The Shorter and Earlier Trial Procedures Initiative

Consultation Document

RESPONSE OF THE LONDON SOLICITORS LITIGATION ASSOCIATION

The LSLA was formed in 1952 and currently represents the interests of a wide range of civil litigators in London. It has over 1,400 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms. Members of the LSLA Committee sit on the Civil Justice Council, the Civil Rule Committee, The Law Society Civil Litigation Committee, the Commercial Court Users Committee and the Supreme Court Costs Group, to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change. Representatives from the City of London Law Society and the City of Westminster and Holborn Law Society also sit on the LSLA Committee.

This document sets out the response of the London Solicitors Litigation Association to the Consultation Document about the Shorter and Earlier Trial Procedures Initiative. No specific questions were posed in the Consultation Document, and the LSLA has therefore commented generally on the proposed procedure, following which it has commented on specific points regarding the drafting of the proposed Practice Direction.

1. <u>Demand</u>

It was widely agreed that the Shorter Trial Scheme was a welcome proposal, taking into account that issuing claims pursuant to Part 8 of the CPR can, in some circumstances, already provide a solution to lengthy, drawn-out proceedings and trials. It was felt that the Shorter Trial Scheme would enable proceedings to be dealt with expediently, and in a more cost effective manner. In particular, it was felt that claims quantified at between £50,000 and (say) £500,000 would benefit from the proposed truncated procedure: the relatively quick time to take a case to trial, combined with the limiting of the disclosure exercise, the abbreviation of pleadings, and the limiting of a trial to four days was viewed as a positive step towards reducing the costs of litigation for each party without resulting in any serious dilution of the quality of the process.

It was also noted that the scheme would generate demand if it worked successfully, and provided that there was judicial availability to "police" the procedure and hear any interim applications.

2. <u>Types of cases for which the scheme is suitable</u>

With regard to the cases set out at 2(1)(c) being specified as unsuitable for the scheme, it was agreed that sub-sections (1) and (3) were sensible. As to sub-section (4), it was commented that the Intellectual Property Enterprise Court should be specifically excluded rather than mentioned as a court in which the Shorter Trials Procedure may not be appropriate. It was noted that sub-section (2) was vague. However, provided the docketed judge is able to engage with the evidence at an early stage (as it appears to be expected he/she will), and that he/she tests assertions about complexity, it was agreed that the wording of 2(1)(c)(2) was appropriate. It was thought that any problems with that wording may lie not in the concept but in the policing of it.

The scheme seems well suited to the types of cases the consultation specifies, i.e. commercial and business cases that do not involve complex disputes of fact. It was noted that individuals (as opposed to corporate entities) are not excluded from availing themselves of the scheme, provided their cases involved business issues.

3. Costs budgeting

It was felt that the decision to exclude the scheme from costs budgeting obligations altogether was, on balance, not appropriate. While there is an argument that the docketed judge will have seen the entirety of the proceedings, and will therefore be in a stronger position to assess parties' costs following judgment, it was noted that summary assessment of costs is often by reference to an adjustment to what judges see in the breakdown of costs presented to them. There is an argument that setting budgets, to which each party will be expected to adhere, will provide greater certainty and allow costs to be assessed in a more straightforward manner. It was also noted that the truncation of the timetable and the procedure should assist parties when preparing their costs budgets.

However, given that costs budgeting is a time-consuming and often expensive exercise, it was suggested that a simplified and less prescriptive budgeting procedure be introduced which would perhaps allow parties to identify the likely overall costs rather than being held to specific compartmentalised budgets for each stage of the litigation.

It was also commented that it is difficult enough to make any sense of summary assessment schedules for one-day Fast Track Trials or one-day hearings of applications, and so trying to apply that process to a case with a trial of up to four days will not work unless there is more information in a prescribed form, so that there is consistency: a simplified costs budgeting process would be an obvious solution.

Some members commented that the time and effort of contesting Costs Management applications could stop the initiative in its tracks, and on that basis costs budgeting should be excluded. It was also commented that using even a simplified costs budgeting procedure further embeds the principle of determining costs prospectively rather than reviewing costs at the end of a case with the benefit of hindsight, and that many would still object to a further bedding-in of that process. An alternative may be to adopt a procedure similar to the Intellectual Property Courts for the lower value claims where there is a cap on recoverable costs. However, that is likely to be unpopular.

4. Abbreviated pleadings

It was widely agreed that the proposals to limit pleadings to 20 pages was sensible and appropriate.

