Submission

on proposed CJC

General Pre-Action Protocol

Background

Lovetts Plc is an incorporated solicitors practice that specialises in trade to trade debt recovery and the contract litigation that arises from that. We cover a wide range of industries, including the construction industry.

These comments are therefore based on the way the Protocol affects these types of case.

Summary

- We support the aims of the Protocol in all cases
- The Protocol procedure is useful in larger cases where there is a genuine dispute
- The Protocol procedure is not appropriate where no real dispute has come to light and summary judgment is likely be sought, or where, simply, the debtor has not made any complaints etc.
- Principally, the Protocol procedure is also inappropriate for routine trade to trade debt recovery. By the time legal proceedings are required the substance of the requirements will have been covered by the credit control procedure. A simple letter stating that the next step will be the issue of proceedings is all that is necessary.
- We make some drafting suggestions at the end of this submission

The general aims of the protocol

The general aims of the protocol and the practice direction are good but unexceptional. They are, after all, the aims of any good credit controller operating a good credit control system!

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Every credit controller wants to find out as quickly as possible if there is a dispute, to resolve any dispute as fast as possible, to provide any information needed, and get paid without going to court.

Trade creditors are very conscious of costs. Legal proceedings for them are already a last resort.

The usefulness of the existing protocols

Protocols have proved a useful tool but their use has been limited to higher value claims. This is because the Protocol procedures in themselves require major outlay on the part of the Claimant.

Normally their use has been restricted to cases where there are known problems with a claim and the Claimant wants to negotiate a settlement. Protocols have been a useful tool in these circumstances.

The cost of the Protocol procedure arises because of the need to study the Claimant's papers very carefully; to discuss the evidence with the Claimant; to draft the initial Protocol letter and obtain the Claimant's approval of it. Normally it would go through several drafts. There is then a need to consider the Defendant's response and any documents with that.

How would the Protocol affect Claimants?

In cases where the Claimant's own credit chasing has shown no dispute about the invoice it would be reasonable to continue using standard seven day LBAs followed up by a Claim Form if there is no response to the LBA.

It is unreasonable that a Claimant should have to go through a Protocol procedure where its own chasing has shown no dispute.

The sanction for protocol breach is in costs. In Small Claims cases, which constitute the majority of our claims, the Claimant has little to lose by way of costs in any event. The Courts have shown a marked reluctance to make unreasonable costs orders against Small Claims Defendants and it is to be hoped they would take the same view in relation to Protocol matters against Claimants.

In Fast track and Multi-track cases there will clearly be more risk for the Claimants on costs if they do not pursue a Protocol procedure. Nevertheless, if there is genuinely no dispute known and the LBA fails to disclose one, there is no reason why the Claimant should not proceed. It is normal practice, if the LBA brings a disputed response, to consider it with the Claimant and to attempt to deal with before issuing.

The Protocol will have implications where either the Claimant's own chasing, or the LBA, disclose a possible dispute. In those circumstances we will need to consider with the Claimant whether adequate information and documentation has been exchanged. There may be an advantage to the Claimant in being able to call for documents which the Defendant supposedly holds.

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Detailed Comments

Paragraph 3.2 of the proposed Protocol says that parties *"must attempt to settle the dispute by negotiation…"* It will become more important to give evidence in defended cases of the Claimant's credit chasing cycle to show that the Claimant has attempted to get settlement. The Protocol does not say that the negotiation must be immediately prior to the issue of proceedings or by the lawyers. Therefore the Claimant's own attempts should be adequate.

3.3. of the Protocol says that parties should comply in a manner that is *"proportionate to the matters in dispute."* It does not say *"reasonable and proportionate"*. This latter would be a better phraseology because in Small Claims matters, the overriding priority is to get the case to trial as quickly as possible and with minimum costs.

The ability to call in aid the Protocol in order to require documentation is likely to be a haven for recalcitrant debtors.

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.

