CIVIL JUSTICE COUNCIL

CJC Review of Pre-Action Protocols

Final Report Part I

August 2023

Contents

1. Executive Summary

1.1 This document is the first part of the Civil Justice Council's (CJC) final report into the role of pre-action protocols (PAPs). The Council commenced a review of PAPs in late 2020. Following a preliminary survey of views on PAPs, and the creation of a number of subgroups, the CJC published its Interim Report (IR) in November 2021. The consultation period closed in January 2022. The Council received a large number of responses (133 in total). The responses covered a full range of views about how best to reform PAPs and the merits of the reform proposals set out in the IR. Most of the proposals were supported by the majority of respondents who proffered a view on them, but whether respondents were in favour of the proposals, against them, thought they weren't ambitious enough, or were neutral, the working group (WG) found most of the comments very helpful. A number of the proposals in the IR have been revised to take account of feedback during the consultation.

1.2 Following the conclusion of the consultation period, the Council decided to bifurcate the process for concluding its review. The first phase (this report) would be dedicated to examining the role of PAPs in the civil justice system, and in particular the potential benefits of digitalising pre-action processes, and the place and content of the Practice Direction on Pre-action Conduct. The second phase, which is still to come, would be focused on potential reforms to litigation specific PAPs and/or the creation of new litigation specific PAPs.

1.3 PAPs have come to occupy an increasingly important role in the civil justice system. They provide norms of conduct for parties to prepare their cases for the court system, but also provide an opportunity for the parties to avoid the court system altogether - and the cost, delay and stress that goes with it - by reaching a mutually agreed resolution to their dispute. In the IR the WG sought to emphasise that proportionate court adjudication and mutually agreed fair dispute resolution were complementary rather than competing goals, and that PAPs can successfully contribute to both outcomes. PAPs are designed to get people to take legal rights more seriously, by requiring parties to engage with each other when a legal problem arises (and that includes businesses and public bodies responding to individuals and small businesses with genuine grievances), but they are also designed to help people understand that most legal disputes do not require court adjudication for the dispute to be resolved satisfactorily. Given that the overwhelming majority of cases settle without the

need for court adjudication, the potential to use the pre-action stage more effectively to resolve cases without the need for litigation at all, or at least facilitate narrower litigation focused on the real issues in dispute, must be substantial. Harnessing the potential of pre-action protocols to promote greater access to more affordable justice, especially through the use of digital portals, is a priority for the CJC.

1.4 The report discusses the potential for digital pre-action portals to make dispute resolution more accessible and more efficient, but also the risks if pre-action portals are not properly designed, robustly tested, and adequately maintained. It considers both the challenges of designing a general pre-action portal - enabling the parties to digitally complete the PAP steps required of them - and the development of fully integrated online systems which connect pre-action documents and exchanges to a guided settlement process or claim issue and filing systems. These two different kinds of portals present different challenges for those designing and administering them. Whatever type of portals are developed, and whether they are designed by government or private service providers, they should be accessible and workable for both professional court users and litigants in person, and digital assistance or paper-based alternatives must be available for litigants in person who are technologically disadvantaged either because they have limited access to technology or limited ability to use it.

1.5 Amongst respondents who answered consultation questions on digitalisation, there was general support for the proposal set out in the IR that there should be online pre-action portals whenever there is an online court process, and that the systems should be interlinked so that data supplied in the pre-action portal would be accessible to the court (subject to privilege constraints), but a number of respondents also raised concerns.

1.6 These concerns and the WG recommendations appear in section 2, but the summary outcome is that the digitalisation of pre-action processes has qualified support both from the respondents and from the WG itself, the crux of the qualification on full support being that any technological solutions must be properly resourced and not tend to exclude litigants in person (LIPs) or vulnerable/technologically disadvantaged people. Any implementation must address the more detailed issues set out in Section 2 and be based on an agreed and clear understanding of how far within the court process a particular PAP portal will extend, i.e., whether it will take matters as far as the completion of the PAP steps, or will go further into guided settlement systems and claim filing. The WG suggests a staged

approach, and not a 'big bang' all-in-one implementation if government decides to take the process further than a General PAP portal limited to completion of PAP steps. Implementation, therefore, would be done on a 'proportionate' basis where, in this context, 'proportionate' means both 'by stages' and 'in a way which progresses without giving rise to unacceptable risk of excluding some groups of people from the process without the simultaneous development of measures and features to alleviate that risk'. The approach suggested by the WG is intended, also, to reduce the risk of *perceived* failure by users including professional users/commentators which could undermine the system. For the avoidance of doubt nothing in this report would preclude private providers from developing new, innovative portals which provide pre-action dispute resolution services, in which use of those portal services is voluntary for parties to a dispute. The recommendations and guidance set out in this report are directed towards mandatory pre-action protocols (i.e. pre-action processes that can result in sanctions for non-compliance when litigation is formally commenced) regardless of whether parties comply with their protocol obligations through a mandatory portal or other method of communication. Formal oversight of voluntary portals will still be necessary, however, where rule makers deem participation in these portals sufficient to discharge a party's pre-action obligations before commencing court action. The interaction between these voluntary portals and digital court processes will also need to be carefully managed to ensure their inter-operability. It is particularly important that any limitations in the technology used in portals do not undermine the functionality of digital court processes.

1.7 Other key recommendations of the WG, include:

i. The overriding objective should be amended to include express reference to the need to comply with, and enforce, PAPs.
ii. For disputes currently subject to the Practice Direction on Pre-action Conduct, there should be a new General Pre action Protocol as a PD to CPR Part 1 and a new PAP for small claims worth £500 or less. The second phase of this review will consider whether any other litigation currently covered by the PD-PAC should be the subject of a bespoke PAP, including high value commercial litigation.
iii. The new General PAP should include:
    - A requirement for defendants to provide an acknowledgement of a pre-action letter of claim within 21 days which confirms whether the defendant is the right entity for

the claim, the details of any insurer on risk for the claim, and what additional information the defendant needs to provide a full reply to the pre-action letter of claim. The defendant must provide a full response within 90 days of receipt of the pre-action letter of claim.

- Further guidance on the meaning of "key documents" that must be disclosed by the parties.
- An obligation to engage in pre-action dispute resolution, with a default obligation to hold a confidential pre-action meeting if the parties cannot agree on an appropriate dispute resolution process.
- An obligation to complete a joint stocktake report setting out the issues on which the parties agree, the issues on which they disagree and the reasons for the disagreement, and the documents the parties are still seeking disclosure of.
- Clearer guidance, especially for the benefit of LIPs, about the role of PAPs in the litigation process, the need to act reasonably and proportionately in engaging with PAPs, and the consequences of failing to do so, including potential criminal consequences for dishonesty.

iv. There should be clearer processes and guidance for raising and resolving disputes about compliance with PAPs.

v. The procedures for costs only proceedings under CPR 46.14 should be streamlined to allow for quicker summary or provisional detailed assessment. Whether there should be a new procedure for resolving costs liability disputes for claims that settle at the pre-action stage should be decided on a litigation specific basis – i.e., it should be introduced in areas where there is a likely need for such a procedure.

vi. Responsibility for governance of pre-action portals should be given to the new Online Procedure Rules Committee, and HMCTS and MOJ should explore the feasibility of developing a general pre-action portal (limited to carrying out the PAP steps in the General PAP and Lower Value Small Claims PAP). Ideally, such a portal would be linked to relevant existing general claims portals including Online Civil Money Claims (OCMC) and Damages Claims Online.

vii. Parties who have complied with the General PAP or the Lower Value Small Claims PAP should be allowed to rely on their pre-action letters of claim and replies, and/or joint stocktake report, as their formal pleadings in litigation between them. Parties would be

free to file conventional pleadings if they prefer that option, and the court would have discretion to order conventional pleadings or further particulars where appropriate.

1.8 A full list of the WG's recommendations can be found in Section 9. A number of the WG's recommendations took account of, and are intended to contribute towards, making dispute litigation greener and reducing the carbon footprint of litigants and those representing them.[1] Greater digitalisation of the pre-action space, including permitting parties to engage in dispute resolution process virtually rather than in person, will reduce the need to travel and, if managed properly, can reduce the volume of paper used in managing disputes.

1.9 As stated in the IR, readers should bear in mind that the CJC is not formally responsible for the drafting of pre-action protocols; this is the Civil Procedure Rule Committee's (CPRC) responsibility. The CJC is responsible for making policy recommendations about the operation and future direction of civil justice in England & Wales, including the role of pre-action protocols. However, to assist interested persons understand how these principles might look in practice, in some instance the WG has developed possible text that could be used when revising the pre-action protocols. Whether the CPRC adopts that text, and the extent to which it does so, is ultimately a matter for the CPRC.

1.10 I would like to thank all the members of the main WG for contributing to this report. Many members split into small groups to review the large number of consultation responses and suggested ways of reconciling respondents' views and developing and revising the proposals in the IR. A number of WG members also contributed to the drafting of this report. I would particularly like to thank Masood Ahmed, a former member of the CPRC, who did the principal drafting for the draft General PAP and Lower Value Small Claims PAP at Annex 2 and 3. Finally, I would like to thank the CJC Secretariat, particularly Leigh Shelmerdine and Amy Shaw, for all their administrative support for the WG and in preparing this report.

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[1] In the drafting of this report the WG was provided with the Greener Litigation Pledge and recommended pre-action wording on sustainable conduct available at https://greenerlitigation.org/

Process for producing this final report

1.11 The Civil Justice Council commenced a review of the PAPs in late 2020. The Council established a main working group (WG) and three sub-committees to deal with personal injury related PAPs, housing related PAPs and the Judicial Review PAP respectively. The members of the main WG and terms of reference for the review can be found in Annex 1. The CJC also conducted a preliminary survey to gauge court users' views of PAPs. A summary of the results of this survey, and a full list of respondents, can be found in Annex 2 of the IR. The WG published its IR on 15 November 2021 which is available on the CJC website.[2] The consultation period was initially 6 weeks, but this was extended for a further 4 weeks following requests from representative organisations for more time to formulate their responses to the consultation.

1.12 The Consultation closed on 21 January 2022. There were 133 responses in total. Most respondents made their comments through the online form, though a number of respondents also provided separate submissions as an alternative to, or in addition to, their answers to the online form. 92 respondents responded on behalf of their organisation, and 41 responded in an individual capacity. We received responses from virtually every segment of the civil justice system: lawyers; representative lawyer organisations (both barrister and solicitor); advocacy organisations and advice centres, representing a large number of different types of court users; insurers; ADR providers including Ombudsmen; legal technology companies; judges; academics; litigants in person, and a number of "repeat player" litigants such as NHS Resolution. 48 (36%) respondents stated that they represented defendants, 35 (26.3%) respondents stated they represented claimants, and 50 (37.5%) respondents did not nominate any interest. All public consultation responses have been published on the CJC website.[3]

1.13 In very broad summary, consultation responses spanned the full spectrum from those strongly in favour to those strongly against the proposals outlined in the IR. Criticisms of the proposals included that they were too radical and unnecessary, too conservative and too

[2] https://www.judiciary.uk/wp-content/uploads/2021/11/CJC-PAP-Interim-Report.pdf
[3] File download available at https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/pre-action-protocols-working-group/

lawyerly or insufficiently imaginative,[4] too prescriptive and too vague. Most proposals received support from a majority of respondents who expressed a view. We should, however, sound a word of caution regarding references to majority and minority positions. A substantial number of consultation responses took the form "We support this proposal, but…" or "We do not support this proposal, however we do accept…". For some proposals, a significant number of respondents took a neutral position. There were also some responses from representative organisations which candidly acknowledged that their members were divided over some proposals and requested that the CJC provide more time for responses and/or more detail regarding them.

1.14 The WG was expanded to welcome new members to work on this final report of stage 1. William Wood KC, formerly the ADR member of the CJC, joined the group, as did Brett Dixon who became the new Law Society representative. The WG also received valuable input from James Walker, the CJC small and medium-sized enterprises member, when formulating its recommendations on digitalisation of PAPs.

1.15 The WG wishes to stress that given the breadth of issues covered in this report, we have endeavoured to keep it as short as reasonably practicable. The report sets out our recommendations and the reasons for adopting them. It does not recapitulate all the arguments for and against particular proposals, which are discussed in some detail in the IR. Some proposals are discussed in more detail than others especially where they have been modified in light of feedback during the consultation. We have cited consultation responses sparingly. This should not be taken to mean that the responses were of limited assistance. On the contrary, the WG found the responses extremely helpful, and they heavily influenced the final recommendations made in this report. It may be helpful, therefore, to set out a general methodology in producing this report. Where there was overwhelming support for a proposal, we decided to recommend its adoption. Where there were majorities in favour of a particular proposal the WG set about exploring ways of reconciling majority and minority views so that the proposal could be taken forward in a way that took account of the

[4] One criticism we thought was particularly interesting was the suggestion that the phrase "pre-action" was to bound up with going to court and therefore particularly intimidating to many individuals and small businesses, who would prefer some form of dispute resolution hub or service to resolve their disputes. The phrases pre-action and PAPs have now become well entrenched in legal parlance that changing them may prove difficult, but it is at least worth thinking about whether a more neutral title "dispute resolution protocols" might encourage more people to engage with them. A general dispute resolution service for individuals and small businesses, similar to that provided by ACAS for employment disputes, would require substantial investment but is undoubtedly a proposal worth pursuing if resources are available.

concerns of the minority and qualifications expressed by those who supported the proposal. For some proposals, opposition was concentrated amongst those working in specific types of litigation. This opened up the possibility of creating exceptions or introducing alternative approaches for some categories of litigation beyond those already flagged in the IR. In most areas, however, the WG has focused on trying to reconcile majority and minority views, which is why a number of proposals have been significantly modified from their original form. In cases where there was strong opposition to proposals the WG either went back to the drawing board or elected not to pursue the proposal further.

1.16 There are some exceptions to this general methodology. Given the systemic nature of civil justice, concerns about some proposals can be ameliorated by changes to other rules. In some cases, the WG has not adopted proposals as originally set out, not because there was not a majority in support of them, but through a desire to develop a set of proposals that balanced the objectives of the reforms with concerns about their combined effect.

1.17 Some respondents raised concerns that the reform proposals may have unintended consequences. All reforms carry this risk. However, it must also be squarely acknowledged that the current system already produces some severe consequences that are not intended. The Woolf Reforms, the Jackson Reforms, the Briggs Review and Jackson Supplementary Report on Fixed Costs are all testament to the fact that the system of civil justice in England & Wales continues to resolve legal disputes at very high cost, often disproportionately to the value of what is at stake, and this is the case even where the litigation does not go to trial or result in any judgment. What impact this has on those who have a legal problem but fear that the costs and stress of litigation are too high to pursue (or defend) their matter is necessarily speculative, but it is a very real unintended consequence of an inaccessible justice system. Given the overwhelming majority of cases settle without the need for court adjudication, the potential to use the pre-action stage more effectively to resolve cases without the need for litigation at all, or at least facilitate narrower litigation focused on the real issues in dispute, must be substantial.

Implementation, data collection and evaluation

1.18 The WG outlined in the IR what successful implementation of the reform proposals might look like, noting that this is one area where defining success is much easier than measuring it. Firstly, the available data on the operation of PAPs is limited, in part because a major

purpose of PAPs is to encourage parties to resolve disputes without having to enter the court system at all. This is one area where the digitalisation of PAPs and linking them to online court processes has real potential to improve our knowledge base of how PAPs are working in practice. The digitalisation section considers how to go beyond just making basic claims data available through pre-action portals, but also critical settlement information available to users and researchers as well.

1.19 Measuring success cannot be done through quantitative data alone however. As observed in the IR, while more proportionate dispute resolution and litigation is a central objective of PAPs, English law adopts a definition of proportionality that is not susceptible to quantitative measurement.[5] Moreover, promoting consensual dispute resolution cannot be measured in settlement rates alone. If litigants are to accept settlement outcomes as legitimate, any agreement needs to be perceived as fair, be grounded in a clear understanding of the parties' rights and obligations, and parties need to feel they had some meaningful control over the process. For these reasons feedback from all parties with an interest in the civil justice system, such as through the PAP survey that was conducted at the beginning of the Council's review, will continue to be crucial in evaluating how PAPs are working in practice including the impact of any changes that come out of this review.