5. Time periods for compliance

It was noted that the timetable pre-CMC was tight, and that much needed to happen within a short period of time. The Claimant is to fix the CMC for a date approximately eight weeks from the date on which the Defendant is due to acknowledge service of the claim form. In that time, the Defendant must serve its defence, and the Claimant its Reply (if any); the parties are expected to agree the Case Memorandum and List of Issues; the parties must make requests for disclosure of particular documents or classes of documents relating to particular issues and, if there is no agreement as to the extent of the disclosure to be given, prepare to raise those disclosure requests at the CMC.

It was agreed that the proposed Practice Direction provides sufficient clarity as to how cases should be taken forward pre-CMC. However, it was noted that the Claimant should, in its pre-action letter to the Defendant, be required to provide details of all facts and matters which are to be advanced:

given the tight timetable, the Defendant must know that the Claimant is not going to advance a different cause of action or rely on substantially different facts to those set out in the letter of claim.

It was also commented that the requirement on Claimants to serve the claim promptly after the expiry of time for the Defendant's response might be inappropriate if settlement discussions are taking place. If those settlement discussions break down it may then be necessary for the Claimant to serve its claim. It is unclear what is meant by "promptly": with a view to avoiding satellite litigation, it was suggested that it might be better to include a time period that expires "x" weeks/months after the response to the letter of claim. If a claimant has not issued within that time period, then it will not be permitted to issue under the procedure, but must apply to transfer it to the procedure once the claim is eventually issued.

As regards paragraph 2(4)(g), it was suggested that the word "promptly" be removed. It was also suggested that the claimant be directed to fix the CMC for the first available date not less than 10 weeks after the defendant is due to acknowledge service of the Claim Form in order to allow sufficient time for the pleadings to have closed and for the parties to comply with their pre-CMC obligations under the Practice Direction.

6. Paper applications

It was agreed that the default procedure (applications being determined on paper) was sensible, given the time and expense of parties preparing for and attending oral hearings and the limitations in arranging for such hearings to be listed, as well as the fact that the docketed judge determining such applications would have extensive knowledge of the case. However, the increasing willingness of many members of the judiciary to deal with matters outside of the Court day (i.e. before 10:30am and after 4:00pm) was commented on and the proposal raised that, rather than simply defaulting to determination applications on paper, provision should also be made for telephone hearings.

It was also commented that the time for a party to challenge an order was very short.

7. Disclosure

It was noted that in addition to arbitration-style disclosure parties were expected to disclose "*any documents, the existence and contents of which they are aware and which would fall to be disclosed under CPR 31.6(b)*". This appears to be an attempt to prevent parties from hiding "the smoking gun" and as such was welcomed. However, the issue was raised as to how awareness might be tested: other than parties signing disclosure statements, there appears no way to do so until parties are cross-examined at trial. If that provision is to be included, it will need to be policed by the courts. It is unclear how it will be policed: what are the parameters intended to be?

It was observed that there may be a demand for having pure arbitration-style disclosure, noting that it would not be as thorough but could work provided the court was careful in scrutinising disclosure requests.

8. Judicial docketing

The concept of judicial docketing was widely approved of, although it was noted that it may mean that these cases will have a degree of judicial prioritisation, perhaps to the detriment of other cases. It was also suggested that there might be more willingness among the judiciary, if there are docketed judges, to indicate their thoughts on the case at an early stage of the proceedings (as it is thought that parties often benefit from an early indication of strengths and weaknesses).

9. Summary assessment of costs

It was agreed that the summary assessment of costs was sensible and appropriate. It was assumed that the time for judgment and summary assessment are not included within the four day maximum trial period. However, the Practice Direction needs to clarify how costs are to be dealt with, whether by written submissions following judgment being handed down, or by a time-limited hearing to deal with consequential matters following judgment.

10. Flexible Trials Procedure

It was widely agreed that, given the tendency of opposing parties to disagree about procedure, as well as the proposals for the Shorter Trials Procedure and the current case management provisions within the CPR, there is no need for a separate Flexible Trials Procedure.

11. General Points

It was noted that in the Chancery Division Masters now have expanded jurisdiction to hear cases, and that the types of cases brought under this initiative would likely be the types of cases which could be dealt with by Masters. It was therefore suggested that where the proposed Practice Direction refers to "Judges", it should refer to "Judges and Masters", unless the term "Judges" includes "Masters".

It was also commented that in the Intellectual Property Enterprise Court it is sometimes ordered that the Particulars of Claim/Defence/Reply (which are more detailed than usual) can stand as evidence in chief, without the need for further witness statements, and suggested that there might be provisions for similar orders within the proposed procedure.

The Practice Direction also assumes that parties will have professional representation: should there be express provisions for litigants in person within the proposed procedure?

