



JUDICIARY OF
ENGLAND AND WALES

Business and Property Courts

Consultation on Pre-Action Protocols

We write in connection with the above consultation, in order to make some brief observations on behalf of the [Judges and Masters of the Business & Property Courts (“B&PCs”) sitting in the Rolls Building in London (the Chancery Division, Commercial Court and Technology and Construction Court)]. We have only a few comments, and so respond by letter rather than by completing the detailed on-line response form. We are content however for this to be treated as a public response to the consultation.

To begin with, we entirely support the initiative to impose more rigour on parties’ pre-action conduct in some types of dispute. For example, B&PCs Judges and Masters routinely handle cases involving litigants in person which would plainly have benefited, at the pre-action stage, from efforts being made either to settle or at least to exchange information and/or identify key issues in a structured way.

Thus, we all have experience of disputes which might never have been litigated at all, or which may at least have been litigated in a more focussed and efficient manner, had a more prescriptive code of pre-action behaviour been imposed on the parties. Multiple factors contribute to such outcomes, including perhaps a lack of appreciation of what the litigation process is likely to involve. Many parties have no prior experience of litigation and do not have the benefit of experienced advisers. For this important category of court user, one can very clearly see the value of a set of prescriptive, pre-action steps which are designed to encourage parties to exchange information, draw breath and take stock of their respective positions, and then continue (if they wish to) on a properly informed basis.

Other types of Court user are likely to be different, however. They may be commercial people or enterprises who, whether or not routinely involved in the business of litigation, have access to well qualified advisers. Our experience is that many commercial parties value their decision-making autonomy as business people. Many are likely to consider they are best placed to assess for themselves when a potential dispute has reached the point where no further progress can be made outside a formal court process, without the civil procedure regime prescribing the steps they must take before they can have access to a court. Indeed, many commercial contracts already contain dispute escalation clauses for just this purpose.

Against this background, we are aware of the representations made by industry bodies such as the London Solicitors Litigation Association (LSLA) and the Litigation

Committee of the City of London Law Society. On behalf of the court users they represent, they have expressed concerns about the pre-action phase becoming more burdensome, and about the potential consequences, which include businesses being driven to litigate elsewhere. This is a point which is an acute concern for the courts of the B&PCs whose work is dominated by international litigants. We agree with the view expressed by the various industry bodies that a prescriptive regime in relation to pre-action protocols is bound to be a negative factor for international parties in exercising their choice as to whether to litigate in London.

In addition, if accession to the Lugano Convention is eventually achieved the proposed regime could have serious effects in the context of the “first seised” test, again rendering the B&PCs less attractive to international litigants.

It is important to emphasise that these sentiments are entirely consistent with our experience of the views and attitudes of the court users whom the various industry bodies represent.

Moreover, the B&PCs Judges and Masters themselves have expressed concerns about the possible effects of a more prescriptive pre-action phase applicable as a default in all cases. An overly prescriptive approach may result in the pre-action phase itself becoming heavily lawyered. If that happens, then a procedure intended encourage settlement and limit disagreement may in practice come to resemble the litigation process it is designed to try and avoid.

Some particular points may be made briefly:

Mandatory good faith obligation to resolve or narrow disputes: We sound a note of caution in relation to this. Problems of interpretation can arise in any context in which one seeks to assess conduct against a “*good faith*” standard, but that is particularly so when such conduct is in the pre-action phase of litigation. Litigation is an adversarial process, in which parties are entitled to adopt differing (and sometimes polarised) views. It may be very difficult indeed, in any given case, to assess precisely where the dividing line falls between bad faith reliance on a point versus justifiable reliance on a different point which is arguable but ultimately fails. The danger in imposing a specific yardstick of *good faith* is that it is likely to encourage disagreements about just that kind of issue, resulting in a proliferation of disputes *about litigation*, and increased pressure on limited court resources. Plainly, the more complex the dispute the greater the potential for such issues to develop, and so the problem may be particularly acute in larger commercial and Chancery cases.

Joint Stocktake Report: Here the concern is about the utility of the parties being required to spend time pre-action seeking to define and agree the issues which separate them, at least in the larger and more complex cases. Of course we agree with the critical importance of doing so as cases develop, but the parties involved in complex cases are likely to need detailed adviser input in order to do so effectively, and it is an exercise which naturally flows from the exchange of statements of case. Requiring parties to formulate agreed issues *pre-action* may result in just the sort of heavy lawyering of the pre-action phase we mentioned above, with the risk that it then comes to include some of the same features as the litigation process it is meant

to try and avoid. Commercial parties, who are likely to view the pre-action phase as their opportunity to try and reach a commercial (rather than legal) solution, would see that as a matter of concern.

The related issue of disclosure is another important part of the equation, and essentially the same points may be made. The Joint Stocktake Template requires an account to be given of disclosure requests made and (where relevant) the reasons given by a party for non-disclosure. Again one can easily see, in complex commercial cases in particular, how such a requirement may result in heavy lawyering, and how it brings with it the potential for early disputes not about the substance of the case but about the parties' pre-action conduct. The concern may be particularly acute as regards disclosure, always a matter of understandable interest to litigants, if the effect is to require pre-action some attenuated version of the process the parties will later have to go through under PD51U, if they are unable to resolve their dispute.

Sanctions: Similar concerns arise. There is a balance to be struck between encouraging effective pre-action conduct and avoiding the proliferation of early disputes about whether parties have behaved appropriately in the pre-action phase. The suggestion that non-compliance with pre-action steps should routinely be addressed at an early stage, including by the imposition of cost sanctions, might in practice result in an unhelpful proliferation of early disputes about pre-litigation conduct. This is obviously not a point confined to larger and more complex commercial cases, but may increase the risk in such cases of parties making strategic use of the potential to divert attention from the substantive claim.

Overall, we of course agree with the continuing desire to do more to encourage effective pre-action conduct, and in particular to encourage discussion between parties with a view to avoiding litigation where possible, or if not then at least narrowing and clarifying the issues in dispute.

We share the concerns expressed by others, however, that some of the measures presently proposed may be regarded by Business and Property Court users as unhelpful and indeed counterproductive. We therefore have reservations about a uniform approach. For the reasons we have given, we would encourage the CJC to give particular weight to the feedback from the industry bodies we have mentioned, on behalf of Business & Property Court users. The CJC will obviously be anxious to ensure that the needs of such users are sufficiently accommodated in any new pre-action framework.

