Questionnaire Replies

on proposed CJC

General Pre-Action Protocol

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.

No, it is inconvenient and misleading for those not familiar with CPR to have two documents dealing with the same thing. It would be better to have all the provisions in the protocol.

An inferior alternative would be to have a clear incorporation of the Practice Direction at the beginning of the Protocol

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, the ***aims*** of the Protocol should apply to all cases. However, the ***detailed procedural requirements*** should not apply to:-

- Cases where there is no dispute and summary judgment will be sought
- Cases where a creditor has operated a credit control procedure and the debtor has not raised any complaints during the procedure or following a normal 7 day letter before action
- Routine debt recovery cases where, even if there is a dispute, the substance of the protocol has already been covered in the credit control procedure

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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.

It seems satisfactory

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

No.

Paragraph 6 of the Protocol refers to ADR. The CJC points out that it has deleted the phrase: *"It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR".* The inclusion of that phrase provides a balance between the needs of Claimant and Defendant. ADR invariably results in a compromise and it is unjust that a Claimant with a valid claim should be forced to accept less than its true entitlement. The exclusion of that wording will put increased pressure on Claimants to accept ADR. There are already Defendants with no valid Defence who exploit the ADR bias of the courts to get a reduced settlement.

The existing Construction and Engineering Protocol provides exemption from the need for compliance where :

a) there has been an adjudication which is to be enforced or
b) the claim will be subject to a summary judgment application.

The general Protocol needs to follow this approach in respect of an ADR settlement and summary judgment. By doing that, it will provide a fair balance between the parties.

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.

For larger cases where there is a serious dispute, yes. For smaller cases it should be clearer that the full procedure does not have to be followed where that would not be reasonable. See the suggested amendments to sub-paragraph 3.3 in our submission.

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

No, the industry is quite capable of drafting letters!

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

No. Paragraph 7 of the Protocol is largely inappropriate in simple debt claims, certainly in non-consumer debt cases. Something far simpler that takes into account the realities of a credit control process is required. In the vast majority of cases a normal credit control procedure does what the protocol requires and more. Litigation is almost always a last resort for trade creditors.

Our views are set out in detail in our submission and amendments to paragraph 3 or 7 are suggested.

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

No. The existing provisions are working well and provide a fair balance. The proposals unnecessarily complicate matters for no discernible benefit. The general approach of the CPR was to simplify. In particular:

- The provisions at 8.4(b) (agreeing expert where one side paying) are naïve and an unwarranted restriction on the right of the party to instruct whom he chooses with his own money. The existing ability of the court to penalize in costs is quite sufficient.
- 8.9 needs amending even if the principle is accepted. As drawn, an objection to even one expert would give the instructing party the right to choose any expert from his list. The 2nd sentence should read: *"If there remains on the list one or more expert who are acceptable, then the first party must instruct that expert or one of the other acceptable experts."*
- 8.11 seems entirely pointless. It will simply encourage litigants to object on principle to an expert in order to preserve his own rights for a later time.

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

No. The proposal for a Defendant to agree not to use the statutory defence in relation to limitation shows naivety on the part of the Protocol drafters. We believe a Judge would be bound to take the point that a claim was statute barred even if the Defendant did not. We could certainly not face our indemnity insurers, having missed a limitation date, with the plea that the Defendant had apparently waived his right.

Lovetts plc - April 2008

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