The numbering of the proposed Practice Direction is confusing. It could perhaps be helped by the addition of sub-headings (such as pleadings, disclosure, witness evidence etc).

Drafting Points

(1) Paragraph 2(4)(d): It would be helpful if the sub-paragraph made it clear that the Defendant has 14 days to respond to the letter of claim, not just to say whether or not it agrees to the procedure. It should therefore be amended as follows: "*The proposed defendant should respond to the letter of claim within 14 days...*". It is clear from later in the Practice Direction that this is intended to be the substantive response to the letter of claim, and also that it is intended that the parties will be able to agree an extension to the deadline for the defendant to provide its substantive response. The sub-paragraph should therefore also refer to "*or such other time period as the parties may have agreed*" but ought perhaps to include a longstop date for the response.

(2) Paragraph 2(4)(g): a longstop date for fixing the CMC should be given.

(3) Paragraphs 2(4)(i) and 2(4)(j): it was commented that the current reference to challenging jurisdiction in the middle of a section about acknowledging and filing the defence was cumbersome, and that those paragraphs ought, therefore, to be adapted and moved to after paragraph 2(4)(l).

(4) Paragraph 2(4)(k): this appears to give defendants longer to file a Defence and Counterclaim than in cases where the Shorter Trial Procedure is not used. It is suggested that the wording be

amended to reflect that the Defence and Counterclaim must be served either within 14 days of service of the Claim Form (if no acknowledgement of service is filed) or within 28 days of service of the Claim Form (if an acknowledgment of service is filed).

(5) Paragraph 2(4)(k)(3): in order to reflect the obligation on a claimant to include in its core bundle documents on which the defendant is likely to rely, as well as the documents on which the claimant itself relies, it is suggested that the wording of this paragraph be amended to include an obligation on the defendant to include documents on which the claimant is likely to rely.

(6) Paragraph 2(4)(l): it was suggested that the wording be amended as follows: "*The Defendant and the Claimant may agree that the period for service and filing of the defence shall be extended by up to 14 days unless such extension would put at risk the hearing date for the CMC*", thus mirroring CPR 3.8(4).

(7) Paragraph 2(4)(m): It is suggested that the paragraph be amended as follows: "*Reply and Defence to Counterclaim to be served within 14 days of service of the Defence and Counterclaim*".

(8) Paragraph 2(4)(q): "*The Claimant's solicitors shall provide a draft <u>of</u> the Case Memorandum...*"

(9) Paragraph 2(4)(r): sub-paragraph (1) refers to "*issues*", and sub-paragraph (2) refers to "*a List of Issues*". The term "issues" is vague, and it is suggested that the wording be amended to refer to "any procedural matters including but not limited to suitability of the case for the Shorter Trials Procedure" as well as any other issues envisaged that are not covered by giving directions.

(10) Paragraph 2(4)(s)(3)(a): Rather than "*The parties shall, within 4 weeks of the CMC, make and serve a disclosure list*...", it is suggested the paragraph be amended to read: "*Each party shall, within 4 weeks...*".

(11) Paragraph 2(4)(s)(3)(b)(ii): the paragraph should refer to paragraph 2(4)(s)(2), and not 2(4)(r)(2).

(12) Paragraph 2(4)(t): it was suggested that a limit on the number of pages in a witness statement be imposed, with parties having to apply to the Court for permission to exceed that limit as soon as it becomes reasonably apparent that they expect to exceed that limit (and in any event prior to service of witness statements).

(13) Paragraph 2(4)(v)(2)(b): the word "consist" should be removed from the second sentence.

(14) Paragraph 2(4)(v)(2)(c): "Business" should not be capitalised.

(15) Paragraph 2(4)(v)(3): it is suggested that the period for applying to vary an order be clarified as being "*...3 business days <u>after receipt of the order</u>*".

(16) Paragraph 2(4)(w): "*...In all other cases, such time limits <u>may</u> only be extended...*". It was commented that this paragraph appears to be inconsistent with the other extensions that parties can agree, and that therefore a reference be included to the effect that time limits can be extended save where otherwise specified in the Practice Direction. It would also be sensible if there was consistency of approach between paragraphs 2(4)(l) and 2(4)(w) about the mechanism for notifying agreed extensions.

(17) Paragraph 2(4)(x): this needs to be clarified – "material" is not a defined term and has no obvious recognised meaning within the CPR. The intention of the paragraph needs to be made clearer.

(18) Paragraph 2(4)(aa): the paragraph should refer to CPR Rules 3.12 to 3.18 (inclusive) if the intention is to exclude costs budgeting.

London Solicitors Litigation Association
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