The City of London Law Society

4 College Hill
London EC4R 2RB
Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

LITIGATION COMMITTEE response to the Civil Justice Council's Interim Report for Consultation on Review of Pre-Action Protocols dated November 2021

The City of London Law Society ("CLLS") represents approximately 17,000 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 a variety of consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Introductory Comments

1. Members of the Committee consider that there is already a high degree of compliance in commercial cases with the existing Practice Direction governing pre-action behaviour. The draft proposals appear to be aimed at lower value and less complex claims in respect of which practitioners on the Committee have less experience.

2. As a group we share a high degree of concern that adding requirements in the pre-action phase in the manner contemplated (including, for example, the stocktake report) will serve to add complexity and increase costs. The range of proposals under consideration promotes the evolution of the pre-action phase into something more "judicialised", with letters potentially assuming a status akin to pleadings, the potential for new disclosure obligations, obligations to act in good faith, and the inclusion of statements of truth on correspondence. Many of these measures have the potential to give rise to satellite disputes.

3. In the context of a competitive global marketplace for the resolution of international business disputes, it is particularly important to consider carefully any aspect of civil procedure that unnecessarily front-loads costs and therefore potentially reduces the attractiveness of the English courts for the resolution of disputes. High costs, particularly at the start of a dispute, can drive businesses to courts with less expensive procedures, or to arbitration.

4. If the Civil Justice Council ("CJC") is to recommend a move towards mandatory compliance with a general Pre-Action Protocol ("PAP"), we consider that all commercial litigation matters issued in the Business and Property Courts should be excluded from its ambit.

5. The following is a response to the questions in the separate pdf list of questions. In light of the type of litigation conducted by members of the Committee, we answer questions 11 to 23 (questions relevant to all Protocols) and questions 24 to 27 (questions specifically related to Practice Direction – Pre-Action Conduct). We do not offer answers on the questions specifically related to particular protocols for the specialist areas of litigation listed.

Questions relevant to all Protocols

6. ***Q11. Do you agree that the Overriding Objective should be amended to include express reference to the pre-action protocols?***

No. We do not believe there is a need to amend the Overriding Objective to include a reference to the PAPs. The Overriding Objective is well understood.

7. ***Q12. Do you agree that compliance with PAPs should be mandatory except in urgent cases? Do you think there should be any other exceptions generally, or in relation to specific PAPs?***

No. We do not think compliance with PAPs should be mandatory. Practitioners on the Committee consider there is already a high degree of compliance with the existing Practice Direction governing pre-action behaviour and so it is unnecessary to make compliance mandatory.

If the CJC is to recommend a move towards mandatory compliance with a general PAP, we believe complex commercial litigation matters should be excluded from its ambit. The exclusion might be set by reference to a minimum financial threshold but the better course is to exclude all cases listed in the Business and Property Courts, irrespective of value.

8. **Q13.** ***Do you agree there should be online pre-action portals for all cases where there is an online court process and that the systems be linked so that information exchanged through the PAP portal will be automatically accessible to the court (except for those designated as without prejudice)?***

Yes.

9. ***Q14. Do you support the creation of a new summary costs procedure to resolve costs disputes about liability and quantum in cases that settle at the PAP stage? In giving your answer, please give any suggestions you might have for how such a costs procedure should operate.***

We are not in favour of the creation of a new summary costs procedure and do not believe there should be any change to the present position. In any event, in the vast majority of cases, where disputes settle in the pre-action phase, there should be no cost consequences at all since the pre-action stage has served its purpose.

10. ***Q15. Do you agree that PAPs should include a mandatory good faith obligation to try to resolve or narrow the dispute? In answering this question, please include any views you have about the proper scope of any such obligation and whether are there are any cases and protocols in which it should not apply.***

No, we do not agree with the proposal to introduce a mandatory good faith obligation. Our strong view is that the imposition of such a duty will inevitably lead to satellite disputes regarding the expected threshold and party compliance.

11. ***Q16. Do you agree that, unless the parties clearly state otherwise, all communications between the parties as part of their good faith efforts to try to resolve or narrow the dispute would be without prejudice? Invitations to engage in good faith steps could still be disclosed to the court demonstrate compliance with the protocol, and offers of compromise pursuant to Part 36 would still be governed by the privilege rules in Part 36.***

No. We do not believe there needs to be a presumption one way or the other as to the status of communications made in this context. The Committee considers the existing law is perfectly adequate. Those discussions which are genuinely part of efforts to resolve and settle a dispute are already afforded protection. Conversely, those exchanges which do not qualify should not be afforded without prejudice status as a matter of course.