1.20 Conscious of the limitations in our knowledge base, and aware of the crucial gateway role that PAPs play in all civil litigation in the courts in England & Wales, the WG has adopted a cautious and incremental approach to most of its recommendations. Incremental development, and introducing reforms for certain types of litigation in the first instance, will allow time for those rules to bed down, and their impact assessed, before deciding whether to expand them to other areas. Nonetheless, some of the areas in which some respondents have urged caution, like digitalisation, are also the very areas that offer the greatest potential to improve our understanding of how PAP processes are working in practice. It is entirely appropriate that a cautious and incremental approach is taken to digitalisation of PAPs, but the need for that process, and its potential value to all interested parties, is beyond dispute.

[5] CPR 44.3(5).

A note on the court's powers regarding pre-action conduct

1.21 We think it may also be helpful to include a brief word on the court's existing powers to regulate pre-action conduct. While the report recommends further incorporation of PAPs into the CPR, nothing in our report is designed to extend the court's powers or expand the court's role in regulating pre-action conduct beyond the existing legal framework.

1.22 The court has limited powers to regulate pre-action conduct before proceedings have been commenced. These powers are expressly set out in primary legislation (though the power was often first established by the court exercising its inherent jurisdiction), such as the power to order pre-action disclosure,[6] civil search orders[7] or interim injunctions including freezing orders.[8]

1.23 As set out in the IR, the steps that parties are required to take prior to commencing legal proceedings were significantly expanded with the introduction of PAPs following the Woolf reforms. The steady proliferation of PAPs since then has only heightened the importance of the pre-action phase for parties contemplating litigation in the courts. A number of these PAPs have been integrated into the CPR itself and can fairly be described as a formal extension of the litigation process. Those rules include, for example, rules regarding costs for claims that are settled at the pre-action stage. Other PAPs remain guides to sensible pre-action conduct that parties are *expected* to follow *if* proceedings are subsequently issued. Some doubts have been expressed about the vires of rules regulating the conduct of parties who resolve or do not proceed with threatened legal action given the CPR only applies to court proceedings.[9] The recent powers provided to the OPRC concerning pre-action conduct are arguably equally limited; they do not provide a clear basis for pre-action jurisdiction

[6] Civil Procedure Act 1997, s 8; Senior Courts Act 1981, s 33 and County Courts Act 1984, s 52.
[7] Civil Procedure Act 1997, section 7.
[8] Senior Courts Act 1981, section 37.
[9] Civil Procedure act 1997, s.1.1. The Civil Procedure Rule Committee has power to make rules to govern the procedure in the civil courts.

comparable to that set out in section 37 of the Senior Courts Act 1981.[10] For this reason the IR suggested that to put the vires of pre-action processes beyond doubt, provision would need to be added to the Civil Procedure Act 1997 to enable the CPRC to issue rules governing pre-action conduct or to provide for pre-issue settlement schemes. However, no-one seriously questions the jurisdiction of the court to take account of pre-action conduct, including compliance with relevant protocols, when managing proceedings *that have been commenced*. The court can already make case management directions that take account of PAP compliance, costs orders that reflect the degree of compliance with PAPs, and stay orders to allow for completion of steps that should have been taken at the pre-action stage. Whether the court's powers do or should include striking out a claim (or defence) for non-compliance is considered in section 5 on sanctions.

1.24 None of the recommendations in this report are intended to alter the existing framework for regulation of pre-action conduct; namely, the court only has jurisdiction over pre-action conduct where that is provided for in primary legislation; where there is a dispute about costs for a claim that is settled at the pre-action stage, or where a legal claim is issued by the parties. Should any future challenges to the vires of aspects of PAPs be made, this may have implications for some of the recommendations in this report if they are not supported by primary legislation. Whether the courts choose to use their inherent jurisdiction to expand the orders they can make before any claim is issued – as they have done in the past - is properly a matter for the courts. The WG can only stress the crucial role that PAPs have come to occupy in civil litigation in England & Wales.

1.25 The practical question remains how to replace the PD-PAC, which is currently a free-standing Practice Direction within the CPR. One possibility would be to simply replace it with a PD-General PAP. This could be incorporated into the formal scheme of PDs, as either a new PD annexed to either CPR Pt 1 or Pt 3. Annexing a new PD to a specific part of the CPR would not alter its nature or status, it would remain equivalent in effect to the PD-PAC. Annexing

[10] Online Procedure Rules may only take account of steps taken prior to the commencement of online proceedings. They are thus comparable to the position under the CPR in respect of the PAPs: Judicial Review and Courts Act 2022, s.24. and its explanatory notes, which make the point that it 'will enable the Online Procedure Rule Committee (OPRC) to have greater flexibility in relation to pre-action behaviour by prospective litigants, by allowing Online Procedure Rules to refer to things done by third parties rather than having to spell out the details in the Rules themselves.'. See Explanatory Notes to section 24, paras. 285-287. Also see *Belsner v CAM Legal Services Ltd* [2022] EWCA Civ 1387 at [15], '. . . *Section 24 of the Judicial Review and Courts Act 2022 will allow the new Online Procedure Rules (sic) Committee (OPRC), in due course, to make rules that affect claims made in the online pre-action portal space. It would obviously be more coherent for the OPRC to make all the rules for the online pre-action portals and for claims progressed online.'*

the current PD to a specific provision of the CPR was initially intended when the idea of such a PD was raised prior to the PD-PAC's introduction in 2009.[11] The WG favours the latter approach, for while it would not formally alter the status of PAPs, it would have an important symbolic effect by linking the PAP to the rules themselves. This would emphasise their importance and make them easier to locate for parties unfamiliar with the rules. There were mixed views on the WG as to whether the PD should be attached to CPR Pt 1 (the Overriding Objective) or Pt 3 (the court's case management powers). Ultimately, it concluded that it would be more appropriate to attach the PD- General PAP to CPR Pt 1 given the WG's recommendation to amend the Overriding Objective to expressly refer to PAPs, and the important role PAPs perform in facilitating just dispute resolution at proportionate cost.

The role of PAPs

1.26 Although a relatively new feature in the litigation landscape, PAPs have come to occupy a crucial space in the civil justice system. In our IR we stated that the role of PAPs was to provide sufficient notice and information to parties to enable them to meaningfully engage in formal or informal dispute resolution processes, and where a full resolution is not agreed, to help narrow the dispute so that any subsequent litigation is limited to resolving those issues that need to be determined by the court. In this way PAPs help foster fair dispute resolution without the need for litigation and facilitate more proportionate litigation when litigation is necessary. For PAPs to fulfil these objectives they need to be accessible to all, set out clear, proportionate steps towards dispute resolution and effective case management, and be consistently followed by parties and consistently enforced by the courts.

1.27 Almost all respondents agreed with this description of the role of PAPs. This is demonstrated by the overwhelming support for the proposal to include express reference to PAPs, and the need to comply with them, in the Overriding Objective, and for the PAPs to make explicit

[11] IR Appendix 3 'A Brief History of Pre-action Protocols', para [19].

reference to the Overriding Objective.[12] There were similarly high levels of support for making compliance with PAPs mandatory, with exceptions for urgent cases. A number of respondents rightly observed that PAPs were already de-facto mandatory due to the expectation they would be complied with if litigation is commenced. Almost all respondents supported the need for an exception in urgent cases. A number of respondents suggested there should be a broader range of exceptions than those listed in the draft General PAP. For example, the Association of Personal Injury Lawyers (APIL) suggested that urgent cases were not just linked to the expiry of limitation periods, and could include such things as the need to obtain an interim payment due to lack of capacity. We agree that there may be some contexts in which urgency should be defined more broadly. However, save for what is set out below about risks to party's health and welfare, we believe a more flexible definition of urgency is better dealt with through suitable amendments to litigation specific PAPs.

1.28 Where PAPs have not been followed because of the urgent need to file a claim to avoid the expiry of a limitation period, the current PD-PAC requires parties to seek a stay of proceedings to comply with a PAP. The WG believes this guidance should remain.

1.29 One important issue raised by respondents was whether there should be an exception to mandatory compliance with PAPs for vulnerable parties. On balance, we think that such an exception is undesirable. A separate consultation question was directed towards improving PAPs for vulnerable parties. Most respondents' attention was directed to improving the language of PAPs (though many recognised the language used in PAPs was usually more accessible than the language in the rules) and better signposting, including through appropriate links in online portals. Very few respondents suggested that vulnerable parties should be exempt altogether from PAPs. Secondly, we believe that the information collected at the PAP stage, particularly through online portals, can be an effective way of identifying vulnerable parties at the earliest possible opportunity. The WG believes that all online portals should have a question asking parties whether they consider themselves to be vulnerable and the nature of that vulnerability. That question can pick up the non-exhaustive

[12] The IR noted that CPR1.1(2)(f) could be amended to include reference to 'enforcing compliance with rules, practice directions, orders and any applicable pre-action protocol' as part of the court's obligation to deal with cases justly and at proportionate cost. Similarly, the obligation to actively manage cases in CPR 1.4 could include in (2)(a) 'encouraging the parties to co-operate with each other in the conduct of the proceedings and in complying with any applicable pre-action protocol'. The precise wording of any amendments is a matter for the CPRC, but the WG believes the amendments should emphasise the need for parties to co-operate with each other by complying with PAPs and the need for the courts to enforce PAPs.

definition of vulnerability used in Practice Direction 1A. Where parties answer in the affirmative, the portals should then provide additional signposting information about support that may be available to those vulnerable parties. Thirdly, to the extent that vulnerable parties may face challenges in complying with PAPs, the WG's suggested approach to sanctions for non-compliance (which endorsed the approach outlined by the Court of Appeal to CPR 3.9 in *Denton*)[13] would require the court to take into account the reasons for PAP non-compliance, and all the circumstances, in deciding what sanction, if any, should be imposed. A party's vulnerability will invariably count as a relevant circumstance that the court must take into account when exercising its discretion.

1.30 While the WG does not support a blanket exemption for vulnerable parties from having to comply with PAPs, it believes it would be desirable to include an express acknowledgement in the PAP that the 'urgency exception' includes cases where there is a serious risk to health or welfare of a party without urgent court intervention.

Recommendations:

1.31 The Overriding Objective be amended to refer to the need for compliance with, and enforcement of, PAPs.

1.32 All PAPs should make explicit reference to the Overriding Objective, and specifically the parties' obligation to co-operate.

1.33 Compliance with PAPs be made formally mandatory. Urgent cases should be exempt from this requirement. Urgent cases should include, at a minimum, situations where the limitation period is expiring, where urgent injunctions are being sought and expressly exempt claims where there is a serious risk to the health or welfare of a party without urgent intervention of a court.

1.34 All online pre-action portals should include a question asking parties about their vulnerability. Where parties identify themselves as vulnerable, additional information should be provided to those parties identifying support that may be available to them.

[13] *Denton v TH White [2014] EWCA Civ 906.*

2. PAPs in a Digital Justice System

2.1 The IR acknowledged that any discussion about the accessibility of the justice system in the 2020s must begin with a discussion about access to technology. Lord Briggs has observed that one of the aims of the Online Court he proposed in his Civil Courts Structure Review[14] was to "liberate court users from having to read, learn or understand [procedural rules]" because "users (lay as well as professional) will only have to obey one rule: do what it tells you to do on the screen."[15] This ambition could apply equally to pre-action exchanges as it does to the conduct of litigation. Not only do online portals make communication and file storage easier and cheaper (and hence more accessible) they can also provide real time information to parties about the process; what each stage consists of, where they are presently up to, how long they have to complete a stage, and what happens next etc. The availability of pre-action online portals is currently patchy but there are well known successful examples,[16] and recent initiatives,[17] as well as a significant number of online ombudsman schemes[18] and industry sponsored, and regulator certified, online dispute resolution platforms.[19] There is also an increase in private providers creating online complaints tools to help consumers solve their disputes with a range of manufacturers and service providers from phone companies to banks and others.[20] The most sophisticated portals can even assist parties reach an agreement by providing algorithms that ask the

[14] https://www.judiciary.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf
[15] Lord Briggs, Foreword to A Higgins (**ed**) *The Civil Procedure Rules at 20* (OUP 2020).
[16] Notably https://www.claimsportal.org.uk/ is an independent portal led by a balanced board of compensators and representatives of the claimant community as the mandatory mechanism for making claims that fall under the Pre-Action Protocol for Lower Value Personal Injury (Employers' Liability and Public Liability) Claims and Pre-Action Protocol for Lower Value Personal Injury Claims in Road Traffic Accidents.
[17] See in particular https://www.officialinjuryclaim.org.uk/ for whiplash claims.
[18] See for example https://www.financial-ombudsman.org.uk/contact-us/complain-online (Financial Services Ombudsman) and https://www.ombudsman-services.org/sectors/energy (Energy Ombudsman)
[19] See for example https://www.aviationadr.org.uk/ which is accredited by the Civil Aviation Authority.
[20] One example is the partnership between Resolver UK https://www.resolver.co.uk/ and a comparison website. Some technology companies operate their own dispute resolution processes to resolve complaints between buyers and sellers using their platforms.

parties to rank the issues in dispute that matter to them most, which are then used to generate potential settlements that the parties can accept or reject.[21]

2.2 There was general support for the notion that there should be a digital PAP portal or portals for any digital court processes amongst those who addressed the consultation question on digitalisation. A significant number of those who supported the proposal and of those who were against the proposal recorded their support or opposition to the proposal without giving reasons. A range of concerns were raised which the WG felt would have to be clearly addressed if the idea were to be taken forward. The group felt, however, that if such concerns could be resolved, then digitalisation has the potential to make the completion of pre-action process i.e., the PAP steps required of the parties from exchange of pre-action letters of claims and replies up until the stocktake, more streamlined. Whether a digital PAP process should go further and connect fully into the court filing system and claims issue is a more complex question the answer to which would depend on the quality of implementation, resourcing, and specificity of tailoring of the PAP portal to the type or category of claim involved.

2.3 The WG felt that before any digital PAP system is implemented there must be clarity as to its core purpose. If it is to be a form of integrated system which connects pre-action documents and exchanges to a guided settlement process or claim issue and filing systems such as CE File, then the tailoring of the PAP system is needed so as to work with the expected 'work streams' and case-types rather than be a single generic system.

2.4 If the providers of such portals could be encouraged to adopt common data standards, disputes that remain unresolved after the relevant portal's PAP-complaint processes are completed could then progress seamlessly – via Application Programming Interface (API) technology – to online courts.[22] Parties could, for example, be spared having to draft statements of case or re-entering the facts of their dispute. This fully integrated model may require significant resources to fit the PAP digital front end to the specific nature of any given legal area of work or case type, and the API technology would be critical to its success or failure. Given the resources required to create and maintain pre-action portals that are

[21] See e.g., https://rechtwijzer.nl/

[22] This is part of the Master of the Rolls' vision for civil justice as articulated in numerous fora: see e.g. The Right Hon. Sir Geoffrey Vos, Master of the Rolls, London International Disputes Week 2021, 10 May 2021 p3; 'Mediated interventions within the Court Dispute Resolution Process', 28 October 2021, p4, his speech at the London International Disputes Week 2021 and in his lecture to the GEMME conference in Dublin.

fully integrated with digital court processes, it is likely that they would have to be funded by industry.

2.5 By contrast where a PAP portal is limited to completion of the relevant pre-action steps, (exchange of relevant information; dispute resolution negotiations (which can occur online or offline) and the stocktake), the need to be very tailored is less pressing and a case is more easily made for such a more general form of PAP portal. Such a generic PAP portal could even be integrated into existing general claim portals such as OCMC in a relatively straightforward way. It may be more possible for the Ministry of Justice or HMCTS to directly create and maintain such portals.

2.6 It was the view of the WG that the focus of any further implementation of mandatory PAPs should proceed in line with this second alternative – completion of the main PAP steps only. Moreover, whether pre-action portals are developed by government, private providers, or a public & private partnership, the operation of those portals, including those already in use, should be kept under regular review and supervised by Government so as to ensure they are bedding down appropriately. This will ensure that the resources devoted to implementing any guided settlement systems are built on a solid foundation of an established and operational general pre-action portal. The WG wishes to stress, however, that while the experience of operating a limited general pre-action portal will be extremely valuable in guiding the creation of further portals, grafting a generic PAP portal on to a range of specific guided settlement processes should be avoided. It is particularly important that the technological limitations of any mandatory pre-action portal do not end up dictating the content of pre-action rules in order to accommodate the technology.

