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Response to the Civil Justice Council consultation paper on a General Pre-Action Protocol and Practice Direction on Pre-Action Protocols

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to Government consultations on issues of importance to its members through its 17 specialist committees. This response to the consultation on a consolidated pre-action protocol has been prepared by the CLLS Commercial Litigation Committee made up of solicitors who are expert in their field.

Preliminary Observations

In our response to the previous consultation on a proposal to introduce a Consolidated Pre-Action Protocol, we noted the benefits of flexibility and a tailor-made approach afforded by the use of the different specialist protocols. A similar philosophy has guided our response to the current proposal. While we welcome the aims of clarity and accessibility behind the proposed introduction of a general protocol, we consider that care needs to be taken to ensure that the protocol is not more prescriptive than necessary, particularly given the range of different claims to which it is intended to apply.

Consultation Questions

1. ***Question: Do you agree with the proposed new structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute? Please give reasons for your view.***

We recognise the attraction in principle of dividing the matters covered by the existing Practice Direction between a shorter practice direction and a general protocol, in the manner proposed. We recognise that it is desirable to emphasise that the overriding approach sought to be encouraged by the pre-action protocol regime applies to all cases and not just those covered by one of the specialist protocols, and that a general protocol may assist in achieving this. We are, however, concerned (as appears below) that in some places the desire to create a comprehensive free standing protocol has in places led to an excessively prescriptive procedure.

2. ***Question: Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply? If so please specify.***

No.

3. ***Question: Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol? If so, please specify.***

We note the explanation for the change from "should" to "must". We do however have a concern that in places the language of the draft protocol gives insufficient recognition to the fact that the framework suggested should be a guide; that circumstances can vary; and that it is the spirit rather than the letter of the guidance in the protocol that is important.

We have no comments on the draft of the revised, shorter practice direction.

4. ***Question: Do you agree with the approach taken to ADR in the General Pre-Action Protocol?***

Yes.

5. ***Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits. Please give reasons for your view.***

1) The time limits suggested and the approach to enforcing the time limits adopted in the draft Protocol appear sensible as a general framework.

2) However, we consider that the flexibility indicated by paragraph 7.2 is also appropriate more generally in the approach parties should have to the provisions of the protocol, given the broad range of disputes to which the Protocol will apply. We therefore suggest that the protocol should include (perhaps in section 3) some more general statement of flexibility based on what is reasonable in the circumstances, along the lines of paragraph 7.2.

3) The chronology implied by paragraph 3.2 appears to be wrong in that it suggests that the letter before a claim only comes *after* negotiations have failed. It seems more logical to expect that discussions aimed at resolving the dispute should follow after the claimant has written such a letter.

4) Note also that the cross reference in paragraph 3.2 should be to paragraph 7 not paragraph 5.

5) The provisions in section 7 as to disclosure of documents go too far in that they require a party to disclose <u>all</u> documents to be relied on at the pre-action preliminary stage. This is far too much front-loading of the claim preparation. The approach of the existing Practice Direction which is limited to "essential" documents is preferable. If it is felt that "essential" does not go far enough, "principle" or "main" might suffice.

6) For similar reasons, we suggest that it would be preferable for paragraph 7.13 to read: "*or explain in writing why the documents are not provided*". The

"unavailability" of the requested documents may not be the only legitimate reasons not to provide them.

7) Bearing in mind that the proposed protocol is aimed to a large extent at unrepresented potential litigants, what is required by the provision in paragraph 7.4 obliging the potential claimant to draw the other party's attention to the court's powers to impose sanctions for failure to comply with the protocol should be set out more fully.

6. Question: Would it be helpful to include a 'model' letter (non-mandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?

While an example letter might play a part in explaining the appropriate approach which the protocol is seeking to achieve, this suggestion is presumably aimed only at unrepresented potential litigants. The difficulty is that the example letter may be mistakenly treated as a "standard form" by such readers, which could be counterproductive.

7. Question: Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?

We agree with the proposed additional information in these cases.

8. Question: Do you agree with the approach taken to experts in the General Pre-Action Protocol? Please give reasons for your view.

We do not agree with certain aspects of the proposed regime with respect to expert evidence. In brief, the proposals appear too prescriptive in two respects:

1) The requirement in paragraph 8.6 that a party must disclose the fact that it has obtained expert advice and, moreover, must disclose any such report obtained, goes too far. A party may have legitimate reasons why it wishes to obtain confidential pre-action expert advice. Further, such material is privileged. It is wrong to compel a party to disclose such material unless perhaps they intend to rely on it at a later stage in the dispute.
2) The regime envisaged by paragraphs 8.10 and 8.11 may be misunderstood by unrepresented parties. While it is appropriate to encourage the proper consideration of a single expert, and to warn potential costs sanctions if a party acts unreasonably, compelling the blanket use of a single expert if a party does not "object" to the other side's expert may be misunderstood. It would be preferable to focus the party's decision explicitly on whether they are content to agree that one of the experts proposed by the other side should be the only expert instructed, while leaving the ultimate decision on this question to them.

9. Question: Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the 'time bar' defence?

Yes.

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