12. ***Q17. Do you agree that there should be a requirement to complete a joint stocktake report in which the parties set out the issues on which they agree, the issues on which they are still in dispute and the parties' respective positions on them? Do you agree that this stocktake report should also list the documents disclosed by the parties and the documents they are still seeking disclosure of? Are there any cases and protocols where you believe the stocktake requirement should not apply? In giving your answer please also include any comments you have on the Template Joint Stocktake Report in Appendix 6.***

No. Practitioners on the Committee believe that a joint stocktake report will increase costs overall and add delay. In all but the simplest of disputes, preparation of the report is likely to be a significant undertaking, requiring a high degree of co-operation between the parties.

We are concerned by remarks suggesting that parties should be penalised for adopting different positions in litigation from those taken during PAP letters of claim or replies. The pre-action phase is an opportunity for parties to exchange information and documents, so that they can understand the issues in the case. As a consequence, in many instances it is both natural and appropriate for parties to adjust their position as their knowledge improves along with their assessments of the merits. To impose penalties will increase and front-load costs: parties will be reluctant to advocate for a particular position without having more certainty of underlying facts than would normally

be the case at the outset of pre-action correspondence. The introduction of any such penalties would downgrade the very value of the "dialogue" which the pre-action protocol was designed to bring about. The status of PAP letters will also be elevated, bringing them close to pleadings. Again, this is likely to increase (and front-load) costs not least because a higher level of input may be needed from counsel.

13. ***Q18. Do you agree with the suggested approach to sanctions for non-compliance set out in general principles from para 3.26? In particular please comment on:***

a) ***Whether courts should have the power to strike out a claim or defence to deal with grave cases of non-compliance?***

b) ***Whether the issue of PAP compliance should be expressly dealt with in all Directions Questionnaires, or whether parties should be required to apply to the court should they want the court to impose a sanction on an opposing party for non-compliance with a PAP?***

c) ***Whether the PAPs should contain a clear steer that the court should deal with PAP compliance disputes at the earliest practical opportunity, subject to the court's discretion to defer the issue?***

d) ***Whether there are other changes that should be introduced to clarify the court's powers to impose sanctions for non-compliance at an early stage of the proceeding, including costs sanctions?***

e) ***Whether you believe a different approach to sanctions should be adopted for any litigation specific PAPs and, if so, why?***

The Committee does not comment on any of the other litigation specific PAPs, only the proposed general PAP.

We do not consider that compliance with the general PAP should be compulsory. Consequently, we do not agree with the imposition of sanctions for non-compliance. Existing costs consequences – related to a litigant's conduct – are an adequate means of encouraging good behaviours.

As regards to various sanctions mentioned, members of the Committee are particularly concerned by references to strike-out. This is a draconian sanction and we do not believe it appropriate in this context.

14. ***Q19. Do you agree that PAPs should contain the guidance and warnings about pre-action conduct set out in paragraphs 3.8-3.13?***

We noted the suggestion at paragraph 3.9, that parties should "*have an obligation to resolve their dispute fairly*". This invites a subjective assessment of what is, and what is not, "*fair*" and may lead to satellite disputes over standards applied. It is also a surprising suggestion in the context of what remains an adversarial system.

The Committee acknowledges that the obligation may have some utility in cases involving vulnerable parties, or perhaps in consumer cases. However, these protections may be unnecessary in cases where parties are legally represented in view

of professional duties imposed on solicitors which regulate their dealings with litigants in person and the imposition of the obligation to advance only claims which are properly arguable.

We consider that a Jet2 warning (paragraph 3.11) stating the consequences of providing dishonest information as part of the PAP process might be useful for unrepresented parties.

15. **Q20.** ***Do you think there are ways the structure, language and/or obligations in PAPs could be improved so that vulnerable parties can effectively engage with PAPs? If so, please provide details.***

We do not have any observations in this regard.

16. ***Q21. Do you believe pre-action letters of claim and replies should be supported by statements of truth?***

Whilst it may serve to warn unrepresented parties of the position arising under *Jet2*, we do not believe the inclusion of a statement of truth is necessary. Moreover, requiring a statement of truth could contribute to the front-loading of costs. Parties are likely to put their cases at the pre-action stage at their highest, based on what is often limited information, not least to flush out the other side's position. If letters of claim and replies are to be supported by statements of truth, then parties will need to carry out more investigation, incurring greater costs than currently. Those costs may not ultimately be proportionate to the issues / sums in dispute. It might also lead to parties pursuing points once proceedings are issued which they might otherwise have abandoned.

17. ***Q22. Do you believe that the rule in the Professional Negligence Protocol giving the court the discretion to impose sanctions on defendants who take a materially different position in their defence to that which they took in their pre-action letter of reply should be adopted in other protocols and, if so, which ones?***

As a general approach, we think parties should be entitled to reconsider their position as their understanding of the issues and facts in a case evolves and improves. We consider this to be a natural part of the pre-action process and, as a matter of principle, parties should not be penalised for adjusting their position.