2.7 If Government decides to establish further mandatory pre-action portals for specific case types, the question will arise as to which case types should be included and how. Further consultation on this question would be required. It would be undesirable to press ahead based on assumptions as to what areas ought to be included, given the expense and 'failure product' which could be produced by an implementation of guided settlement processes which is not based on a mature consideration of what is needed and how it can be done, informed by expertise from within the professional groups and others dealing with specific claim types in 'the real world'. The WG noted that much personal injury work has already had a guided settlement approach and it is possible that what remains are either case types that do not have guaranteed insurer representatives, or clinical negligence which does but

which has other sensitivities and where government departments are involved. If one steps away from personal injury, then the work involves lower case volume and hence limits both the risks and the rewards potentially available from the system in cost and overall efficiency terms. A very tentative view was taken that very low-end clinical negligence, in the simplest of cases, might be an area suitable to be included in a guided settlement mechanism but it was noted that the work and care required in its implementation even at that level would be challenging.

Funding, Testing and Maintenance

2.8 Whether it be integrated systems which connect pre-action documents and exchanges to a guided settlement process and claim issue and filing systems, or more general pre-action portals to allow completion of PAP steps with the capacity to transfer open pre-action documents to the court if need be, such portals need to be robust and properly tested. Underlying some of the responses both for and against the proposal were concerns about how reliable online portals might be in the absence of adequate funding (for example the Property Litigation Association). Some respondents highlighted deficiencies in the Online Injury Claim (OIC) which in their view hindered, rather than promoted access to justice and emphasised the need for proportionate introduction of digitisation.

2.9 This need for robustness informs the WG's view that the portal system should be allowed to have a solid and 'bedded down' foundation in the system before advances are made, if desired, to add guided settlement systems in specific case-type areas. Permitting the proper bedding down of a general pre-action portal, limited to the pre-action steps set out in the protocols, would also enable a review of the extent, if any, to which the system has achieved the aim of not impairing access to justice for some groups of users such as the digitally disadvantaged or sensory impaired community. Notably the 'Briggs' Civil Court Structure Review envisaged systems able to cope with multiple languages and it would be an important step towards reducing risk of exclusion if any portal had interface language options, display or text adaptation options for neurodiverse users or others with various types of sensory difficulties. Implementing such a system would encourage more users to opt to use the portal even where paper options are available.

2.10 The WG wishes to stress that while these recommendations relate to digital portals that are *mandatory* for parties to use before commencing court action, much of the advice set out

here about the accessibility of portals, and the need to keep their operation under review by Government, applies equally to the operation of privately developed portals that parties can use voluntarily.

2.11 An important regulatory question remains as to the status of voluntary private portals if the parties participate in them but fail to resolve their dispute and then wish to proceed to court. Should providers of private portals wish to market their portals as being sufficient to discharge parties' pre-action obligations before commencing litigation – and therefore "court ready" without the need for additional steps beyond use of the portal – then it follows that such portals would need to be subject to some form of regulation to ensure the processes do in fact meet of the objectives of pre-action protocols as set out in this report; specifically facilitating fair settlements and proportionate litigation. While it would not be necessary for digital portals to be identical in every particular to the content of the pre-action protocol which would otherwise apply to the parties' dispute, the portals would need to cover the main PAP steps. Otherwise, parties would be free to contract out of a pre-action protocol whenever it suited them. Given PAPs serve important public interests, such as the promotion of proportionate litigation and use of litigation of last resort, it is not appropriate to allow parties to contract out of pre-action processes whilst still demanding access to the court system. To that end, the WG believes that any private portal marketing itself as "court action ready" would need to be formally certified to ensure that minimum standards are met.

2.12 A certification process would be equally critical to ensure that portals are technically compatible with digital court processes, so that documents exchanged in the portal can be accessed and utilised at the court stage. Any direct connectivity between the portal and the court system itself must be by way of APIs which prevent 'contagion' if the private portal provides functionality which has not been road-tested for compatibility.

Linkage to Court Systems and Protecting Confidential Discussions

2.13 A number of respondents that were broadly in favour of digitalisation expressed concern that the link to existing systems, such as CE-filing or any new systems, should be flexible and not constrain the information exchange between parties. In particular, concerns were raised about the need to protect privileged material including without prejudice communications.

The WG wishes to reiterate its observations in the IR that digitalisation should facilitate dispute resolution processes; parties would not be forced to engage in online dispute resolution and would be perfectly free to engage in confidential off-line negotiations. The question which the WG considered, and on which there were a range of views, was whether online portals could adequately facilitate confidential communications in a way that avoids inappropriate disclosure and/or use of the communications. Some respondents' concerns about privilege tended to conflate the challenges faced by litigants with limited or no understanding of without prejudice (WP) law, and the ability of digital systems to securely store without prejudice communications. In relation to the former, the challenge faced by litigants is just as acute when using paper processes as it would be using digital portals. Online portals might even have a didactic effect, by prompting litigants choose how to designate their correspondence, and explaining the status of their and their opponent's communications.

2.14 On the other hand, the risks of inappropriate disclosure of WP material might be somewhat greater for a digital system due to the ease with which WP material could be uploaded in bulk to a file accessible by an inappropriate party or the court or mediator, if the process was a simple 'upload' option. In other words, it is easier to send emails than post to the wrong person, and that risk must also be a live one in the case of digital portals. A complicating factor which would increase the implementation cost and difficulty of using the system is that where WP correspondence passed between Party A and Party C, with a view to settling disputes between them in a claim where there are three or more parties (e.g., apportionment between two defendants, or agreement over an issue in the case tactically for the common benefit A and C as between them and Party B) there would need to be protections against WP correspondence between A and C being open to being accessed by B. On the other hand, it is worth observing that nearly all dispute resolution portals involve three or more parties; at least two parties to a dispute and a third-party mediator, ombudsman, or tribunal. The functionality of these portals depends on software that allows secure communications between two parties that are not visible to others.

2.15 There appear to be three types of solution to the WP correspondence issue. The first possible solution is that such correspondence should only take place outside the portal. The OIC and the older PI portals all use that approach.

2.16 The second possible approach to WP correspondence would be to provide an option when a document is uploaded, or any communication is sent via the system to another party, for it to be flagged or marked as WP (or some similar more accessible phrase for LIPs). This information would then be sealed in a 'digital brown envelope.' However, this does lead to a risk of inadvertent disclosure through mislabelling.

2.17 A third possible approach is to adopt a digital version of the default rule proposed in the IR; that all dispute resolution discussions are automatically treated as WP, unless parties choose to designate their correspondence in some other way. This suggestion is consistent with the existing WP law which provides that genuine efforts to compromise disputes are automatically treated as without prejudice, whether or not they are designated as such, and that conversely, merely applying the label without prejudice will not make a communication privileged.[23] For this solution to work a portal would need to be able to separate pre-action letters of claim and replies (which are not privileged and should be available to the court) and the stocktake report (which would be available to the court to assist it making case management decisions) from confidential settlement discussions as part of dispute resolution. It also depends on litigants being able to distinguish between the three different PAP steps and the documents that comprise each step. This too raises a risk of misunderstanding and mislabelling, as with option 2, albeit at a smaller scale as it does not require every communication to be individually classified.

2.18 Some members of the WG favoured option 1 because it was clearly the safest way of avoiding inadvertent disclosure, whereas some members of the WG favoured option 3 because it opened up the possibility of using portals to engage in dispute resolution discussions with all the efficiency benefits that go with it. The downside of option 1 is that it would create online portals with a functionality gap in them; at a key stage of the process, the parties would be forced offline to conduct dispute resolution discussions.

2.19 On balance, the WG believes that parties should always be free to conduct dispute resolution discussions offline, but that provided the technology is secure and affordable, portal developers should be permitted to develop secure communication channels that

[23] *Bradford & Bingley plc v Rashid* [2006] UKHL 37.

allow the parties to conduct confidential negotiations with each other *through* their platforms.

2.20 A point on which there was consensus is that whether confidential negotiations are held offline, or via the portal, they should ultimately be stored or uploaded into a secure part of the portal (the digital brown envelope) and available to the court once the substantive dispute is resolved. This would be similar to the system adopted in the Senior Courts Costs Office for costs assessment whereby offers are filed in a sealed envelope along with the other papers for assessment and are looked at by the court only after decisions are made such as on provisional detailed assessment. By that stage no harm can be done by inadvertent disclosure. Those are now filed electronically, apparently without any major problems.

Digitalisation and Data Collection

2.21 Digital systems offer opportunities for users, law and policy makers and academics to access rich data sets on behaviours of users of the systems. In the context of digital pre-action portals this can provide invaluable insights into who is, and by extension who isn't, using pre-action portals and statistics on dispute resolution e.g., time taken to resolve disputes, stages at which disputes are resolved etc. All data processing needs to comply with relevant privacy laws but the WG also wants to highlight a potential tension between transparency and the commercial interests of any private providers designing and maintaining pre-action portals. Part of the Master of the Rolls' vision for digitalisation of the justice system, which is already taking shape, is that many pre-action portals would be created and maintained by private providers. These portals must be subject to some regulatory oversight (see Governance below), and common data standards will be critical if the portals are to be effectively linked with online court processes. Nonetheless, some design variations are inevitable given private providers are likely to take different approaches to their portals. Information that is genuinely commercial in confidence should be protected, but the WG would strongly recommend that any pre-action portal should adopt a commitment to transparent data sharing.[24]

[24] Relatedly, the WG notes the need for transparency from HMCTS about the operational aspects of their digital platforms and any changes to them. This will make it easier for court users, especially professional court users, to adapt their systems accordingly, but also allow researchers (both government and independent) to research the effects of, and changes to, digital processes.

2.22 Another idea that the WG considered was whether portals could be used to collect data on settlement proposals for use by researchers *after* the case was finally resolved. Ultimately, a policy decision needs to be made as to how 'visible' to others the process of negotiation ought to be: it may be desirable that the history of the negotiation be available after the event so that processes of settlement and settlement rate data can facilitate research and better understanding of those processes in the future. This data collection would, of course, require party consent but where negotiations are uploaded to portals via any of the options outlined above, the possibility of making this information available to researchers after the parties have resolved their dispute, is worth exploring further.

Litigants in Person and Vulnerable or Technologically Disadvantaged People

2.23 A number of respondents stated that pre-action portals should not only be accessible to LIPs but also provide simplified processes. However, several respondents noted that any portals may be inaccessible to some LIPs who may not have access to technology or have sufficient skill to manage online claims, and that paper-based alternatives must remain available for such litigants. Others raised the need for digital support for users to prevent digital exclusion. The positive value of being able to choose between online portals and paper processes was stressed by some respondents including a litigant in person. The potential for useful signposting and links to guidance and ADR solutions, as well as cross-referencing relevant rules, was highlighted by some respondents. However, it was notable that although a number of responses referred to LIPs and vulnerable parties, and those lacking access to technology, there was no mention of vulnerability in the narrower sense now being addressed by the courts in PD 1A. Nonetheless the WG was of the view that any system must ensure that vulnerable litigants, in all senses of that word, are not disadvantaged. Digital systems can be very difficult for users with sensory or cognitive disabilities, and the elderly who may have either no access to the internet or insufficient relevant experience of using it.

2.24 The Law Society noted the majority of OIC users engaged legal representation despite the portal being designed for LIPs, underscoring the value that litigants see in using legal representation even to navigate procedures designed to be accessible to non-lawyers.

Governance

2.25 Functionality and reliability are not the only requirements for pre-action portals. The demands they make of litigants, and the opportunities they provide to litigants to engage with each-other, must be fair and conform to principles of legality including the Overriding Objective. In the IR the WG suggested that pre-action portals could become the responsibility of the new Online Procedure Rule Committee (OPRC), which was established under Part 2 of the Judicial Review and Courts Act (which was then before Parliament).[25] The OPRC could be responsible for the content and linking of online court processes and pre-action portals, and the certification process for private portals who wish to market their pre-action dispute resolution services as compliant with the relevant pre-action protocols, and thus "court ready" if the dispute is not resolved. The task of developing PAPs currently belongs to the CPRC, for example in relation to the recent work preparing the new whiplash portal, which is based on a bespoke PAP. Just as the CJC has a statutory role in providing advice to the Civil Procedure Rule Committee, including regarding the design of PAPs, the WG believes the CJC can play an equally important function in referring proposals for changes to pre-action portals to the OPRC.

Recommendations

2.26 The WG recommends that any online portals must be based on a clear understanding of their intended scope and the scope of relevant applicable court processes. If there is a pre-action portal limited to the main PAP steps, then that has different implications (and potentially easier ones to address) than a fully integrated system where there are specific online processes tailored to specific types of claim and which are connected to interactive systems to guide negotiation and settlement or even the court filing and claims issue systems.

2.27 The WG recommends that MOJ, perhaps in conjunction with HMCTS, examine the feasibility of developing a general pre-action portal which is limited to the main PAP steps, but can be linked to relevant existing online general claims portals (such as OCMC & Damages Claims Online). The WG recommends that a general pre-action portal be allowed to bed down first – so relevant lessons can be learnt – before a decision is made to develop multiple online

[25] Judicial Review and Courts Act 2022, Part 2, sections 19-33.

portals for specific claim types. It is important that a general pre-action portal is not merely grafted on to digital processes for specific claim types.

2.28 If multiple online portals are adopted for specific claim types, along the lines of guided settlement systems, the WG recommends that the PAP online process for any given type of online court or guided settlement process should be co-designed, with proper consultation with stakeholders, so that the two work relevantly together.

2.29 The WG recommends that all pre-action portals be designed to be used by both professional court users and LIPs (including, appropriate layperson summaries to explain technical language where necessary). This objective includes developing portals both for individual web-based access and for professional users who require integration with their own case management systems via an API. This will maximise the efficiencies of the system for all users.

2.30 The WG recommends that a paper-based alternative is available to all pre-action portals if adequate digital assistance is not available to technologically disadvantaged people.

2.31 The WG recommends that parties should not be compelled to conduct dispute resolution discussions online, however subject to the technology being available, and cost effective, developers of pre-action portals should be permitted to facilitate confidential dispute resolution discussions online through a secure part of the portal.

2.32 The WG recommends that any pre-action portal provide appropriate signalling to vulnerable litigants about sources of assistance that may be available to them, the rules on vulnerable litigants (including CPR Part 1.6 and PD1A) and provide an opportunity for litigants to identify themselves as vulnerable.

2.33 The WG recommends that governance of pre-action portals be allocated to the OPRC.

2.34 The WG recommends that all pre-action portals should adopt a commitment to transparent sharing of data.

2.35 The cost of creating, operating, and maintaining any pre-action portal (of whatever kind) needs careful consideration. This in the WG's view falls into two categories: namely, consideration of the cost overheads for users, including professional firms, and costs to the court system which go beyond set up cost and demand ongoing funding. The WG recommends close attention is paid to cost aspects and cautions against underestimating the technical challenges involved, and resources required, to successfully develop and operate pre-action portals.

2.36 While the WG recommendations do not apply directly to private pre-action portals where use of them is voluntary, there should be a formal certification process for private portals that are marketed to prospective parties as being compliant with pre-action protocols applying to the parties' dispute – and therefore "court ready" without the parties having to take any additional steps beyond use of the portal – to ensure they meet minimum standards.

3. Introduction of a General Pre-action Protocol

3.1 When discussing the detail of PAPs in this report, it is important to stress that we are referring to cases only covered by the current PD-PAC. None of the recommendations would therefore automatically apply to any other PAP, whether those PAPs are embedded into mandatory digital portals and/or retained as separate PAPs, which are currently set out as appendixes to the Civil Procedure Rules.

3.2 The Interim Report sets out a proposal for replacing the current PD-PAC with a General Pre-action Protocol. 79 respondents answered questions about the PD-PAC and a clear majority favoured the introduction of a general PAP. The WG agrees that a new General PAP should be introduced.

3.3 Most comments about the General PAP related to the content of the Protocol which will be dealt with in specific sections below, but it is appropriate here to consider whether there should be any exceptions or different protocols adopted for the very wide range of cases presently covered by the PD-PAC, and whether there should be any variations to the extent that online portals are created for disputes that would be subject to the General PAP.

3.4 In the Interim Report, the WG agreed that it would be desirable to develop a streamlined PAP to deal with ultra-Lower Value disputes, in accordance with the recommendations of the CJC report on *Small Claims*.[26] This is because some of the proposed steps in the General PAP, such as the stocktake requirement, would be disproportionate for very small claims. The WG has produced a draft Lower Value Small Claims PAP at Annex 3. The WG was mindful of the fact that given the small size of these claims a significant number of litigants would be unrepresented. Accordingly, the WG sought to produce a simpler, shorter and jargon free PAP that would be easier to understand and follow for LIPs; emphasising key aspects about the role of PAPs, how the fit into the litigation process, what is expected of the parties including the need for honesty and to act proportionately, and the potential consequences of not doing so. We wish to stress that the draft Lower Value Small Claims PAP at Annex 3 has not been 'road tested' on LIPs, even experimentally. The WG is putting

[26] CJC 'The Resolution of Small Claims – Final Report' (January 2022) para [5.9].

forward the draft as an example of what the PAP might look like. When it comes to drafting this PAP, the WG recommends that the CPRC consult with advocacy organisations who work closely with LIPs, and ideally some LIPs themselves, on the wording and layout of the Lower Value Small Claims PAP.

