

# Why it pays to be flexible

Dr Chris Pamplin looks at the impact of flexible trials on expert witness work



## IN BRIEF

- ▶ Shorter Trials Scheme and its key provisions.
- ▶ Flexible Trials Scheme and its key provisions.
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In October 2015 the Ministry of Justice launched two schemes seeking to lessen the time and expense that trials exert on its over-stretched budget. Since then, the Shorter Trials Scheme (STS) and the Flexible Trials Scheme (FTS) have been running as pilots at the Rolls Building, London and are to continue until the end of September 2017. (If you're used to dilapidated court buildings out in the sticks, the virtual tour of the Rolls Building at <https://www.judiciary.gov.uk> may be an eye opener).

The aims of the FTS and the STS are set down in paras 2 and 4 of the Shorter and Flexible Trial Procedure Guide. It states that these are: "...to achieve shorter and earlier trials for business related litigation, at a reasonable and proportionate cost. The procedures should also help to foster a change in litigation culture, which involves recognition that comprehensive disclosure and a full, oral trial on all issues is often not necessary for justice to be achieved. That recognition will in turn lead to significant savings in the time and costs of litigation."

The pilot scheme is limited to trial proceedings in the Rolls Building in Fetter

Lane, London, which houses the Chancery Division (including the Patents Court and the Companies Court), the Commercial Court, the London Mercantile Court and the Technology and Construction Court.

Apparently it is the intention that the pilot schemes will be monitored and, if necessary, refined. If successful, the schemes will be introduced permanently. Furthermore, those provisions seen to work may well be incorporated into the Civil Procedure Rules (CPR).

## Shorter Trials Scheme

The architects of the STS claim that it will offer dispute resolution on a commercial timescale. Cases will be managed by specific judges with the aim of reaching trial within about 10 months of the issue of proceedings. Judgment may be expected within six weeks thereafter. The procedure is intended for cases that can be fairly tried on the basis of limited disclosure and oral evidence. The maximum length of trial would be four days, including reading time.

If proceedings fall within the scope of the scheme, participation is currently voluntary with the agreement of both parties. CPR PD 51N (2.15) provides that, when considering applications for transfer, the court must:

- ▶ bear in mind the overriding objective of the CPR;
- ▶ be mindful of the type of case for which the scheme is intended and the suitability of the case to be a part of the scheme; and
- ▶ take notice of the wishes of the parties.

However, while the guidance states that the scheme is not mandatory, the wording of the Practice Direction appears to imply that the court may make an order that a case is deemed suitable—perhaps leaving the way open for a more dictatorial approach to be taken.

Transfers both in and out of the scheme are provided for in CPR PD 51N (2.14) which states that the court may, under its own initiative, "suggest" that a case be transferred into the STS.

Types of case that will not be considered suitable for participation in the scheme are set out in CPR PD 51N (2.3). These are:

- ▶ fraud or dishonesty claims;
- ▶ multiple issue or multi-party claims;
- ▶ where extensive disclosure is required; and
- ▶ particulars of claim longer than 20 pages.

## Key provisions of STS

Key provisions of the STS include:

- ▶ simpler application procedures with the option for these to be made in writing or by telephone;
- ▶ requirements for any counterclaim to be served together with the defence, any reply and any defence to a counterclaim;
- ▶ an abbreviated, issue-based approach to disclosure, with no requirement to volunteer adverse documents (instead, the parties will be expected to present their case with just the evidence upon which they seek to rely. This approach shares similarities with adjudication

- proceedings);
- ▶ limited witness evidence; and
- ▶ shortened timescales, with trials to take place no more than eight months after the case management conference, the trial to last no more than four days and judgment to be given within six weeks thereafter.

The procedures in CPR PD 51N (2) will apply in place of the usual pre-action protocols.

The usual costs management provisions will not be applicable. A new system of speedy assessment (see CPR PD 51N (2.57–2.58)) will take their place, and costs will be assessed summarily by the trial judge. The parties will be required to exchange simultaneously schedules of costs containing sufficient detail of the costs incurred at each stage in the proceedings. Costs will then be assessed on this basis following judgment.

Save in exceptional circumstances, the court will make a summary assessment of the costs of the party in whose favour any order for costs is made, and CPR 44.2(8), CPR 44.7(1)(b) and Pt 47 do not apply.

