

## **CIVIL JUSTICE COUNCIL PRE ACTION PROTOCOLS CONSULTATION**

### **FEDERATION OF SMALL BUSINESSES RESPONSE**

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the Civil Justice Council's consultation with regard to Pre Action Protocols.

We represent 160,000 members in every community across the UK, and are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

In October 2021, FSB responded to the HM Court Service consultation on Dispute Resolution, a copy of which response we attach, and to which we shall refer.

In our HMCTS Response, we suggest that resolution of disputes or potential disputes should be tackled at a far earlier stage than when the parties involved have started to engage with the court system, which is when HMCTS is first able to address issues. Alternative Dispute Resolution (or as the Master of the Rolls would have it, simply 'Dispute Resolution') processes such as 'early neutral evaluation' are not early enough, if they succeed formal claim and defence and only appear at the Case Management Conference stage. Dispute Resolution action has a far greater prospect of success if it can take place before court action has started and before significant legal costs have been incurred (which then become factors in their own right influencing the resolvability of a dispute).

In addition, discussions between interested parties including HMCTS and ADR specialists often bemoan the fact that there is still only limited knowledge and take-up in respect of ADR. For that to change, there cannot be a continuation of current approach and processes. There must be a different agenda that can better generate business interest and promote the advantages that ADR processes can offer.

With that in mind, we respectfully suggest a possible new approach. We have, in our response to the Dispute Resolution call for evidence, proposed a 'Dispute Resolution Service' akin to the ACAS conciliation role, to triage disputes at the earliest stage possible. For small businesses, this would significantly help to reduce the direct costs (e.g. legal and court fees) and indirect costs (e.g. time taken away from running the business) associated with disputes. To some, a 'Pre Action Protocol' may suggest relevance only if 'action' (and as it is HMCTS who promulgates the PAPS that would imply court action) is envisaged. We suggest a more neutral first stage 'protocol' entitled 'Dispute Resolution – First Steps' ('DRFS'), which would in simple language describe the available processes for dispute resolution from negotiation through conciliation and mediation, neutral third party evaluation, through to adjudication, arbitration and court action, to educate disputants about the dispute resolution possibilities from the outset. Links to all relevant and available ADR services and resources in suitably divided categories, including the Pre Action Protocols, would be included. In an ideal world the DRFS might signpost disputants to a dedicated Dispute Resolution Service of the type we suggest above, or at the very least to a dedicated dispute resolution website which is suitably branded to differentiate it from the HMCTS material, so as to avoid deterring those for whom court proceedings, even in veiled prospect, might be off-putting.

We now turn to the CJC proposals in its Interim Report, which mostly demand relatively brief comment:

So far as PAPS generally are concerned, we are supportive of the three objectives listed in paragraph 2.6 of the Interim Report, and in particular we welcome the good faith obligation to try and resolve or narrow the dispute. Where we differ is mainly as to how the options are presented to disputants, as we have explained above.

Compulsory ADR has a place in the panorama of dispute resolution possibilities, but its use must be carefully evaluated and controlled, and it should be deployed as a discretionary option available to judges in prescribed circumstances, most obviously in disputes where there is a lack of good faith and parties are failing to engage either at all or effectively, a situation which could be assessed by requiring parties to describe in more detail at CMC stage what attempts they had actually made to resolve the dispute or narrow the issues.

We agree that a formal stocktake of the dispute and issues is likely to be helpful in focusing minds on the core issues and their strengths and weaknesses. Formalisation could also be designed to help to marginalise side issues and highlight their disproportionality in terms of cost versus benefit.

We do not disagree with the Working Party's approach as outlined in paragraph 2.23 of the Interim Report. We agree that the PAPS must evolve so as to be effective in relation to disputes of all types. Accessible language is imperative. Where legal advice and assistance is required to enable PAPS to be effectively deployed, disputants must be able to source that advice and assistance at affordable cost. Obligations for advisers to collaborate must include an obligation for there to be accommodations where there are inequalities of arms or resources.

With regard to technology, often the dispute resolution processes and the mechanism for their delivery are conflated. We welcome the greater use of technology in relation to mechanisms, provided that there are safeguards, and alternative options for those who do not have the means or technical facilities available to them.

We would be happy to engage with those developing new PAPS, whether they be general or specialist, to help ensure that they accommodate the needs of litigants in person and SMEs, and can effectively both communicate their requirements and enable their realisation. Timescales specified should accommodate the different capabilities and resources of disputants. If there are to be sanctions for non-compliance with PAPS, there needs to be clear notice of that possibility to all disputants at the outset in a similar manner and with similar prominence as is prescribed in respect of the warnings given to tenants on notices seeking possession.

Of the specialist PAPS, small businesses will most commonly encounter those relating to Debt, Construction and Engineering, Commercial Property Dilapidation Claims, and the Low Value Small Claims Track. With regard to the Debt Protocol, we agree that the time limit for response to the initial letter of claim is too long, and that delays in the ability to issue a claim are often exploited by knowledgeable debtors.

We agree that creation of a new simple summary costs procedure, to resolve issues relating to costs where a dispute has been settled before court action has commenced, would be useful.

If you would like to discuss any of the points further, please contact me via my colleague [REDACTED]

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