3.5 One of the motivating factors behind the WG's proposals for the new General PAP was that the current PD-PAC, although valuable in some respects, was "too woolly" to be a practical guide to pre-action conduct to use the words one respondent to the Preliminary Survey. Accordingly, the proposals sought to give clearer guidance including by transforming some of the exhortations in the PD-PAC to consider ADR and undertake a stocktake, into concrete but flexible obligations on the parties which would more effectively achieve the aims of PAPs. However, a significant number of respondents working in the field of high value commercial litigation raised concerns that the proposed General PAP was too prescriptive, and risked undermining the flexibility in the PD-PAC that was especially valued by those involved in complex commercial litigation.

3.6 There is always a balance to be struck between, on the one hand, flexibility in procedure and a concomitant risk of vagueness as to the steps required of parties, and on the other hand, clear and precise procedural rules that may become overly technical and costly to comply with. The WG fully accepts that the optimal balance between flexibility and prescription will vary across different types of litigation, and even across claims with different values and complexity in the same field.

3.7 The WG remains sceptical of the claim that a concrete obligation to engage in dispute resolution in high value commercial litigation would be undesirable on the grounds that the parties are sophisticated, well advised, and already understand the benefits of ADR. We are not sure that the frequent statements from the judiciary, many cited in the IR,[27] that the value of ADR is not fully appreciated by practitioners needs a footnote disclaimer that this is not true of commercial lawyers. Ultimately, whether commercial lawyers and their clients already fully appreciate the benefits of ADR, and whether high value commercial litigation would or would not benefit from some form of mandatory dispute resolution obligation, is partly an empirical matter which is difficult to verify, and partly a judgement call.

3.8 Similarly, while the WG agrees with those respondents who argued that the complexity of commercial litigation means it would be unrealistic to think that a joint list of issues in

[27] Review of Pre-Action Protocols, Interim Report' (November 2021) para [2.8].

dispute as part of a stocktake could replace the pleadings process, we do believe that such a process could be valuable in improving the pleadings processes in commercial and other complex litigation. Indeed, the Australian experience in developing "Concise Statements", which the proposed stocktake is partly based on,[28] was borne out of judicial frustration that sophisticated commercial parties in the Federal Court could waste significant private and public resources arguing arcane pleading points that did not address the real issues in dispute.

3.9 Having set out these observations, the WG acknowledged that there was something approaching a chorus of commercial lawyers working in high value litigation who stated that they needed a PAP with greater flexibility. Although not a legal argument, the WG is also conscious of the fact that high value commercial litigation is an important component of UK plc, and as part of these litigation services, well-resourced commercial clients have become accustomed to greater degrees of procedural flexibility than is generally enjoyed by other litigants.

3.10 For these reasons, the WG asked the London Solicitors lawyers Association and Commercial and Chancery Bars to consult with their members and about the need for, and potential content of, a bespoke PAP for complex litigation conducted in the Business & Property Courts. A bespoke PAP could potentially provide the flexibility needed in high value commercial litigation, whilst still being compatible with the principles underpinning the proposed General Pre-action Protocol. What categories of litigation should be covered by a bespoke PAP, and precise content of such a PAP, will be considered as part of the WG's second report on litigation specific PAPs.

3.11 An important question that arises from the emergence of digital justice portals (both post action and pre-action) is the extent to which the rules applying to those processes should be the same to those applying to other methods of communication, or whether there should be variations to take account of both the benefits and risks of technology being used to complete pre-action processes. We think the answer to this question is nuanced rather than black or white.

3.12 One thing that is clear is that the objectives of engaging in pre-action processes are the same whether in the digital or analogue world: to facilitate fair settlement without the need to

[28] Concise statements typically contain the information that should be set out in pre-action letters of claim and replies. The joint stocktake would build on those statements by also identifying the issues in dispute between the parties.

resort to litigation or, where settlement is not possible, to promote proportionate litigation by narrowing the issues in dispute. Given the objectives are the same it follows that the steps the parties are required to take to further those objectives should also be the same. Digitalisation may well transform the litigation process but it will not transform what the parties need to do to fairly resolve, or narrow the issues, in dispute. For this reason, our recommendations for the contents of the General PAP should apply equally to digital pre-action processes as much as they do to any other form of pre-action exchanges.

3.13 The Working Group fully anticipates and, subject to the qualifications set out in section 2 of this report, welcomes significant innovation in the design of digital pre-action portals, specifically in relation to *how* parties comply with pre-action protocols. Moreover, given the rapid changes in technology and our use of technology, it would be unwise to rule out the possibility that digital portals might evolve in such a way that modification of the pre-action steps required of the parties, and the legal infrastructure to promote compliance with those steps, should be modified in appropriate instances. However, in the WG's view there would need to be a clear case, supported by evidence through pilots or studies of current use of digital portals, which demonstrates that the relevant rules governing digital PAPs should vary from those governing non-digitalised PAPs. Lastly, where disputing parties are given an option of complying with a pre-action protocol by way of using a digital portal or a paper-based process, the rules need to be materially the same. This comity respects principles of equality and prevents any discrepancies from being exploited by prospective litigants.

Recommendation:

3.14 The PD-PAC be replaced by a PD that contains a General PAP; and a PAP for Lower Value Small Claims worth £500 or less (the wording of which should be developed in consultation with LIP advocacy groups). Possible text for the General PAP and PAP for Lower Value Small Claims is set out in Annexes 2 and 3.

3.15 The rules governing pre-action processes should be the same whether they are carried out through digital portals or other forms of communication. Pre-action protocols should vary based on the needs of the litigation and the parties to the dispute, not the technology used by the parties. Depending on how the technology evolves, there may be cases where it is appropriate to vary the rules governing pre-action processes in the digital sphere if it is

demonstrated that the pre-action steps required of the parties can be sensibly modified without undermining the common objectives of pre-action protocols.

Guidance to the Proposed General PAP

3.16 The draft General PAP in the IR set out suggested guidance and warnings to prospective litigants about a range of matters including:

- That litigation should be a last resort; that compliance with the PAPs is mandatory (except in urgent cases), and that parties should co-operate with each other to resolve complaints and disputes before considering litigation.
- That large organisations should include contact information for handling pre-action letters of claim.
- The parties must actively cooperate with each other, both *before and after* any proceedings are commenced, to achieve the Overriding Objective.
- The relationship between the General PAP and litigation specific PAPs and designating the General PAP as a default PAP if litigants were unsure which PAP applied to their claim. The draft General PAP included a flow diagram which sets out the processes that parties must follow at the pre-action stage, including whether parties should follow the General PAP or a litigation specific PAP.
- The need to comply with PAPs in a proportionate and reasonable manner, and potential cost consequences of taking disproportionate steps.
- The option of making a formal offer of compromise and the benefits of doing so.
- The need to be honest in pre-action exchanges and that severe consequences, including contempt of court, can result from dishonesty, as per the Court of the Appeal's ruling in *Jet 2.*[29]
- Guidance on the use of expert evidence.

[29] *Jet2Holidays-v-Hughes* [2019] EWCA Civ 1858

3.17 The overwhelming majority of respondents supported this guidance – indeed it received more support than any other proposal. Some respondents suggested there was some potential for confusion regarding the relationship between the general PAP and the litigation specific PAPs. The WG disagrees. The relevant guidance at para 8 of the draft General PAP was clear:

"The general principles set out in this protocol also apply to the specific protocols, but do not, in any way, change the specific procedural steps which the parties are required to take in those protocols. The general principles are:

- Starting court proceedings should be a last resort.
- There must be an early exchange of relevant information.
- The parties should behave reasonably and proportionately.
- The parties should negotiate in good faith to try to settle their dispute or narrow the issues."

3.18 For the reasons set out below when discussing changes to the good faith obligation to try to settle the dispute or narrow the issues, we believe the last bullet point should be amended to read:

- The parties must take reasonable steps to find out if the dispute can be resolved or narrowed by agreement.

3.19 This change goes to the content of the general principles, rather than the relationship between general and specific protocols. The WG believes it is particularly important to make the General PAP a default PAP for those parties unsure about which protocol applies to their claim and this has also been made clear by the inclusion of a flow diagram in the proposed General PAP (at para. 9). The extensive proliferation of pre-action protocols has shown no sign of abating during the CJC's current review of PAPs. While this specialisation is undoubtedly helpful in most instances, finding the correct protocol could be a daunting challenge for litigants in person who are unfamiliar with the legal process. This observation applies just as much to a litigant trying to find the correct digital portal, as it does a litigant trying to use the correct PAP. Providing litigants in person with, and clearly signposting, a

safe route for engaging in pre-action exchanges with the other party without fear of criticism for following the "wrong PAP" is, we think, a valuable step in making PAPs more accessible.

3.20 Although the general principles require the parties to "behave reasonably and proportionately," the WG considers that there is value in making explicit reference to the Overriding Objective and the parties' obligation to further the Overriding Objective in the general principles. The express references to the Overriding Objective are consistent with the Recommendation to amend the Overriding Objective to include reference to PAPs.

3.21 Having a separate PAPs for Lower Value Small Claims also enables this guidance to be appropriately adapted to the types of litigants using those PAPs, and the relevant rules governing that type of litigation. For example, we have removed the references to offers of compromise, the use of expert evidence, and cost consequences of disproportionate conduct in the draft Lower Value Small Claims PAP in Annex 3.

Recommendation:

3.22 The WG recommends the adoption of the guidance in paragraphs 2 to 17 in the Draft General PAP.

4. PAP Steps

4.1 At the outset the WG wishes to reiterate its observations in the IR that all PAP obligations should be sequential, and dependent upon compliance with preceding steps. This means, for example, that if a defendant failed to provide a letter of reply indicating they disputed the claim, then no dispute resolution obligation would arise. Similarly, if one of the parties refuses to engage in dispute resolution, there is no need to complete a stocktake. This sequential and contingent nature of PAP obligations should significantly reduce the time and resources spent by parties on compliance with a PAP when the other party is refusing to engage. The issue for sanctions for non-compliance with a PAP is addressed in section 5.

PAP Step 1 – Information Exchange: *Timeframes for Pre-action Letters of Reply*

4.2 In a salutary reminder of the gap that can open up between law on paper and law in practice where standards are not backed by any obligation or sanction, a large number of consultation respondents claimed a requirement to provide pre-action letters of responses within 14 days in straightforward cases would be practically unworkable, notwithstanding that the current PD-PAC already recommends that pre-action replies be given within 14 days for 'standard cases.' A clear majority of respondents were opposed to the proposed timeframes of 14 days for responses with an ability to extend this timeframe for a further 28 days (42 days in total) to collect additional evidence. Some respondents questioned what the meaning of a 'standard' case was.

4.3 Accordingly, the WG went back to the drawing board. After carefully considering consultation responses, the WG decided that the outer limit for pre-action replies in the current PD-PAC should become a mandatory time limit in a new General PAP, however the new timeframe should also include a requirement to acknowledge the pre-action letter of claim within 21 days.

4.4 In opting for an acknowledgement step, the WG was mindful of comments during the consultation from claimant lawyers that 90 days is far too long to wait for no response at all,

or to be told that the claimant has the wrong entity, or that the defendant has no insurance to cover the claim.

4.5 Accordingly, in the defendant's acknowledgement, the WG group felt that the defendant should be required to confirm whether it believes it is the right entity to respond to the claim. If the defendant believes it is not the right entity but that a related entity is the right defendant, it must provide the name and contact details of that other entity. The defendant must also indicate whether it believes it has insurance coverage for the relevant claim and the identity of that insurer. In the letter of acknowledgement, the defendant should also indicate what, if any, additional information it needs from the claimant to provide a full response to the claimant's pre-action letter of claim. If the defendant fails to provide a letter of acknowledgement, the claimant can proceed to issue a claim in court.

Recommendation:

4.6 The General PAP should require defendants to provide a letter of acknowledgement within 21 days of receipt of the claimant's pre-action letter of claim, and a full response within 90 days of receipt of the pre-action letter of claim. The defendant must identify in its letter of acknowledgement whether it believes it is the right defendant for the claim (or the identity of the correct defendant where that defendant is a related entity) and where the defendant believes it is insured for the claim, and the identity and contact details of that insurer. The defendant should also indicate what additional information it needs to provide a full response.

Timeframes for the Lower Value Small Claims PAP:

4.7 The WG felt that 90 days was an excessively long period of time to provide a full reply for Lower Value Small Claims disputes, and that a separate acknowledgement step would be disproportionate given the sums involved. The WG believes that a fixed deadline of 30 days for responding to pre-action letters of claim should be adopted in the Lower Value Small Claims PAP, given speedy justice is a priority for these claims.

Recommendation:

4.8 The Small Claims PAP should provide defendants with 30 days to provide full response to pre-action letters of claim.

PAP step 1 – Information Exchange: Disclosure

4.9 In the Interim Report the WG proposed two related but distinct changes to pre-action disclosure for cases covered by the PD-PAC.

4.10 First, it produced new language in the proposed General PAP that sought to explain the meaning of 'key documents.' That language was as follows in paragraph 19 of the draft General PAP:

'The claimant's and defendant's letters must disclose and attach any key documents on which the parties rely in support of their claims or defences (e.g., a copy of the contract, receipts) and the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

All parties must provide sufficient information to enable each party to understand each other's position and to meaningfully engage in good faith efforts to resolve or narrow the dispute.'

4.11 The latter paragraph is consistent with the purposive nature of the obligation to exchange relevant information in the current PD-PAC i.e., the parties can be sanctioned if they do not provide sufficient information to allow the objectives of the PD-PAC to be met.

4.12 Secondly, the WG asked for views on whether the proposed General PAP should include a formal disclosure standard and, if so, what standard. The IR noted that there were real challenges in incorporating a disclosure standard into the General PAP in particular, given that the PD-PAC covers a range of cases governed by different disclosure rules under the CPR. On the other hand, it was widely acknowledged by the WG and those responding to the preliminary survey, that disclosure of relevant information was usually crucial if the parties were to engage in meaningful settlement discussions at the pre-action stage.

4.13 Respondents were almost evenly divided on the introduction of a disclosure standard, with a very small majority against it. There were also a large number of neutral responses. Both the case for and against a disclosure standard was neatly summarised by FOIL in its consultation response:

'One of the main complaints raised by FOIL members about the current PAP regime is the paucity of information received by the defendant. The concern is not limited to a particular

type of litigation but extends across many of the PAPs. Either through a failure by claimants to get to grips with the details of the claim early, or through a tactical decision to keep information confidential, in many claims insufficient information is made available to allow for a decision on liability and for meaningful discussions on quantum. Too often, information and details are "TBC". Without full disclosure of information attempts at resolving or narrowing the dispute will be at best hampered, and at worse rendered pointless. The general support in the interim report (Appendix 5, para 8), for "requiring more, but proportionate disclosure at the pre-action stage across most PAPs" is welcomed.

...

FOIL is wary of introducing provisions within the PAP regime which turn the process into quasi litigation. It has reservations over introducing a litigation standard of disclosure into the pre-action regime. That said, the detail of Initial Disclosure under PD 51U might give a useful steer on the type of disclosure which would be appropriate.'

4.14 Ultimately, the WG decided against recommending the incorporation of any new disclosure standard in the General PAP. Nonetheless, the WG does believe the revised guidance on the meaning of "key documents" would be a helpful addition for litigants, particularly litigants in person.

4.15 Clyde & Co made the useful point that the PD-PAC does not contain any statement that disclosed documents can only be used for the instant dispute and argued that this was a major omission. We agree, especially in light of the formal recognition that PAP compliance is mandatory and therefore the parties are required to disclose key documents. We have included some text about the use of disclosed documents in the proposed General PAP.

Recommendation

4.16 The General PAP does not include a formal disclosure standard but does include additional guidance on the meaning of "key documents" as set out in paragraph 4.9 of the draft General PAP. The guidance should also remind parties that documents disclosed as part of the information exchange process should only be used for the dispute at hand.

