – general

3.1 The Flexible Trials Scheme applies to a claim started in any of the Business and Property Courts.

3.2 The Flexible Trials Scheme enables parties by agreement to adapt trial procedure to suit their particular case. Trial procedure encompasses pre-trial disclosure, witness evidence, expert evidence and submissions at trial.

3.3 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.

3.4 The Flexible Trials Scheme enables the parties to agree to invite the court to determine identified issues on the basis of written evidence and submissions. In such a case, whilst the court will seek to comply with the parties' request, it may call for oral evidence to be given or oral submissions to be made on any of the identified issues if it considers it necessary to do so. Where an issue is to be determined in writing it is not necessary for a party to put its case on that issue to the other party's witnesses.

3.5 The Flexible Trials Scheme provides a standard trial procedure as set out in paragraph 3.9 below, the Flexible Trials Procedure. This may be varied by agreement between the parties.

Adoption of the Flexible Trials Scheme

3.6 If the parties wish to adopt the Flexible Trials Scheme they should agree to do so in advance of the first CMC and inform the court accordingly.

3.7 If the parties wish to adopt a variation of the Flexible Trials Procedure such variations should be agreed in advance of the first CMC and the court informed accordingly.

3.8 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.

Flexible Trials Procedure

3.9 Unless otherwise ordered, the following directions apply where the Flexible Trials Scheme is adopted—

(a) each party will be required to disclose the documents on which he relies and documents which are actually known to fall within rules 31.6(b) or (c) without the need for a search. At the same time the party may request specific disclosure of documents it requires from any other party. If the parties wish to agree that there be wider disclosure in accordance with rule 31.5(7)(a) to (f) they should seek to do so in relation to limited and defined issues;

(b) where there is a dispute as to whether specific disclosure should be provided in deciding whether it is necessary so to order the court will have regard to how narrow and specific the request is, whether the requested documents are likely to be of significant probative value and the reasonableness and proportionality of any related search required, having regard to the factors set out in rule 31.7(2). A party is only required to carry out a reasonable search and to provide a disclosure statement pursuant to rule 31.7 in relation to specific disclosure which it has agreed or been ordered to provide;

(c) 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 CMC or as subsequently agreed by the parties or directed by the court;

(d) expert evidence at trial will be given by written reports and oral evidence shall be limited to identified issues, as directed at the CMC or as subsequently agreed by the parties or directed by the court;

(e) submissions at trial will be made in writing with oral submissions and cross examination subject to a time limit, as directed at the CMC or as subsequently agreed by the parties or directed by the court;

(f) where an issue is to be determined at trial on the basis of written evidence it is not necessary for a party to put its case on that issue to the other party's witnesses. Where an issue is to be determined on the basis of oral evidence it is only necessary for a party to put the principal parts of its case to the other party's witnesses, unless the court directs otherwise."

ANNEX D

"PRACTICE DIRECTION RELATING TO THE USE OF THE WELSH LANGUAGE IN CASES IN THE CIVIL COURTS IN OR HAVING A CONNECTION WITH WALES

The purpose of this Practice Direction is to reflect the principles of the Welsh Language Act 1993 and the Welsh Language (Wales) Measure 2011 that in the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality.

Contents of this Practice Direction

1. GENERAL

1.1 This practice direction applies to civil proceedings in or having a connection with Wales.

1.2 The existing practice of conducting a hearing in Wales entirely in the Welsh language on an ad hoc basis and without notice will continue to apply when all parties and witnesses directly involved at the time consent to the proceedings being so conducted.

1.3 In every case in Wales in which it is possible that the Welsh language may be used by any party or witness [or in any document which may be placed before the court], the

parties or their legal representatives must inform the court of that fact so that appropriate arrangements can be made for the management and listing of the case.

1.4 Any document placed before the court in civil proceedings in or having a connection with Wales may be in the English or Welsh Language. The parties or their legal representatives must inform the court as soon as practicable if a document in the Welsh language will or may be placed before the court so that appropriate arrangements can be made.

1.5 HMCTS forms in the Welsh language are available on the *justice.gov.uk* website. The Welsh Language Unit of HMCTS provides translation facilities.

1.6 If costs are incurred as a result of a party failing to comply with this direction, a costs Order may be made against that party or their legal representative.

1.7 Where a case is tried with a jury, the law does not permit the selection of jurors in a manner which enables the court to discover whether a juror does or does not speak Welsh or to secure a jury whose members are bilingual to try a case in which the Welsh language may be used.

2. THE DIRECTIONS QUESTIONNAIRE

2.1 In any proceedings in which a party is required to complete a directions questionnaire, that party must include details relating to the possible use of Welsh (i.e. details of any person wishing to give oral evidence in Welsh and of any documents in Welsh (e.g. documents to be disclosed under Part 31 or witness statements) which that party expects to use).

2.2 A party must include the details mentioned in paragraph 2.1 in the directions questionnaire even if that party has already informed the court of the possible use of Welsh in accordance with the provisions of section 1 above.

3. CASE MANAGEMENT

3.1 At any interlocutory hearing, the court will take the opportunity to consider whether it should give case management directions. To assist the court, a party or that party's legal representative should draw the court's attention to the possibility of Welsh being used in the proceedings, even where he or she has already done so in compliance with other provisions of this direction.

3.2 In any case where a party is required to complete a pre-trial check list (listing questionnaire) and has already intimated the intention to use Welsh, that party should confirm the intended use of Welsh in the pre-trial check list and provide any details which have not been set out in the allocation questionnaire.

4. LISTING BY THE COURT

4.1 The diary manager, in consultation with the Designated Civil Judge and the Liaison Judge(s) for the Welsh language, will ensure that a case in which the Welsh language is to be used is listed—

(a) wherever practicable before a Welsh speaking judge; and

(b) where translation facilities are needed, at a court with simultaneous translation facilities.

5. INTERPRETERS

5.1 Whenever an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the Court Manager in whose court the case is to be heard will take steps to secure the attendance of an interpreter whose name is included in the list of approved court interpreters.

6. WITNESSES AND JURORS

6.1 When each witness is called, the court officer administering the oath or affirmation will inform the witness that he or she may be sworn or may affirm in Welsh or English as he or she wishes.

6.2 Where a case is tried with a jury, the court officer swearing in the jury will inform the jurors in open court that each juror may take the oath or may affirm in Welsh or English as he or she wishes.

7. ROLE OF THE LIAISON JUDGE

7.1 If any question or difficulty arises concerning the implementation of this practice direction, contact should in the first place be made with the Liaison Judge(s) for the Welsh language."