18. ***Q23. Do you think any of the PAP steps can be used to replace or truncate the procedural steps parties must follow should litigation be necessary, for example, pleadings or disclosure? Are there any other ways that the benefits of PAP compliance can be transferred into the litigation process?***

No. Our view is that PAP steps are unlikely to be capable of replacing or truncating established procedural steps in complex litigation.

Rather than reducing costs overall, we think reforms of this nature may instead serve to increase front-loading of costs. For example, if a letter of claim may serve as a pleading, parties are likely to spend far more time (and resources) preparing that letter. It is also likely to increase the level of input sought from counsel and formalise the content of the letter.

Questions specifically related to Practice Direction – Pre-Action Conduct

19. **Q24.** ***Do you wish to answer questions about Practice Direction – Pre-Action Conduct?***

Yes.

20. **Q25.** ***Do you support the introduction of a General Pre-action Protocol (Practice Direction)? In giving your answer please do provide any comments on the draft text for the revised general pre-action protocol set out in Appendix 4.***

We are not in favour of the introduction of a general PAP. We do not feel there is a need for a specific PAP to be drafted for cases which presently fall within the existing (general) Practice Direction. It is not clear to us whether the proposed general PAP will add much (if anything) of value to the present position.

Members of the Committee consider that there is already a high degree of compliance with the existing Practice Direction governing pre-action behaviour. The draft proposals appear to be aimed at lower value and less complex claims in respect of which practitioners on the Committee have less experience. As a group we share a high degree of concern that adding requirements in the pre-action phase in the manner contemplated (including, for example, the stocktake report) will serve to add complexity and increase costs. The range of proposals under consideration promote the evolution of the pre-action phase into something more judicialised, with letters potentially assuming a status akin to pleadings, the potential for new disclosure obligations, obligations to act in good faith and the inclusion of statements of truth on correspondence. Many of these measures have the potential to give rise to satellite disputes.

21. ***Q26. Do you agree parties should have 14 days to respond to a pre-action letter of claim under the general pre-action protocol, with the possibility of a further extension of 28 days where expert evidence is required? In cases of extension, the defendant would still be required to provide a reply within 14 days disclosing relevant information they had in their possession and confirming that a full reply would be provided within a further 28 days. Claimants would have 14 days to respond to any counterclaim. If you do not agree with these timeframes, what timeframes would you propose?***

The Committee is not in favour of these timeframes. As a general observation we feel that they are extremely short and will be unsuitable for all but the very simplest of cases. Often the letter of claim is simply the start of the process and parties need adequate time to seek representation, investigate the facts and collate documents for their advisors before a response can be prepared.

We believe that the flexibility afforded by the existing system is very much to be preferred. Each case is different and we do not think the rules should seek to be overly prescriptive in this regard.

22. ***Q27. Do you think that the general PAP should incorporate a standard for disclosure, and if so, what standard? For example, documents that would meet***

the test for standard disclosure under CPR 31, or meet the test for "Initial disclosure" and/or "Limited Disclosure" under Practice Direction 51U for the Disclosure Pilot. In giving your answer we are particularly interested in respondents' views about whether the standard should include disclosure of 'known adverse documents'?

We are not in favour of a general PAP or, if a general PAP were introduced, of it incorporating a standard for disclosure. Practice Direction 51U already provides the Court with early control of the disclosure process. Attempting to bring forward disclosure obligations to the pre-action stage is impractical, since disclosure needs ultimately to be done by reference to pleaded issues. It would also front load costs still further, and could be unnecessarily duplicative of the steps that are required to be taken pursuant to Practice Direction 51U.

If the CJC have any comments please contact the Chair of the Litigation Committee, Gavin Foggo, at gfoggo@foxwilliams.com.

Date: 20 January 2022

THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Gavin Foggo	Fox Williams LLP (Chair)
Mark Lim	Lewis Silkin LLP (Vice Chair)
Jan-Jaap Baer	Travers Smith LLP
Patrick Boylan	Simmons & Simmons LLP
Andrew Denny	Allen & Overy LLP
Richard Dickman	Pinsent Masons LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Richard Foss	Kingsley Napley LLP
Daniel Hayward	Fieldfisher LLP
Lois Horne	Macfarlanes LLP
Jonathan Isaacs	DWF Law LLP
Richard Jeens	Slaughter and May
Jeremy Kosky	Clifford Chance LLP
James Levy	Ashursts LLP
Hardeep Nahal	Constantine Cannon LLP
Daniel Spendlove	Signature Litigation LLP
Patrick Swain	Debevoise & Plimpton LLP