PAP Step 2 – Dispute Resolution

4.17 In the Interim Report the WG observed that, given the substantial benefits of consensual dispute resolution and the fact that the vast majority of cases settle without court adjudication, the encouragement of ADR at the pre-action stage (backed by costs sanctions for an unreasonable failure to engage in ADR) could and arguably should be strengthened by the introduction of a good faith obligation to try to resolve or narrow the dispute. The IR report made clear that this obligation should be non-prescriptive but would require the parties to engage in good faith steps to try to resolve or narrow the dispute.

4.18 A majority of respondents supported this proposal, but the WG found the comments both from those who supported the proposal and those who were against extremely helpful. Comments on this proposal could broadly be split into two main groups:

- Those who were in favour of the obligation but wanted greater clarity on the scope of the obligation, or for some in the ADR community, a greater steer towards mediation or ADR generally.

- Those who were against the good faith obligation in principle, or on the grounds it was too uncertain, or because of concerns about power imbalances in specific types of litigation.

4.19 The main concerns could be summarised as follows:

- An obligation to try to narrow the dispute was too uncertain and could lead to protracted litigation as to when compromises were required, and how much compromise was required.

- The meaning of 'good faith' itself was too uncertain, and in the case of insurers or those representing them, there were concerns that a finding that a party had not met this obligation could constitute a finding of bad faith for the purposes of insurance law.

- The mechanisms for policing of the obligation insofar as it extended to making offers of compromise was inconsistent with the part 36 rules which required offers to be kept confidential from the court until the claim was resolved.

- If the obligation to engage in dispute resolution was non-prescriptive, there could be arguments between the parties as to what process would be appropriate.

- Even acknowledging and welcoming the non-prescriptive nature of the obligation, some respondents felt that the obligation was a form of compulsory ADR which they opposed in principle.

- The obligation would produce unjust outcomes if it applied in areas where there were severe power imbalances between the parties.

4.20 Many ADR providers strongly supported the proposal. They welcomed the signposting of different forms of ADR in the draft General PAP, and the recognition that an obligation to engage in dispute resolution was consistent with the right of access to court. One criticism that was made of the proposal by ADR providers was that it could have provided even a greater steer towards mediation and its benefits.

4.21 The WG has sought to reconcile all these comments so far as reasonably practical. The only principled objection which the WG did not accommodate was the argument that the proposed obligation amounted to mandatory ADR and should be rejected on that ground alone. The WG does not accept this contention for the reasons set out in the CJC's report on compulsory ADR, which examines the legality and desirability of mandatory ADR.[30] The WG further reiterates its observations in the IR that the proposed obligation has deliberately been made non-prescriptive, in order to maximise flexibility for the parties and in recognition that any compulsory ADR processes must be concluded within a reasonable time and at proportionate cost to be compatible with Art 6 of the European Convention of Human Rights (ECHR).

4.22 The content of the obligation has been substantially revised from its original form to address a number of concerns, but it retains its core features. The changes that have been made by the WG to the obligation and associated guidance include:

- The obligation is solely a *process-based* obligation and involves no substantive obligation to settle or compromise the claim – this is consistent with the conclusions set out in the CJC Compulsory ADR Report. References to an obligation to resolve or narrow the

[30] https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf

dispute have been replaced with an obligation to engage in a dispute resolution process. All references to offers of compromise have, therefore, been removed and would not form any part of the obligation. The guidance also makes clear that the parties are free to proceed to court should a dispute resolution process not resolve the dispute.

- The language of good faith has also been removed on the grounds that the term is more commonly used in European and North American legal systems and is too unfamiliar to most lawyers in England & Wales, or, in the case of insurance, has a very specific meaning that does not fit its intended purpose in the pre-action space.

- The guidance provides a default dispute resolution process that the parties must engage in (a pre-action meeting between the parties) if the parties cannot agree on a dispute resolution process. While the obligation remains non-prescriptive, a default option is necessary to avoid disputes about which process is appropriate. The WG has deliberately chosen a pre-action meeting as the default process because it would impose the least time and resource burden on the parties.

- The list of possible dispute resolution processes has been re-ordered to give greater prominence to mediation. The guidance seeks to stress the benefits of early dispute resolution given the overwhelming majority of cases settle without a judgment.

4.23 Summing up the above, the WG believes that the parties should be required to engage in a dispute resolution process at the pre-action stage, but there should be no doubt that the parties are **not** required to compromise their claims or defences. The parties should be free to choose the dispute resolution process that best suits their needs, and a number of dispute resolution options are highlighted, but in the event of disagreement there is a default requirement to hold a pre-action meeting (which can be in person or virtual including by telephone).

4.24 The court should not be shown any communication, or part of a communication, disclosing the substance of negotiations between parties engaged in a dispute resolution process. However, the guidance to the obligation specifies what information can be disclosed for the purposes of demonstrating compliance with the obligation, such as invitations to engage in a dispute resolution process, and responses thereto, and evidence that a dispute resolution process has taken place. The proportion of respondents for and against making dispute

resolution processes confidential by default i.e., without prejudice, was very similar to the proportion of those in favour and against introducing the good faith obligation. This framework – distinguishing between the fact of efforts to engage in dispute resolution which is disclosable, and the contents of dispute resolution negotiations which is without prejudice – is influenced by the PAP for Construction and Engineering Disputes and its rules on pre-action meetings.[31]

4.25 The suggested text for the revised obligation to engage in a dispute resolution process can be found at para 4.10-4.20 of the draft General PAP (in Annex 2). The timeframes for completing the dispute resolution process suggested in the IR remain unchanged from the original proposal i.e., 8 weeks from receipt of the defendant's letter of reply with the option of extensions by consent.

Relationship Between pre and post issue dispute resolution

4.26 One crucial point to address is the relationship between a pre-action dispute resolution obligation and other reform proposals currently under consideration which would require parties to engage in ADR. In particular, the MOJ has recently consulted on proposals for mandatory mediation for all disputes worth £10,000 or less after proceedings are issued, and the parties' statement of case and defence has been filed.[32] The Government's consultation recognises there may need to be exemptions from this requirement in some cases.

4.27 The WG believes the MOJ's proposals are compatible with the WG's own recommendations for the introduction of a pre-action dispute resolution obligation, provided that parties who do engage in pre-action mediation (or any other dispute resolution process involving the assistance of a neutral third party) taken into account in relation to a post issue mandatory mediation requirement. This would not undermine the intent of the MOJ's proposals. A post-issue mandatory mediation obligation will provide real incentives to the parties to consider the benefits of mediation pre-action; it may help the parties to resolve the dispute without the need for litigation, and if mediation is attempted pre-issue, it will relieve the parties from any further mandatory mediation obligation if the pre-action dispute resolution

[31] Specifically paragraphs 9.5-9.6.

[32] Ministry of Justice, 'Increasing the use of mediation in the civil justice system – open consultation' (June 2022) Available here: https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system

process was unsuccessful. This would not, in any way, restrict the autonomy of the parties to engage with any dispute resolution process post-issue.

Should there be exceptions?

4.28 In the Interim Report the WG flagged that there may need to be exceptions to this dispute resolution obligation in areas where there are commonly severe power imbalances between the parties. While a number of respondents agreed with this suggestion, during the CJC's 10th annual forum on Access to Justice for People without means held in December 2021, some dispute resolution providers questioned the need for it. They argued that mediators and Ombudsman were experienced in, and trained to deal with, disputing parties in highly unequal relationships. What dispute resolution obligations, if any, should apply in litigation where parties are typically in unequal relationships will be an important issue in our second report dealing with other PAPs. While it is possible that there will be significant power imbalances between the parties in cases under the General PAP, given that it is difficult to identify a typical type of case covered by the PD-PAC, let alone a typical type of power relationship, the WG believes that the new General PAP to replace the PD-PAC should include a pre-action dispute resolution obligation.

Recommendation:

4.29 The General PAP should include an obligation to engage in pre-action dispute resolution. Proposed wording for the obligation can be found at paragraphs 4.10-4.20 of the proposed General PAP in Annex 2.

Dispute resolution under the small claims PAP

4.30 The merits for and against a pre-action dispute resolution obligation under the new small claims PAP are finely balanced. The case for including an obligation is that this is undoubtedly a category of cases that should normally be resolved without litigation. Only very exceptionally might such cases raise an important legal issue of wider public importance that warrants court adjudication. Indeed, it is for this reason that the CJC Report on Small Claims recommended that the new procedure for Small Claims include mandatory mediation.[33] The case against the inclusion of a pre-action dispute resolution obligation is that the value of these cases is so small that a pre-action dispute resolution obligation may

[33] https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf

be disproportionate, particularly where such cases would be subject to mandatory mediation if a claim was issued and defended.

4.31 Many Lower Value claims are undefended. Some fear it would be wholly disproportionate to require claimants to engage in dispute resolution when the defendant has no intention of defending the claim. However, as stated above, no dispute resolution obligation would arise unless the defendant provided a letter of reply disputing the claim. If a defendant is disputing a claim there is value in engaging in dispute resolution pre-action.

4.32 On balance, the WG believes that the dispute resolution obligation should be modified for small claims so that parties are encouraged to engage in a dispute resolution process, and advised that engaging in pre-action mediation would exempt them from having to repeat the process once litigation is started.

Recommendation:

4.33 Dispute resolution under the Small Claims PAP should be encouraged, but optional, and parties should be made aware of the obligation to engage in mandatory mediation if litigation is commenced.

PAP Step 3 – Joint Stocktake Requirement

4.34 The IR recognised that a formal stocktake requirement can play a helpful role in distilling the efforts that the parties have put into outlining, and seeking to resolve or narrow, their dispute, into more streamlined and proportionate litigation if they have been unable to resolve it at the pre-action stage. The stocktake has the potential to foster fair settlements and promote more proportionate litigation, but it has been under-utilised in the past.

4.35 Given the potential benefits for the parties and the court, the IR recommended that a stocktake requirement not only be retained, but also be improved by making it more concrete. The parties would be required to produce a joint stocktake report which sets out (i) the issues on which the parties agree; (ii) the issues that are still in dispute and the parties' position in respect of them; and (iii) the parties' pre-action disclosure with a view to assisting the court in deciding what further disclosure, if any, is needed. A proforma joint stocktake report was set out at Appendix 4 of the IR. A majority of respondents who expressed a view about the stocktake requirement supported this proposal.

Disclosure as part of the stocktake

4.36 There was some divergence on the issue of discourse as part of the stocktake. For example, DAC Beachcroft noted that disclosure was fairly limited at the early stages of clinical negligence disputes and therefore should not form part of the stocktake exercise, while Clark Wilmott remarked that there should be some limits placed on the disclosure requirement in order prevent a "blanket disclosure" requirement. TLT advocated a non-prescriptive approach so that the parties retain the freedom to agree on the scope of disclosure.

4.37 The WG believes that a requirement to list the documents disclosed by the stage of the stocktake on each side will focus the minds of the parties. It should be stressed that the stocktake requirement does not contain any substantive disclosure requirement. The right to request and the obligation to disclose documents pre-action does not derive from the stocktake requirement. What the stocktake requires of the parties in relation to disclosure is simply to list: the documents have been disclosed; the documents that have been requested and not yet provided, the reasons for the request, and the reason why it has not been produced. In this way, the obligation should focus the parties' minds on whether the document is really a key document needed for resolving the dispute, and whether the reasons for not producing it (yet) are reasonable.

4.38 Significantly, a small majority of respondents were against the incorporation of a disclosure standard in the General PAP. Accordingly, the current requirement to exchange "key documents" in PD-PAC has been carried over to the draft new general PAP (see discussion on disclosure below).

Timeframes

4.39 There was general consensus that the current proposed timeframes for completing the stocktake were too tight and that they should be extended in order that the various steps are carried out and completed effectively. Accordingly, the WG agrees that for the parties to effectively engage with the stocktake requirement (including, for example, time to take client instructions etc) and to accurately complete the joint stocktake report, the current proposed timeframes should be extended from 14 days to 28 days, which was a timeframe proposed by some respondents.

Suggestions to improve the form

4.40 The draft joint stocktake report was, on the whole, well received. Support Through Court, a charity which assists LIPs, noted that the report was "straightforward and easy for LIPs to use."

4.41 Some respondents made a number of drafting recommendations to improve the effectiveness of the joint stocktake report, and a number of these have been taken on board. It was suggested that the stocktake process is another opportune time for the parties to review any pre-issue dispute resolution which has taken place so far, and consider whether further attempts at dispute resolution might be useful. The WG agrees. Although parties are expected to keep dispute resolution under review, the stocktake is designed to show the parties how far apart their positions are. In some cases, it may be that the gaps are so close that one further push towards dispute resolution may achieve a final settlement.

Recommendation:

4.42 The General PAP includes a requirement to complete a joint stock take report in which the parties identify the issues they agree on, the issues they disagree on and the reasons for that disagreement, and the status of the parties' disclosure.

5. Sanctions

5.1 The WG reported in the IR that there was a huge consensus in favour of more consistent enforcement of PAPs amongst respondents to the preliminary survey on the operation of PAPs. The WG sought to respond to this consensus by putting a forward series of proposals that would clarify and improve the process of dealing with disputes about PAP compliance, expand the powers available to the courts for dealing with non-compliance, and provide some guidance as to how the courts should exercise those powers.

5.2 A majority of respondents supported these proposals but the overwhelming consensus in favour of better enforcement of PAPs did start to fracture when it came to the specific measures aimed at achieving more compliance. We will begin by addressing the guidance on sanctions for non-compliance. This issue should not be controversial. Some respondents expressed concern that sanctions proposals would lead to satellite litigation over technical breaches. In this respect we recall that the IR did not recommend any substantive change to the existing guidance on distinguishing between substantive and technical breaches. The Interim Report commended the current guidance in PD-PAC that the court should not be concerned with technical non-compliance[34] and suggested that the guidance given by the Court of Appeal in *Denton* for dealing with applications under CPR 3.9 were equally suitable for dealing with non-compliance with PAPs. In *Denton* the Court of Appeal held that the court should not be concerned with trivial breaches and further warned the parties of the need to co-operate with each other in achieving the Overriding Objective, rather than seeking to obtain a procedural advantage from technical non-compliance. If the courts have managed to avoid disputes over trivial non-compliance with the rules of procedure under CPR 3.9, we think the risk of an explosion of disputes over trivial non-compliance with the PAPs must be low, especially where the guidance on sanctions for non-compliance remains unchanged.

[34] Most PAPs include the following guidance '*Where either party fails to comply with this Protocol, the court may impose sanctions. When deciding whether to do so, the court will look at whether the parties have complied in substance with the relevant principles and requirements. It will also consider the effect any non-compliance has had on another party. It is not likely to be concerned with minor or technical shortcomings.'* PD-PAC paragraph 13.

5.3 Few respondents disputed the value of the WG's recommendations in relation to the process for dealing with PAP non-compliance. Several respondents observed that some directions questionnaires already contained questions about PAP compliance, and some respondents questioned whether a requirement to address PAP non-compliance at the earliest practical opportunity would make much of a difference to compliance rates. Only time will tell whether this change in process would lead to positive changes in parties' pre-action behaviour. What we can say with reasonable confidence is that the current tendency of courts to deal with PAP compliance only at the end of the proceeding is not promoting a culture of compliance with PAPs.

5.4 Some judges during the consultation also indicated that the judiciary might be reluctant to make orders about the costs of proceedings over PAP non-compliance before those proceedings were resolved. The WG would urge the judiciary to resist that sentiment as a general approach. First, there is no jurisdictional barrier that would prevent the courts from exercising their powers to make costs orders at an early stage of the proceeding. Secondly, the tendency to address costs only at the end of proceedings is arguably just as bad for promoting PAP compliance as it is for promoting proportionate costs. We know detailed costs assessments at the end of litigation are not effective either at keeping costs proportionate or even their stated objective of ensuring the successful party recovers their reasonable costs.[35] Prospective costs orders, like prospective costs management, carries a risk that a court will make an order it would not have at the end of the proceeding with the benefit of full hindsight, but given the deleterious effects that dealing with costs at the end of proceeding has had on the administration of justice – a phenomenon recognised in virtually every review of the civil justice system – we think there is a strong case to be made for courts being prepared to make more costs orders at an early stage of proceedings due to PAP non-compliance and its likely impact on the litigation. The same response can be made to judicial concerns about compliance disputes taking up court time. Deferring compliance disputes can only save court time if the issue is never addressed, and if compliance disputes are never addressed, it is hardly surprising that levels of compliance would become variable at best.

[35] Given there is usually a significant gap between solicitor-client and recoverable party-party costs even though both are assessed against a reasonableness standard.