Once it is agreed, or ordered, that a case is suitable for the STS, CPR PD 51N (1.5) imposes a duty on the parties and their representatives. They will be expected to cooperate with, and assist, the court in ensuring that the proceedings are conducted in accordance with the scheme. This will include identifying the real issues in dispute at an early stage and dealing with them as efficiently as possible.

### Flexible Trials Scheme

The FTS announces itself as a procedure adopting "... more flexible case management procedures where the parties so agree, resulting in a more simplified and expedited procedure than the full trial procedure currently provided for under the CPR". Its aim is to reduce costs, to minimise the time required for trial and to enable earlier trial dates to be fixed (CPR PD 51N (3.3)).

Essentially the FTS lays down a framework within which the parties will be expected to operate, but it gives considerable scope for them to vary and agree adaptations of the procedure to suit their own particular case. Parties are encouraged to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of the dispute.

The court will endeavour to support the parties in any variations agreed but will retain ultimate control over the procedure to be adopted.

### Key provisions of FTS

Key provisions of the FTS include the following:

- ▶ Parties will be expected to agree and follow a truncated procedure.
- ▶ Although the court may call for oral submissions, the evidence and submissions should be given and made in writing whenever possible. Oral expert evidence will be restricted and limited to specific issues.
- ▶ It will be necessary to put only the principal parts of the case to the witness.
- ▶ There will be limited disclosure. Adverse documents will be required to be volunteered, but there will be no requirement for a search. When giving disclosure, a party may request specific disclosure from the opponent. The parties will not be required to provide a disclosure statement save where responding to a request for specific disclosure.
- ▶ Trial time and costs will be reduced.
- ▶ There will be limitations on the length of witness statements; the number of documents and oral submissions will be time-limited.

## “There remains some doubt regarding the issue of disclosure under the STS”

In the case of any conflict between the FTS trial procedure and other provisions of the rules or Practice Directions, CPR PD 51N will take precedence. For this purpose, the FTS trial procedure will encompass pre-trial disclosure, witness evidence, the provision of expert evidence and submissions at trial. However, it appears that, unlike the STS, the definition of trial procedure under the FTS does not extend to pre-action procedures, the commencement of proceedings, case or costs management or the assessment of costs.

If the case is considered suitable, parties wishing to use the FTS procedure should agree to do so prior to the first case management conference and inform the court of their intention (CPR PD 51N (3.6)).

### Expert evidence

Under both the STS and the FTS expert evidence at trial will be given, wherever possible, by written reports. Oral evidence shall be limited to identified issues, as directed at the case management conference or as agreed subsequently by the parties or directed by the court (CPR PD 51N (2.46)).

With regard to witness evidence generally, the schemes enable the parties to agree to invite the court to determine identified

issues on the basis of written evidence and submissions. In such a case, while 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. This, presumably, includes expert witnesses.

### Consequences for experts

The emphasis on shortened and truncated procedures is likely to have a quite far-reaching impact on expert evidence... if these schemes work as the court intends. Aside from the reduced opportunities for experts to attend hearings and proffer oral evidence, it is likely that expert reports will be expected in a shortened format.

Provision is made in the scheme for the length of witness statements to be limited. While no specific mention is made regarding the length of an expert report, it seems likely that such reports will be expected to comply with the general spirit of the scheme, ie to exclude any "extraneous" material and to restrict themselves to essential issues. Practitioners will be expected to ensure compliance under CPR PD 51N (1.5).

Provisions relating to limited disclosure will also have application to matters of expert evidence. Previous expert reports or pre-action reports from expert advisers need not, it seems, be disclosed under the STS unless: (i) they are documents upon which the disclosing party intends to rely; or (ii) disclosure is being made in response to a specific request or an order of the court. Previously, even if privilege in a document could be claimed, it was still necessary to disclose its existence. However, the STS imposes no requirement to volunteer adverse documents. The abbreviated, issue-based approach of the FTS does require disclosure of adverse documents, but it will not be necessary to carry out a search.

There remains some doubt regarding the issue of disclosure under the STS. It has been suggested that the requirement under the STS for documents to be disclosed where the opponent has requested them or the court has so ordered will operate to provide a mechanism that would, in most cases, lead to the disclosure of adverse documents. However, this is by no means certain.

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