The proposed Protocol requires the provision of documents but also, unless the Defendant is known to be legally represented, a copy of the Protocol. We consider that this is likely to discourage Defendants from replying. They will be faced with a mound of paper which many will find frightening. It would be better for them to be referred to a website, given that the vast majority of people now have access to the internet.

Proposal regarding limitation period

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 draftsman. 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.

The real problem – the realities of "routine" commercial debt recovery

The real problem with the protocol is that paragraph 7 is drafted without taking into account the realities of routine commercial debt recovery.

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Most debtors are only waiting for the "letter before claim"

The first and most important reality is that most debtors are simply waiting for the "letter before claim" before paying. 85% to 90% of the letters we send out are taken no further by the creditor, usually because they have been paid.

The debtors are simply waiting for the creditor to get serious enough. At the moment they know that a "letter before action" from a solicitor means they need to pay now if they are going to avoid proceedings.

Under the new protocol, creditors potentially have to produce much more detailed and therefore expensive "letters before claim". Debtors will know they can delay matters by requesting documents and information.

Most debtors only need the creditor's name and debt amount

The vast majority of debtors both at "letter before claim" stage and, indeed, at action stage, simply need the name of the creditor and the debt amount. They then immediately know exactly what is being claimed because the details are posted in their systems. Where they are not immediately clear as to what is being claimed, they are in practice quick to ask for details.

Its already been done

The difficulty with paragraph 7 is that it assumes the "letter before claim" is the first the debtor has heard about the substance of the claim. But it is not. The threat of legal proceedings usually comes at the end of a protracted process during which the debtor has been telephoned and written to, invoices, copies invoices and statements have been sent to them and any genuine points of dispute have been dealt with.

The debtor therefore already has all the information that a "letter before claim" is supposed to contain.

It is perfectly sensible to require the parties to make sure going to court is a last resort. As explained above, that is already the aim of credit controllers.

However, rather than suggesting that there should be a single letter which contains all this information, it would be better to take into account any attempts at settlement and exchanges of information that have already taken place. Two draft clauses are suggested below.

Information for individuals – paragraph 7.5

This paragraph should only applied to consumers. The information should not be necessary for business people.

As drafted you also get the oddity that a letter to a firm would presumably not need this information but a letter to an individual partner would.

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Recommendations

1. Sub-paragraph 3.3. of the Protocol should read ***"reasonable and*** proportionate to the matters in dispute " rather than simply "proportionate to the matters in dispute."

2. Sub-paragraph 7.5 (information for individuals) should only apply to consumers

3. There is no point in requiring the full procedure in paragraph 7 to be followed where those things have already substantially been done. Two alternative amendments are suggested to cater for this.

   Firstly, subparagraph 3.3 could read:-

   > *To the extent that the substance of the aims of this Protocol have not already been fulfilled,* the parties should comply with this Pre-Action Protocol in a manner that is *reasonable* and proportionate to the matters in dispute. For example, if the dispute is relatively straightforward and low value, then the parties should not make large scale requests for documents and information; *if information has already been provided or documents have already been exchanged then there is no need to do so again.*

   Secondly, as an alternative, sub-paragraphs 7.3, 7.4, 7.6 – 7.14 could be made to apply only to consumer debt recovery. So the following could be included at the beginning of paragraph 7:-

   7.A1 This sub-paragraph applies where a business seeks payment from someone, other than a consumer, for the price of goods and/or services supplied. Where this sub-paragraph applies, sub-paragraphs 7.3, 7.4, 7.6 – 7.14 shall not apply and a court action shall not normally be started unless:-

   - The defendant has been supplied with details of the amount claimed (this will normally be by sending invoices and statements)
   - A reasonable attempt to settle any disputes raised by the defendant has been made
   - All information and documents reasonably requested by the defendant have been supplied
   - The defendant has been allowed a reasonable time to deal with the claimant's response to any points raised by the defendant
   - The claimant has given a reasonable final written warning (by post, fax or email) to the defendant that the next step will be the issue of court proceedings. Where this warning is given at the end of a credit control process, seven days notice will normally be regarded as reasonable.

Lovetts plc - April 2008

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