5.5 The WG fully recognises that dealing with PAP compliance disputes at an early stage of the proceeding would not be appropriate in every case. Under the proposal set out in the IR the court would retain discretion to defer the question of non-compliance to a later stage if it was thought appropriate. Apart from those respondents who supported automatic sanctions regimes, few questioned the wisdom of conferring judges with this discretion. It may be that compliance disputes that are complicated, and require a separate hearing, can be deferred until a later stage of proceeding, whereas clear instances of non-compliance, e.g., a wholesale failure to undertake a PAP step, can and should be dealt with at the first practical opportunity. However, it would not be appropriate for the WG to seek to constrain the court's discretion on exercising this power to defer.

5.6 The next issue to be addressed is the powers the court should have as a sanction for non-compliance. The WG set out a proposal in the IR to allow the court to strike out a claim or defence in cases of grave non-compliance. The word "grave" was used to distinguish disputes about the quality of compliance with the PAP – for example, where a party failed to provide a document reasonably requested of it – from disputes where one party had wholly failed to engage with the PAP and the other party. In addition, by giving courts the ultimate sanction for dealing with grave cases of non-compliance, this might also encourage judges to impose less severe sanctions, such as costs orders and stays, for serious cases of PAP non-compliance.

5.7 Most of the opposition to the proposals in the IR were directed at this strike out power on the grounds that it was too draconian and risked "weaponising" PAPs. This is one of the issues with which the WG group wrestled with the most, because there are significant risks in including a strike out power as well as omitting one. After careful deliberation, the WG elected not to recommend the inclusion of an express strike out power in the PAP itself. It came to this conclusion mindful of jurisprudence from the Court of Appeal that failing to follow a PAP can constitute an abuse of process,[36] and that amending the overriding objective in combination with the new Practice Direction containing the General PAP would effectively incorporate PAPs into the CPR. These developments would empower a court to strike out a statement of case under CPR 3.4, and a statement of case or defence as an abuse of process. Assuming the court's strike out powers extend to PAP non-compliance, the

[36] *Cable v Liverpool Victoria* Insurance Co Ltd [2020] EWCA Civ 1015.

WG considers that the circumstances, if any, in which a court should exercise this power is a matter that should remain for the courts to address on a case-by-case basis.

5.8 One further potential change that emerged during the consultation process was the use of formal notices to warn parties that were in breach of the PAP and provide them with an opportunity to rectify it. The proposals in the IR were designed to improve the process for resolving PAP compliance disputes, at an earlier stage of the litigation process, and to encourage the courts to be more willing to enforce compliance with the PAPs. Giving parties notice that they are in breach of a PAP, and a chance to rectify it, should both reduce the number of disputes that need to be raised with the court *and* if they do need to be raised, give the court greater confidence that it would be just to impose a sanction on the non-complying party. The WG agreed that such notices should **not** be a precondition to the court exercising its sanction powers. Rather, whether a notice had been served should be one factor in all the circumstances that the court would take into account when deciding whether to impose a sanction.

Recommendation:

5.9 The WG recommends the adoption of the guidance on sanctions set out in paragraphs 5.1-5.12 of the Draft General PAP in Annex 2.

5.10 All directions questionnaires (for all tracks) should contain a question about PAP compliance, asking each party to confirm whether they have complied with the PAP and to identify any non-compliance by the other party.

6. Summary Costs Procedure

6.1 In the IR the WG set out a proposal for a new summary costs procedure, independent of Part 8, to resolve costs disputes over matters where the substantive aspect of the dispute was settled at a pre-action stage. The thinking behind this proposal was to remove one of the perverse incentives to litigate (to protect a party's position on costs) when existing costs mechanisms were either unavailable or too burdensome to deal with pre-action costs disputes over the liability to pay costs and/or quantum disputes.

6.2 A majority of respondents who expressed a view on this proposal supported it, but there was also significant opposition. A number of arguments given in opposition to the proposal were mutually exclusive. Some respondents thought that it was unnecessary because existing procedures were adequate and there was no demand for such a procedure, and it could add extra complexity to the process of resolving costs. On the other hand, some respondents were concerned that there could be significant use, and abuse, of the new procedure. Some of the concerns raised about the proposed procedure were grounded in broader concerns about the recoverability of costs, not the process for resolving costs disputes. The WG wishes to reiterate that the proposal in the IR is neutral on the topic of costs recovery. It would neither expand nor contract the circumstances in which costs for pre-action legal work would be recoverable. Recoverability is undoubtedly an important issue, but it is an issue that is properly a matter for the Costs Working Group established by the CJC.[37] The question of when a legal dispute *first* arises between the parties, and from what point costs start becoming recoverable, is similarly beyond the scope of this report. The proposed summary costs procedure would only alter the *procedure* for resolving costs disputes over pre-action legal work where a claim for their recoverability could be made.

6.3 The WG found the question of whether to recommend a new summary costs procedure to be a genuinely difficult one. There was a widespread view that the existing procedures worked reasonably well for costs quantum disputes albeit that the part 8 process was too cumbersome and could be streamlined. On the other hand, views about the need for, and likely impact of, a procedure for determining pre-action costs liability disputes differed considerably.

[37] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/costs/.

6.4 The WG accepts that demand for a new costs procedure for disputes that resolve at the pre-action stage would be variable across different types of claims. It also readily accepts that the imminent expansion of fixed recoverable costs (FRC) is likely to reduce the number of quantum cost disputes including at the pre-action stage. However, the impact that FRC will have on disputes about the liability to pay costs is far less clear, and one of the purposes of the new procedure would be to have a straightforward mechanism for both types of pre-action costs disputes: liability (i.e., entitlement to costs) and quantum (the amount of costs payable). A number of commercial lawyers reasonably observed that it would be difficult to imagine cases where a defendant was willing to settle a substantive claim but unwilling to resolve the question of costs at the same time. It is worth recalling that this proposal originated from the housing sub-committee, and also received support from a number of public lawyers during the consultation period. In many cases of this kind the defendant has a legal, often statutory, obligation to the claimant that is independent of any cause of action brought by the claimant against the defendant. In such scenarios, defendants can and often do acknowledge their legal obligation to the claimant upon receipt of a pre-action letter of claim, but deny that any pre-action legal work was necessary to force the defendant to comply with that obligation and dispute any claim for costs.

6.5 The Association of Senior Costs Judges also questioned whether there was a need for a new summary costs procedure. Some caution, however, is warranted when assessing levels of demand for a new process from those administering the existing one. If the concern is that the existing process is inadequate or too complicated to meet the relevant need, most unmet demand is not going to be visible to those administering the current process. On the other side of the argument, Lloyds Market Association stated that while Part 8 covered most situations in theory, "the apparent current lack of use of Part 8 in relation to the PAP stage suggests that it would be better to have a specific procedure."

6.6 This basic tension in the arguments put against new procedure for dealing with costs liability disputes – there is no demand for it and there could be too much use of it – underscores an important limitation in our knowledge base. How much demand there is for such a procedure, and how litigants might use it (or abuse it) is a matter of conjecture until such a procedure is introduced, or trialled.

6.7 There was also some concern that introducing a new procedure would, depending on its design, introduce inconsistencies between the new and existing procedures e.g., who would

decide the dispute, whether the procedure would be a summary, detailed or provisional detailed assessment. Relatedly, there was a mix of views as to whether the new procedure should be formally summary in nature (summary being used in the technical sense) or should "dovetail" with existing procedures for provisional detailed assessments.

6.8 Stepping back from the detail, and in light of both the significant support and significant concerns regarding a new summary costs procedure, it may be that the two issues under consideration – i) streamlining the existing Part 8 procedures for costs quantum disputes, and ii) introducing a new procedure for determining pre-action costs liability disputes – should be dealt with separately. The WG believes this would be the most sensible way to proceed.

Potential changes to costs only proceedings for quantum disputes

6.9 There was widespread agreement that the Part 8 CPR 46.14 (and accompanying PD 46.9) procedure was 'clunky' and cumbersome. Possible changes suggested during the consultation included amending paragraph 9.9 of the PD to allow a judge to determine costs only proceedings summarily, either of its own motion or on application by one of the parties, even without a hearing.[38] To make that rule work as efficiently as possible, parties would need the option of requesting summary assessment and filing a statement of costs with their Part 8 claim form.

6.10 For the same reason, the WG considered whether it might also be possible for a party to request provisional detailed assessment when filing a Part 8 claim form, with the supporting documentation required by form N258. One of the bottlenecks in this procedure is nothing happens until a court first makes an order for costs. Yet this sequence is arguably anomalous in a jurisdiction that only exists to resolve disputes where the parties agree that there should be an order for costs; the only dispute is what the quantum of costs should be. In a proceeding where an order as to costs is uncontentious, and the real dispute is about quantum, it is worth exploring whether a court make an order for costs at the same time as it assesses those costs, either provisionally or summarily. Or it may be possible to make an order for costs and complete the assessment without referring the matter back to the parties.

[38] Notably the latest edition of Cook on Costs expresses surprise that parties have not attempted to seek summary assessment using the courts powers under paragraph 9.6: *Cook on Costs* (2022 edition) [29]-[30].

6.11 The risk that allowing the parties to expedite the process in this way could result in confusion over the parties' respective positions, or misunderstandings, is relatively low. Again, it should be recalled that this jurisdiction is confined to disputes where the parties have reached an agreement on all issues including which party is to pay the costs, but cannot agree the amount of those costs. In many cases the parties will have only reached that point when the receiving party has presented the paying party with a bill for costs. Moreover, if the WG's recommendations in this report are implemented, the parties will have also completed a stocktake report identifying the issues on which they agree and the issues on which they are still in dispute and the reasons for it. It also goes without saying that the court could not proceed to make a costs order, or assess them, until the defendant has an opportunity to respond to the part 8 claim form where liability for costs is accepted, to request either a detailed or summary assessment; or to dispute the existence of an agreement as to its liability for costs.

6.12 Combining the claim form and request for assessment could either be achieved by developing a dedicated costs only proceeding Part 8 claim form, or allowing the parties to file notices requesting provisional or summary assessment at the same time as the Part 8 claim form. Ultimately the appropriate method of combining the process is best dealt with by the CPRC, but given the parties have agreed there should be an order for costs, and the applicant is required to provide written evidence of that agreement, the WG believes that the real issues in dispute (quantum) should not be delayed while the parties wait for the court to make an order which the parties have already agreed should be made.

A new procedure for determining costs liability disputes for claims that are settled at the pre-action stage?

6.13 On balance the WG believes that rather than introduce a generic costs procedure, it would be desirable in the first instance to introduce a new procedure in those areas of litigation where it is tolerably clear that such a procedure is presently needed. This would certainly include housing, and possibly Judicial Review as well. Exactly where such a procedure is needed will be dealt with in the second report examining possible reforms to litigation specific PAPs. How the new procedure works in those contexts, and whether it is subject to abuse, can then be examined with a view to deciding whether to extend the procedure to other types of litigation and, if so, which ones.

6.14 Whether the court has the power to decide costs disputes in relation to claims that are not formally commenced in court, without the agreement of the parties, is an interesting question. As noted in paragraphs 1.23-24, doubts have been raised about the vires of certain aspects of PAPs which may extend to rules requiring parties to pay costs for claims that are resolved at the pre-action stage. In this specific context, the WG observes that primary legislation to support such a procedure is desirable, and may be necessary depending on the outcome of any court challenges.

6.15 The detail of a new procedure for pre-action costs liability disputes is best dealt with in the second report considering the specific litigation areas where it might be introduced. At this stage the WG confines itself to several general observations. First, it notes that such a procedure would require an alternative to Part 8, or appropriate amendments to Part 8, to allow such proceedings to be commenced without an order for costs from the court or agreement between the parties as to who should pay costs. In this regard it is noteworthy that even in cases where facts are disputed, Part 8 allows the procedure to be used, or modified, by a rule or practice direction (CPR 8.1(6)). Secondly, to ensure there is certainty as to what types of claims can be brought under the new procedure it may be advisable to limit them to instances where the relevant pre-action protocol expressly allows claims for pre-action costs.

Recommendation:

6.16 The WG recommends streamlining the process for determining costs quantum disputes under Part 8 and CPR 46.14. In particular the rules should clarify that the court has power to summarily assess costs even without a hearing, and parties should be given the option of being able to request summary or provisional detailed assessments when filing the Part 8 claim form.

6.17 The WG recommends that any new procedure for determining costs liability disputes for claims that are resolved at the pre-action stage should first be introduced in specific areas of litigation where there is a likely need for such a procedure. The areas where a new procedure might be needed will be dealt with in the second report focused on litigation specific PAPs.

7. Harnessing PAP Compliance to Streamline Litigation Processes

7.1 The IR canvassed several ways in which the steps completed by the parties at the pre-action stage could be used to reduce the steps required at the litigation stage of the dispute. Two specific ideas outlined were using pre-action information exchange as the parties' respective disclosure, and secondly using pre-action letters of claim and replies, in combination with the Joint Stocktake report, as a substitute for the parties' pleadings.

7.2 Respondents gave a full range of views about the merits of this proposal, with a number emphasising that their answers applied to specific types of litigation only. A number of respondents objected to them outright, fearing that they would undermine the litigation process by forcing parties to bring forward the steps normally engaged in post issue, and causing an unnecessary increase in costs. We think those fears misinterpret the nature of the proposals set out in the IR. In relation to pleadings, the WG stressed that relying on pre-action letters of claim or replies, either alone or in combination with the joint stocktake, would be *an option* available to the parties. The parties would be free to file conventional pleadings if they chose, and the court would retain discretion to order conventional pleadings or further particulars. As a consequence, no parties would be obliged to do anything by virtue of this proposal; it would merely give the parties an option *not to take further costly steps* once they had fully complied with the PAP. A significant number of respondents supported this proposal in large part because of its optional nature.

7.3 Similarly, in relation to disclosure, the proposal would not change the nature of any pre-action disclosure obligation. Rather it recognised that when the parties had provided disclosure as required by the PAP, ordinarily it would be unnecessary to order further disclosure once proceedings are issued subject to the court's powers to order specific disclosure where that was deemed appropriate. More respondents supported this proposal than the proposal to truncate the pleadings process. The WG notes, however, that the success of this proposal to simplify disclosure would depend on the adequacy of the

disclosure requirements under the relevant PAP. Given the evenly divided opinion on incorporating a disclosure standard into the General PAP, this proposal is unlikely to work for the General PAP. That said, the information that is disclosed by the parties when following the General PAP should stand as part of their disclosure. The court would then need to decide what additional disclosure, if any, should be ordered. Requiring the parties to provide a disclosure status update as part of the Joint Stocktake Report should make it easier for the court to make an assessment as to whether additional disclosure is required. Whether there are any circumstances where PAP disclosure could stand as the parties' full disclosure in litigation would need to be decided by reference to each PAP. This issue will be revisited in the next report on litigation specific PAPs.

7.4 As for the feasibility of giving parties the *option* of relying on pre-action letters of claim and replies, in combination with the stocktake report, as pleadings, a significant number of respondents working in high value commercial litigation thought it would not be workable for substantial commercial cases. Herbert Smith Freehills, for example, argued that the pre-action exchanges between the parties already helped them to distil the issues for the purposes of preparing pleadings. On the other hand, many saw value in this proposal if it were applied to lower value litigation. Some respondents noted that the MR had stated on a number of occasions that information exchanged at the PAP stage could and should be able to be used as pleadings (without having to use a cut and paste tool) in a number of his speeches on the future of the civil justice system.[39] For this reason, as with the disclosure question, whether certain PAP steps could stand in place of pleadings needs to be answered on a PAP-by-PAP basis.

7.5 The WG is conscious of the technical challenge involved in amending pleading rules, which cover a range of litigation and PAPs, when streamlining the litigation process through greater use of pre-action exchanges may only be suitable for certain types of litigation. On the other hand, this technical rule making challenge highlights one of the clear benefits of digitalising pre-action and litigations processes through online portals and courts. Where pre-action portals and digital courts are seamlessly joined up, allowing pre-action documents to be carried over to the court file through API, whether parties wish to rely on their pre-

[39] The Right Hon. Sir Geoffrey Vos, Master of the Rolls, London International Disputes Week 2021, 10 May 2021 p 3; 'Mediated interventions within the Court Dispute Resolution Process', 28 October 2021, p 4.

action documents as pleadings or prepare conventional pleadings can be addressed through straightforward question on a screen.

Recommendation

7.6 For cases covered by the General PAP and the Lower Value Small Claims PAP, the CPRC and OPRC should consider amending the pleading rules to allow the parties to rely on pre-action letters of claim and replies, in conjunction with the joint stocktake report where one is completed by the parties, as the pleadings for their claims and defences. This freedom should be subject to the court's discretion to order conventional pleadings or further particulars where appropriate.

