

CLAN 2016 ANNUAL CONFERENCE: KEYNOTE SPEECH BY BLAIR J ON SHORTER AND FLEXIBLE TRIAL PILOTS AND FINANCIAL LIST

This document is published by Practical Law and can be found at: uk.practicallaw.com/3-624-8885
Request a free trial and demonstration at: uk.practicallaw.com/about/freetrial

The Commercial Litigation Association (CLAN) held its annual conference on 7 March 2016. A keynote speech by Blair J considered some recent initiatives in the Rolls Building courts, reflecting on the Shorter and Flexible Trial pilots and the early operation of the Financial List.

Practical Law Dispute Resolution

SPEEDREAD

Mr Justice Blair, Judge in Charge of the Commercial Court, gave a keynote speech at the annual conference of the Commercial Litigation Association (CLAN), which took place on 7 March 2016. He reflected on the introduction of the Shorter and Flexible Trial pilot schemes and provided an update on the early operation of the Financial List, highlighting key aspects of the initiative. Points of interest included:

- Encouragement of solicitors and their clients to consider placing cases into the Shorter and Flexible Trial pilot schemes. The judge acknowledged the considerable expense of civil litigation and observed that the courts had a duty to consider ways of trying to control costs.
- An outline of the current workload in the Financial List, which spans a range of financial matters (including interest rate swaps, loan notes, commercial mortgage backed securities, sovereign debt and collateral in the context of close-out loss) and accommodates expedited trials to determine time-sensitive issues.
- Clarification that the Financial List has the flexibility to respond quickly in matters of urgency and to accommodate proceedings in which financial issues arise collaterally (such as professional negligence actions and insurance cases). However, it is not anticipated to be a "high volume list".
- Insight into the Financial Markets Test Case Scheme, which enables the court to hear financial disputes in certain circumstances where there is no matured cause of action, but a determination (in the form of declaratory relief) may help minimise market legal risk. In cases of particular importance, the case may be heard by a court consisting of a Financial List judge and a Court of Appeal judge.

Beverley Barton and Natalie Stopps, editors in the Practical Law Dispute Resolution team, were present at the conference and have produced a detailed report of Blair J's speech, which has been approved by the judge.

THE SHORTER AND FLEXIBLE TRIAL PILOT SCHEMES

The judge began his keynote speech with some observations on the Shorter and Flexible Trial pilot schemes, a topic which had already generated discussion among delegates at the conference. He noted that the schemes applied throughout the Rolls Building courts: in the Chancery Division, Technology and Construction Court and Commercial Court. Usage to date had been modest, but the judge expressed optimism as to the future development of the schemes and did not anticipate that they would lapse in 2017.

Blair J encouraged solicitors and their clients to consider whether cases might be placed into the Shorter and Flexible Trial pilot schemes. Litigants did not necessarily "need a Rolls Royce to get from A to B". Acknowledging the considerable expense of civil litigation, the judge observed that the courts owed a duty to their users to look at ways of trying to keep costs in check, and in terms of timing, referred to the old adage that "justice delayed is justice denied".

THE FINANCIAL LIST

A SPECIALIST LIST FOR THE MARKET

Blair J has been closely involved in the introduction of the Financial List. Explaining its genesis, he described the Financial List as having been led by demand, not supply. Rather than the courts telling users what

CLAN 2016 ANNUAL CONFERENCE: KEYNOTE SPEECH BY BLAIR J ON SHORTER AND FLEXIBLE TRIAL PILOTS AND FINANCIAL LIST

they thought should happen, Hamblen LJ and Rose J had conducted a consultation on market needs, and following a further consultation on the proposals, the List was introduced.

The initiative had gained the support of the government, and, crucially, the Bank of England.

The List deals with financial cases with a value in excess of £50 million, but also embraces cases requiring particular financial markets expertise, and those of general market importance (for which there is no minimum value). Blair J noted that to date there had been three transfers into the List, and ten cases had started there. The current caseload includes matters involving interest rate swaps, loan notes, commercial mortgage backed securities, sovereign debt and collateral in the context of close-out loss. There is a wide range of values, the largest case currently proceeding in the List having a value of US\$3 billion.

SCOPE FOR RAPID RESPONSE IN TIME-SENSITIVE CASES

Blair J emphasised that the Financial List is concerned to respond quickly. Whether an immediate response is required was a matter of judgment, and he noted that cases are not always ready to come on immediately. However, by way of illustration, Snowden J was currently hearing an expedited trial concerning mortgage backed securities and loan notes. With the loan notes about to mature, the issues require prompt determination before they become academic.

FLEXIBLE, BUT NOT "HIGH VOLUME"

The judge highlighted the fact that there is scope within the Financial List to accommodate cases in which financial market issues arise collaterally. He referred by way of example to a professional negligence claim in which the underlying subject-matter concerns financial markets, and to some insurance cases.

However, it is not envisaged that the Financial List will be a "high volume list", as this is not understood to reflect what the market wanted. Many financial cases do not raise particular market issues, and are already very well dealt with by the Commercial Court, Chancery Division and Mercantile Court.

However for some cases, the advantages of a specialised list with a group of nominated judges can bring real benefits, and there is the further advantage of pooling the resources of the Commercial Court and the Chancery Division, both of which deal with financial cases within their specialisms.

THE FINANCIAL MARKETS TEST CASE SCHEME PILOT: "FIRE-PREVENTION"

Blair J confirmed that the Financial Markets Test Case Scheme (a two-year pilot from 1 October 2015) (the Test Case Scheme) is yet to be used, but noted that usage is entirely up to the market. The judges have no particular expectations in this regard.

He observed that we are currently in a time of financial instability: to take the example of China, the slowdown in manufacturing has been accompanied by financial problems in the form of an overheated stock exchange and currency instability.

Where such situations become acute in terms of legal risk, the markets may not want to wait for a party-driven dispute to arise and be determined in the conventional way. The purpose of the Financial List judges in offering the Test Case Scheme is to resolve disputed questions of law where there is no matured cause of action, but a determination (in the form of declaratory relief) may resolve legal risk in the markets.

In cases of particular importance, the issue may be heard by a court consisting of a Financial List judge and a Court of Appeal judge. The Test Case Scheme might clarify an issue before damage becomes actual and/or systemic, and may be of particular use in cases of urgency. However, Blair J made clear that the court would need to be satisfied that the arguments of those with opposing interests are properly represented.

Summing up the ethos of the Test Case Scheme, Blair J referred to a recent speech of the Lord Chief Justice, Lord Thomas of Cwmgiedd (delivered at the DIFC Academy of Law, Dubai on 1 February 2016), in which it was aptly described as "fire-prevention rather than fire-fighting".

FINANCIAL LIST USERS' COMMITTEE

In his closing remarks, Blair J observed that the courts in England and Wales greatly value their Users' Committees. He encouraged practitioners who are able to participate in such committees to do so, noting that judges are not always aware of the practical issues that arise unless told about them by users.

The judge noted that the first meeting of the Financial List Users' Committee had taken place the previous week. A central question is how the committee should be constituted going forward, since membership could potentially be quite wide. While the constitution is still at an "experimental stage", and inevitably not everyone who is well qualified can practically be accommodated in a committee, he anticipated that this will resolve over the next year or so as users make clear their preference.

Legal solutions from Thomson Reuters

Thomson Reuters is the world's leading source of news and information for professional markets. Our customers rely on us to deliver the intelligence, technology and expertise they need to find trusted answers. The business has operated in more than 100 countries for more than 100 years. For more information, visit www.thomsonreuters.com