8. Consideration of Other Consultation Questions in the Interim Report

8.1 The other consultation questions set out in the Interim Report can be dealt with very briefly. They fall into the category 'insufficient support to take the proposals forward,' or were not proposed by the WG initially and respondents agreed with the WG that they should not be taken forward.

Sanctions for Materially Changing Position

8.2 In its IR the WG asked for views on whether the rule in the Professional Negligence PAP that the court could, in its discretion, impose costs sanctions on a defendant for materially altering its defence from that set out in its pre-action letter of reply[40] should be applied more broadly. Multiple respondents suggested that any such obligation should apply equally to both claimants and defendants, and noted the Professional Negligence PAP already achieved this.[41] The WG agrees that the reasoning for such a rule – the need to ensure that parties do not change their positions in litigation from their pre-action stances without good reason – applies to both claimants and defendants. A number of respondents also suggested that a good reason exception should be expressly added to such a rule, even if it was inherent to the court's discretion. The WG also agrees with this suggestion. However, a majority of respondents who expressed a view on this proposal were against it, though few respondents were prepared to criticise the rule as it applied to the Professional Negligence Protocol. A number of respondents observed that the court already has sufficient case management powers to make appropriate orders that accounted for any change in position by the parties, and that the court already had a wide discretion as to costs.

[40] See Professional Negligence PAP para 9.2.2.
[41] See Professional Negligence PAP para 6.3.

8.3 Accordingly, the WG decided against taking this proposal forward, but it is mindful that, as with the PAP for Professional Negligence claims, there may be a case for introducing this proposal in specific areas of litigation.

Introduction of Statements of Truth

8.4 A clear majority of respondents agreed with the WG's position in the IR that statements of truth should not be introduced to PAPs as a general rule. However, the WG is mindful that some online pre-action portals do make provision for statements of truth. The OIC portal for minor RTA personal injury claims is a notable example. One reason proffered during the consultation for its inclusion in this portal was that if information collected at the PAP stage was to be seamlessly transferred to the court should litigation ensue, the appropriate verifications needed to be made at the pre-action stage. That is a rationale that may apply to other PAPs as more of them are incorporated into online portals.

8.5 Although a majority of respondents were against incorporating a statement of truth requirement, the guidance on the importance of honesty, and the consequences of dishonesty in light of the Court of Appeal's decision in *Jet 2,*[42] were widely supported (see paragraphs 3.16-3.17).

[42] *Jet2Holidays-v-Hughes* [2019] EWCA Civ 1858.

9. List of Recommendations

9.1 The Overriding Objective be amended to refer to the need for compliance with, and enforcement of, pre-action protocols.

9.2 All PAPs should make explicit reference to the Overriding Objective, and specifically the parties' obligation to co-operate.

9.3 Compliance with pre-action protocols be made formally mandatory. Urgent cases should be exempt from this requirement. Urgent cases should include, at a minimum, situations where the limitation period is expiring, where urgent injunctions are being sought and expressly exempt claims where there is a serious risk to the health or welfare of a party without urgent intervention of a court.

9.4 All online pre-action portals should include a question asking parties about their vulnerability. Where parties identify themselves as vulnerable, additional information should be provided to those parties identifying support that may be available to them.

9.5 The WG recommends that any online portals must be based on a clear understanding of their intended scope and the scope of relevant applicable court processes.

9.6 The WG recommends that MOJ examine the feasibility of developing a general pre-action portal which is limited to the main PAP steps, but can be linked to relevant existing online general claims portals (such as OCMC & Damages Claims Online).

9.7 If multiple online portals are adopted for specific claim types, along the lines of guided settlement systems, the WG recommends that the PAP online process for any given type of online court or guided settlement process should be co-designed, with proper consultation with stakeholders, so that the two work relevantly together.

9.8 The WG recommends that all pre-action portals be designed to be used by both professional court users and litigants in person (including, appropriate layperson summaries to explain technical language where necessary). This objective includes developing portals both for individual web-based access and for professional users who require integration with their own case management systems via an API. This will maximise the efficiencies of the system for all users.

9.9 The WG recommends that a paper-based alternative is available to all pre-action portals if adequate digital assistance is not available to technologically disadvantaged people.

9.10 The WG recommends that parties should not be compelled to conduct dispute resolution discussions online, however subject to the technology being available and cost effective, developers of pre-action portals should be permitted to facilitate confidential dispute resolution discussions online through a secure part of their portals.

9.11 The WG recommends that any pre-action portal provide appropriate signalling to vulnerable litigants about sources of assistance that may be available to them, the rules on vulnerable litigants (including CPR Part 1.6 and PD1A) and provide an opportunity for litigants to identify themselves as vulnerable.

9.12 The WG recommends that governance of pre-action portals be allocated to the OPRC.

9.13 The WG recommends that all pre-action portals should adopt a commitment to transparent sharing of data.

9.14 The cost of creating, operating, and maintaining any pre-action portal (of whatever kind) needs careful consideration. This in the WG's view falls into two categories: namely, consideration of the cost overheads for users, including professional firms, and costs to the court system which go beyond set up cost and demand ongoing funding. The WG recommends close attention is paid to cost aspects and cautions against underestimating the technical challenges involved, and resources required, to successfully develop and operate pre-action portals.

9.15 While the WG recommendations do not apply directly to private pre-action portals where use of them is voluntary, there should be a formal certification process for private portals that are marketed to prospective parties as being compliant with pre-action protocols applying to the parties' dispute – and therefore "court ready" without the parties having to take any additional steps beyond use of the portal – to ensure they meet minimum standards.

9.16 The PD-PAC be replaced by a PD that contains the General PAP; and a PAP for Lower Value claims worth £500 or less (the wording of which should be developed in consultation with LIP advocacy groups). Possible text for the General PAP and PAP for Lower Value Small Claims is set out in Annexes 2 and 3.

9.17 The rules governing pre-action processes should be the same whether they are carried out through digital portals or other forms of communication. Pre-action protocols should vary based on the needs of the litigation and the parties to the dispute, not the technology used by the parties. Depending on how the technology evolves, there may be cases where it is

appropriate to vary the rules governing pre-action processes in the digital sphere if it is demonstrated that the pre-action steps required of the parties can be sensibly modified without undermining the common objectives of pre-action protocols.

9.18 The WG recommends the adoption of the guidance in paragraphs 2 to 17 in the Draft General PAP.

9.19 The General PAP should require defendants to provide a letter of acknowledgement within 21 days of receipt of the claimant's pre-action letter of claim, and a full response within 90 days of receipt of the pre-action letter of claim. The defendant must identify in its letter of acknowledgement whether it believes it is the right defendant for the claim (or the identity of the correct defendant where that defendant is a related entity) and where the defendant believes it is insured for the claim, and the identity and contact details of that insurer. The defendant should also indicate what additional information it needs to provide a full response.

9.20 The Small Claims PAP should provide defendants with a maximum 30 days to provide full response to pre-action letters of claim.

9.21 The General PAP does not include a formal disclosure standard but does include additional guidance on the meaning of "key documents" as set out in paragraph 4.9 of the draft General PAP. The guidance should also remind parties that documents disclosed as part of the information exchange process should only be used for the dispute at hand.

9.22 The General PAP should include an obligation to engage in pre-action dispute resolution. Proposed wording for the obligation can be found at paragraphs 4.10-4.20 of the Draft General PAP in Annex 2.

9.23 Dispute resolution under the Small Claims PAP should be encouraged, but optional, and parties should be made aware of the obligation to engage in mandatory mediation if litigation is commenced.

9.24 The General PAP includes a requirement to complete a joint stock take report in which the parties identify the issues they agree on, the issues they disagree on and the reasons for that disagreement, and the status of the parties' disclosure.

9.25 The WG recommends the adoption of the guidance on sanctions set out in paragraphs 5.1-5.12 of the Draft General PAP in Annex 2.

9.26 All directions questionnaires (for all tracks) should contain a question about PAP compliance, asking each party to confirm whether they have complied with the PAP and to identify any non-compliance by the other party.

9.27 The WG recommends streamlining the process for determining costs quantum disputes under Part 8 and CPR 46.14. In particular the rules should clarify that the court has power to summarily assess costs even without a hearing, and parties should be given the option of being able to request summary or provisional detailed assessments when filing the Part 8 claim form.

9.28 The WG recommends that any new procedure for determining costs liability disputes for claims that are resolved at the pre-action stage should first be introduced in specific areas of litigation where there is a likely need for such a procedure. The areas where a new procedure might be needed will be dealt with in the second report focused on litigation specific PAPs.

9.29 For cases covered by the General PAP and the Lower Value Small Claims PAP, the CPRC and OPRC should consider amending the pleading rules to allow the parties to rely on pre-action letters of claim and replies, in conjunction with the joint stocktake report where one is completed by the parties, as the pleadings for their claims and defences. This freedom should be subject to the court's discretion to order conventional pleadings or further particulars where appropriate.

Table of Abbreviations and Acronyms

Abbreviation or acronym	Term
ACAS	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
API	Application Programming Interface
CE File	Court Electronic File
CJC	Civil Justice Council
CPR	Civil Procedure Rule
CPRC	Civil Procedure Rule Committee
FOIL	Forum of Insurance Lawyers
FRC	Fixed Recoverable Costs
HMCTS	His Majesty's Courts and Tribunals Service
IR	Interim Report
LIPs	Litigants in person
MOJ	Ministry of Justice
OCMC	Online Civil Money Claims
OIC	Online Injury Claim
OPRC	Online Procedure Rule Committee
PAP	Pre-Action Protocol
PD	Practice Direction
PD-PAC	Practice Direction – Pre-Action Conduct
TBC	To be confirmed
WG	Working Group

Abbreviation or acronym	Term
WP	Without prejudice

Annex 1 Terms of Reference and List of Working Group Members

Terms of reference

1. What amendments to the PAPs, or associated guidance to litigants in person (LIPs), would be desirable to draw litigants' attention to the effects of *Jet2*?
2. Are there any PAPs that are not fulfilling the purposes of PAPs as originally envisioned by Lord Woolf and/or the purposes currently set out in 'CPR PD-PAC'. What function should PAPs perform in the 2020s?
3. Are there major inconsistencies between PAPs and are these justified by the differences in the litigation to which they relate?
4. Are the "soft sanctions" for non-compliance with voluntary PAPs – case management directions and costs orders – being regularly and consistently applied?
5. Should all PAPs be mandatory? Should any PAPs be mandatory? What should the sanctions for non-compliance be?
6. Are any PAPs overly technical or burdensome to litigants and can they be streamlined?
7. Are any PAPs lacking key steps that ought to be required of parties, or prohibit initiatives that should be allowed?
8. Are PAPs a mechanism for de facto compulsory ADR prior to commencement of litigation? Should they be?
9. What are the ratios of cases settled at the PAP stage compared to post issue mediation?
10. Should there be any changes to PAPs as a result of the HMCTS reform programme and the digitisation of the civil justice system generally? To what extent are PAPs already online? Should there be further digitisation of PAP steps and guidance?

Main working group

Chair: Processor Andrew Higgins – Professor of Civil Justice Systems, University of Oxford, and Civil Justice Council Member
Diane Astin – Housing Representative and Civil Justice Council Member
Nicola Critchley – Insurance Representative and Civil Justice Council Member
Masood Ahmed – Associate Professor, University of Leicester
Brett Dixon – Law Society
Daniel Easton – Personal Injury Lawyer Leigh Day
District Judge Judy Gibson – Civil Justice Council Member
Oliver Hallam – Civil Mediation Council
Deputy District Judge Jonathan Hassall
District Judge Sunil Iyer
Master Victoria McCloud
His Honour Judge Richard Roberts

Andrew Skelly – Bar Council
Dr John Sorabji – Barrister, 9 St John Street Manchester
William Wood – Barrister, Brick Court Chambers

Annex 2 Draft General Pre-Action Protocol (Practice Direction) and Joint Stocktake Template

Title	Number
The Protocols[43]	Para. 1.1 - 1.9
False Statements and contempt of court	Para. 2.1 - 2.2
Proportionality	Para. 3.1-3.7
Steps to be taken before starting court proceedings	Para. 4.1-4.24
Compliance with this protocol and the specific protocols	Para. 5.1-5.12
Limitation	Para. 6.1

[43] PRACTICE DIRECTION – PRE-ACTION CONDUCT AND PROTOCOLS - Civil Procedure Rules (justice.gov.uk).

1. The Protocols

1.1 The pre-action protocols set out the steps the parties must take before starting proceedings. The parties must not start court proceedings without first complying with a protocol. Compliance with a protocol is mandatory except in urgent cases. An urgent case would include, for example, where a limitation period (i.e., the time limits for a starting a claim) is about to expire, where a party is applying for an urgent injunction (i.e., an order from the court that the defendant do something or stop doing something), or where there is a serious risk to health or welfare of a party without urgent court intervention. If proceedings are started, then the court may require that the parties have complied with the relevant protocol.

1.2 The protocols are intended to encourage the early exchange of information between the parties and to provide a framework within which the parties can explore the early resolution of their dispute without the need to start proceedings, or narrow their dispute so that any proceedings can be resolved more quickly and at lower cost.

1.3 Litigation should be a last resort. Parties should engage with each other (e.g., discuss the dispute) to try to resolve their dispute before raising the prospect of litigation. Claimants should give defendants a reasonable time to deal with complaints, and defendants should deal with complaints promptly. Nothing in this guidance prevents a claimant from starting court proceedings if their complaint is not resolved by a defendant.

1.4 Large organisations (e.g., public bodies and companies) should publish contact information, including an email address, for handling pre-action letters of claim.

1.5 By engaging with the protocols, the parties must try to resolve their dispute fairly, within a reasonable time, and at proportionate cost. The parties must actively cooperate with each other to achieve the overriding objective (Civil Procedure Rule 1.1(1)) which is to enable the court to deal with cases justly and at proportionate cost. These obligations apply equally to conduct before as well as after proceedings have started and include complying with the relevant protocol, the Civil Procedure Rules, court orders and court directions.

1.6 There are specific protocols for certain types of disputes. If a specific protocol applies to a dispute, then that protocol must be followed. The specific protocols are:

- Pre-Action Protocol for Debt Claims

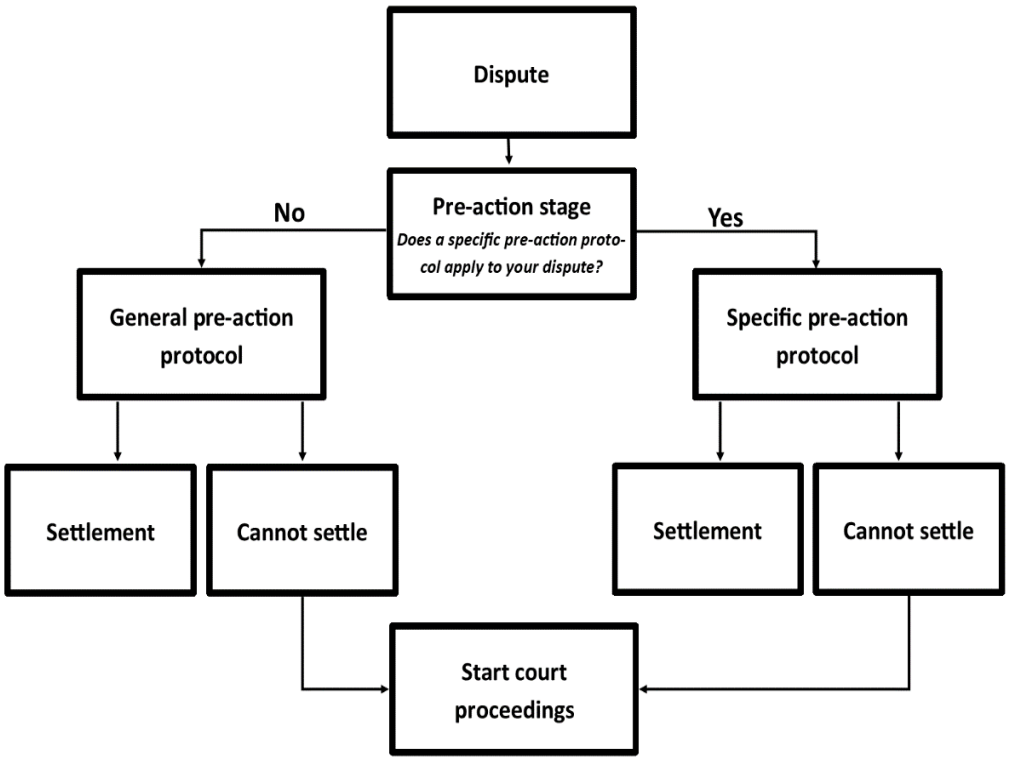
- Pre-action Protocol for Media and Communications Claims
- Pre-Action Protocol for Personal Injury Claims
- Pre-Action Protocol for the Resolution of Clinical Disputes
- Pre-Action Protocol for Professional Negligence
- Pre-Action Protocol for Judicial Review
- Pre-Action Protocol for Disease and Illness Claims
- Pre-Action Protocol for Housing Conditions Claims (England)
- Pre-Action Protocol for Housing Disrepair Cases (Wales)
- Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property
- Pre-Action Protocol for Possession Claims by Social Landlords
- Pre-Action Protocol for Lower Value Personal Injury Claims in Road Traffic Accidents
- Pre-Action Protocol for Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy (the 'Dilapidations Protocol')
- Pre-Action Protocol for Lower Value Personal Injury (Employers' Liability and Public Liability) Claims
- Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents ("The RTA Small Claims Protocol")

1.7 If there is no specific protocol that applies, or where the parties are unclear on which protocol should apply, then the parties must comply with this protocol before starting proceedings.

1.8 The general principles set out in this protocol also apply to the specific protocols, but do not, in any way, change the specific procedural steps which the parties are required to take in those protocols. The general principles are:

- Starting court proceedings should be a last resort.
- There must be an early exchange of relevant information.
- The parties should behave reasonably and proportionately.
- The parties must actively cooperate with each other to achieve the overriding objective.
- The parties should take reasonable steps to try to resolve or narrow their dispute.

1.9 Below is a diagram setting out the processes that parties must follow at the pre-action stage before starting court proceedings.



2. False statements and contempt of court

2.1 Co-operating with each other means that the parties must be honest with each other at all times. Providing false information without an honest belief in its truth can lead to severe sanctions, including criminal sanctions.

2.2 Proceedings for contempt of court may be brought against any person who provides false information in a document which contains a statement of truth, whether prepared before proceedings have started or during proceedings.

3. Proportionality

3.1 Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal or factual issues.

3.2 Examples of reasonable and proportionate steps include:

- describing the relevant law in objective and clear terms to litigants in person (people who do not have a lawyer representing them), and providing them with a copy of the relevant protocol;
- offering to agree relevant facts in order to narrow the issues between the parties.

3.3 Examples of unreasonable or disproportionate steps include:

- requesting information or documents that are already in a party's possession, or are irrelevant or of marginal relevance to the dispute;
- requesting information or documents for ulterior purposes (i.e., unrelated to resolving the specific dispute between the parties);
- withholding relevant information that would, if given to the other party, avoid them incurring additional expense in preparing their case.

3.4 The costs incurred in complying with this protocol or a specific protocol should be proportionate to the dispute. Proportionality takes into account a range of factors including the sums and issues involved and the complexity of the dispute. Where parties incur disproportionate costs in complying with a specific protocol or this protocol, those costs may not be allowed as part of the costs of the proceedings.

3.5 It should be noted that the court must give permission before expert evidence can be relied upon in proceedings and the court may limit the fees recoverable. Many disputes can be resolved without expert advice or evidence. If it is necessary to obtain expert evidence, particularly in Lower Value claims, the parties should consider using a single expert, whom they jointly instruct, with the costs shared equally between them.

3.6 Parties should be aware that they can make a formal offer to settle the dispute under Part 36 of the Civil Procedure Rules. The primary benefit of a formal settlement offer is that even if the offer is not accepted, if the party who made the offer obtains a better outcome from

the court than their offer, they will obtain protection against the amount of costs they have to pay if they lose the case, or increase the amount of costs they can claim if they win the case. To make a formal settlement offer, the parties can use this form N242A – Offer to settle (Section I – Part 36) (publishing.service.gov.uk). Parties are free to make offers to settle their dispute by other methods e.g., writing a letter setting out the proposed terms of settlement.

3.7 If a party is found to have acted dishonestly, or made a claim or defence that shows no reasonable grounds for bringing or defending the claim, that party may be ordered to pay the other party's reasonable costs whether or not they are proportionate to the claim.

4. Steps to be taken before starting court proceedings

4.1 The parties must take three sequential steps before starting a claim; each subsequent step is dependent on compliance by both parties with the previous step. The three steps are:

i) Early exchange of relevant information by all parties
ii) Engaging in a dispute resolution process
iii) Completing a joint stocktake report

Early exchange of information

4.2 The claimant must provide the defendant with a letter which concisely sets out the details of the claim ('the letter of claim').

4.3 The defendant must, within 21 days of receiving the letter of claim, send a letter of acknowledgment to the claimant:

- acknowledging receipt of the letter of claim.
- confirming that it is the correct entity to respond to the claim, or, if known, providing the name of the entity which it says is the correct entity, and, if known, the contact details of that entity;

- confirming that it has an insurance policy which may provide coverage for the claim and an indication whether insurers have confirmed that the claim is covered under the policy. Details of the identity and contact information of any insurer should also be provided;
- detailing any additional information it requires from the claimant in order to provide a full response to the letter of claim.

4.4 If the defendant fails to provide a letter of acknowledgement, the claimant can proceed to issue a claim in court.

4.5 The defendant must provide a full reply within 90 days of receiving the letter of claim. The defendant's reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed.

4.6 All parties must provide sufficient information to enable each party to understand each other's position and to engage meaningfully in dispute resolution processes to resolve or narrow the dispute.

4.7 The claimant's letter of claim and the defendant's acknowledgment of service and full reply are not privileged (i.e., they can be used in court proceedings) and will stand as the parties' disclosure in court proceedings. This is subject to the court having the power to order further disclosure where appropriate in accordance with the relevant rules.

4.8 The claimant's and defendant's letters must disclose and attach any key documents. A document is a key document if a party intends to rely on it to support their claim or defence, or if it is necessary to enable the other party to understand the claim or defence. Any documents disclosed by the parties must only be used in respect of the dispute at hand.

4.9 Examples of key documents include, but are not limited to:

- a copy of the contract;
- copies of receipts or invoices;
- plans and photographs.

Obligation to engage in dispute resolution process

4.10 Most cases which are brought before the courts end in settlement and without a trial or a judgment. The purpose of this part of the protocol is to ensure that, if possible, the parties reach a settlement before they incur the cost, time, and stress of litigation.

4.11 The parties to any dispute are therefore required to engage in a dispute resolution process with each other prior to any proceedings being issued. This dispute resolution process may involve, but is not limited to:

- mediation: a neutral third party (called a 'mediator') assists the parties to try to resolve their dispute;
- early neutral evaluation: non-binding evaluations by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases;
- any applicable ombudsman scheme;
- any dispute resolution scheme that the parties have joined;
- a pre-action meeting: A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute, its root causes, and ways it might be resolved or narrowed.

4.12 If the parties are unable to agree on a particular dispute resolution process, then they must hold a pre-action meeting as specified above.

4.13 As part of dispute resolution obligation:

- the claimant must take reasonable steps to ensure that the defendant understands the basis and amount of any claim that is to be made;
- the defending must take reasonable steps to ensure that the claimant understands (a) whether the defendant accepts the claim or any part of it; and (b) if the defendant does, their reasons for disputing it;
- both parties must take reasonable steps to find out if the dispute can be resolved or narrowed by agreement.

4.14 Where the parties have engaged in mediation under this protocol [or any other dispute resolution process involving the assistance of a neutral third party such as early neutral evaluation, an Ombudsman etc.], and the dispute does not settle, then the parties will not be required to engage in another mediation if court proceedings are started.

4.15 Even if the dispute resolution process does not resolve the issues at this stage positive engagement can, nevertheless, help to narrow the issues between the parties, avoid misunderstandings and help the parties to appreciate each other's cases. It may also assist the parties to settle the dispute at a later stage.

4.16 If one or both parties fail to take part in a dispute resolution process, the court will have the power to stay the proceedings or make other appropriate case management orders or make any order for costs it considers appropriate.

4.17 In the event that a court is enquiring whether or not this protocol was complied with, or otherwise as to the circumstances of any breach of this protocol, the court may examine:

- any communications between the parties that suggests or invites steps by way of dispute resolution, or which respond to or comment upon such a suggestion or invitation;
- any evidence as to the fact of the occurrence of a meeting or communication for the purpose of dispute resolution, including evidence as to the individuals involved in attending any such meeting or making or receiving the communication.

4.18 All other communications between the parties for the purpose of dispute resolution are "without prejudice" i.e., the court will not examine and should not be shown any communication or part of a communication or other evidence which discloses the substance of any negotiations for the purpose of dispute resolution.

4.19 Nothing in this guidance prevents parties from making open offers to resolve the dispute or offers that are "without prejudice save as to costs" i.e., settlement offers that are made but which should not be shown to the court except when the court is deciding the issue of costs of the proceeding.

4.20 If the parties cannot resolve their dispute at the pre-action stage, the parties are free to continue to engage with dispute resolution processes after the claim has been issued.

Stocktake

4.21 Where the parties have complied with (i) and (ii) above but are unable to resolve the dispute, the parties must review their positions before the claimant starts court proceedings. The parties should continue to co-operate and should prepare a joint pre-action report, or list of issues, which concisely sets out the following:

- the issues on which the parties agree;
- the issues on which the parties disagree;
- the claimant’s position on the issues still in dispute;
- the defendant’s position on the issues still in dispute;

- a list of the documents that have been disclosed by the parties, and a list of documents the parties are still seeking disclosure of.

4.22 The parties can use the template stocktake report [a link would be provided once published] to complete the report.

4.23 The stocktake report must be completed within 21 days of the conclusion of the dispute resolution process, and be filed by the claimant with its statement of case (i.e., the document that sets out the claimant's case) when proceedings are started.

4.24 The claimant can commence proceedings without filing a stocktake report 21 days after the conclusion of the dispute resolution process if the defendant fails to co-operate in completing a stocktake report.

5. Compliance with this protocol and the specific protocols

5.1 The court will consider whether all parties have complied in substance with the terms of a specific protocol or this protocol, and is not likely to be concerned with minor or technical infringements.

5.2 The court may decide that there has been a failure to comply with a protocol when a party has:

a) not complied with one or more steps referred to in paragraphs 4 above; or

b) acted unreasonably in such a way as to undermine the objectives of the protocol.

5.3 Where there has been non-compliance with a protocol, the court may order:

a) the parties are relieved of the obligation to comply or further comply with a protocol;

b) the proceedings are stayed while particular steps are taken to comply with a protocol;

c) sanctions are to be imposed.

5.4 Where a party has failed to comply ('the non-complying party') with any of the steps in paragraph 4 of this protocol or any procedural steps in a specific protocol, the other party ('the complying party') may write to the non-complying party to notify it of the nature of the non-compliance, and request that it comply with the protocol.

5.5 The parties can use the template 'Notice of Failure to Comply' ('the Notice') to inform each other of any non-compliance.

5.6 The non-complying party must then comply with the protocol within seven days of receiving the complying party's Notice.

5.7 If, after receiving the Notice, the non-complying party fails to comply with the protocol, the complying party may bring the Notice to the attention of the court when the court considers whether to impose a sanction on a party for failing to comply with the protocol (see paragraphs 5.9-5.11 below).

5.8 It should be noted that (i) the use of the Notice is not a pre-condition to the court exercising its powers to impose a sanction on a party under this or any specific protocol; and (ii) if a Notice is used, it will be one factor in all the circumstances of the case which the court will take into account when deciding on whether to impose a sanction on a party.

5.9 When deciding whether to impose any sanctions, the court will consider whether the breach was serious or significant, whether there was a good reason for it, and all the circumstances of the case, including any Notice of Failure to Comply.

5.10 The court may impose one or more of the following sanctions:

a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;

b) an order that the party at fault pay those costs on the indemnity basis (i.e., at a higher rate than would otherwise be the case);

c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;

d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate (not exceeding 10% above base rate) than the rate which would otherwise have been awarded.

5.11 The court will decide whether there has been non-compliance with the protocol and whether to impose a sanction at the earliest practical opportunity after compliance has been properly raised by one of the parties, unless the court considers it appropriate to defer the issue until a later stage.

5.12 The Court will take into account compliance with this or any specific protocols when giving directions. Directions shall be tailored to reflect the steps undertaken by the parties at the pre-action stage.

6. Limitation

6.1 This protocol and the specific protocols do not alter the statutory time limits for starting court proceedings. If a claim is started after the relevant limitation period has expired, the defendant will be entitled to use that as a defence to the claim. If proceedings are started to comply with the statutory time limit before the parties have followed the steps in a protocol, the parties should apply to the court for a stay of the proceedings in order to allow them to comply with a protocol.

General Pre-Action Protocol (Practice Direction) Notice of Failure to Comply

Notes:

i. The parties must comply with all procedural steps under the protocol.

ii. This Notice should only be completed and sent to a party that has failed to comply with one or more of the procedural steps under a protocol ('the non-complying party').

iii. The non-complying party must complete any outstanding steps under the protocol within 7 days of receiving this Notice.

iv. If, after receiving this Notice, the non-complying party fails to comply with the protocol, the complying party may bring this Notice to the attention of the court when the court considers whether to sanction (i.e., penalise) a party for failing to comply with the protocol.

v. It should be noted that (a) the use of this Notice is **not** a pre-condition to the court exercising its powers to impose a sanction on a party; and (b) if this Notice is used, it will be one factor in all the circumstances of the case that the court will take into account when deciding whether to sanction a party.

Section 1 – The parties

From **[Claimant(s)/Defendants]**	
To **[Claimant(s)/Defendant(s)]**	

Section 2 – Steps to be taken to comply with the protocol

Please indicate the steps (including the corresponding paragraph number in the protocol) that the non-complying party must complete to comply with the protocol.

Any outstanding procedural steps must be completed by the non-complying party within 7 days of the receiving this Notice.

Protocol para. number	**Steps to be taken**

Section 3 – Signature

Signature on behalf of [Claimant(s)/Defendants]	Date

General Pre-Action Protocol (Practice Direction) Joint Stocktake Template

Note: This document should be completed only after the parties have completed all previous pre-action steps, namely (1) Early exchange of relevant information and (2) The obligation to engage in a dispute resolution process. See paragraph 4 of the General Pre-Action Protocol (Practice Direction) for further details.

Section 1 – The Parties

Claimant(s)	
Defendant(s)	

Section 2 – Steps to Try to Resolve or Narrow the Dispute

Please indicate the step or steps the parties engaged in to try to resolve or narrow the dispute. Only one step is required, but please tick all that were undertaken:

Steps	**Yes**
Mediation: a neutral third party (called a 'mediator') assists the parties to try to resolve their dispute	
Early neutral evaluation: non-binding evaluations by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases	
Any applicable Ombudsman Scheme	

Any dispute resolution scheme that the parties have joined	
A pre-action meeting: A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute, its root causes, and ways it might be resolved or narrowed	
Other (Please specify)	

Section 3 – List of Agreed Issues

The parties agree on the following matters relevant to their dispute.

	Details
1	
2	
3	
4	
5	
6	
7	
8	

Create additional rows or continue on separate sheet if required.

Section 4 – List of Issues in Dispute

	Issue	Claimant(s)' position	Defendant(s)' position
1			
2			
3			
4			
5			
6			
7			
8			

Create additional rows or continue on separate sheet if required.

Section 5 – Disclosure

5A Documents Disclosed by the Parties

There is no need to attach the documents to the stocktake report.

	Documents disclosed by the Claimant(s)	Documents disclosed by the Defendant(s)
1		
2		
3		
4		
5		
6		

7		
8		

Create additional rows or continue on separate sheet if required.

5B Documents the Parties have requested but have not yet been disclosed

	Documents requested by the Claimant(s)	**Reason for the request**	**Defendant(s)' reason for not disclosing**
1			
2			
3			
4			
5			

Create additional rows or continue on separate sheet if required.

Section 6 – Signatures

Signature on behalf of Claimant(s)	Date
Signature on behalf of Defendant(s)	Date

Annex 3 The Protocol for Lower Value Small Claims Disputes

1. The Protocol for Lower Value Small Claims Disputes

1.1 The pre-action protocols set out the steps the parties should take before starting proceedings. This protocol applies to disputes with a financial value of £500 or less ('Lower Value Small Claims disputes'). You should follow this protocol if your dispute is £500 or less excluding costs and interest.

1.2 Pre-action guidance in respect of claims above £500 can be found here [link to PaPs].[44]

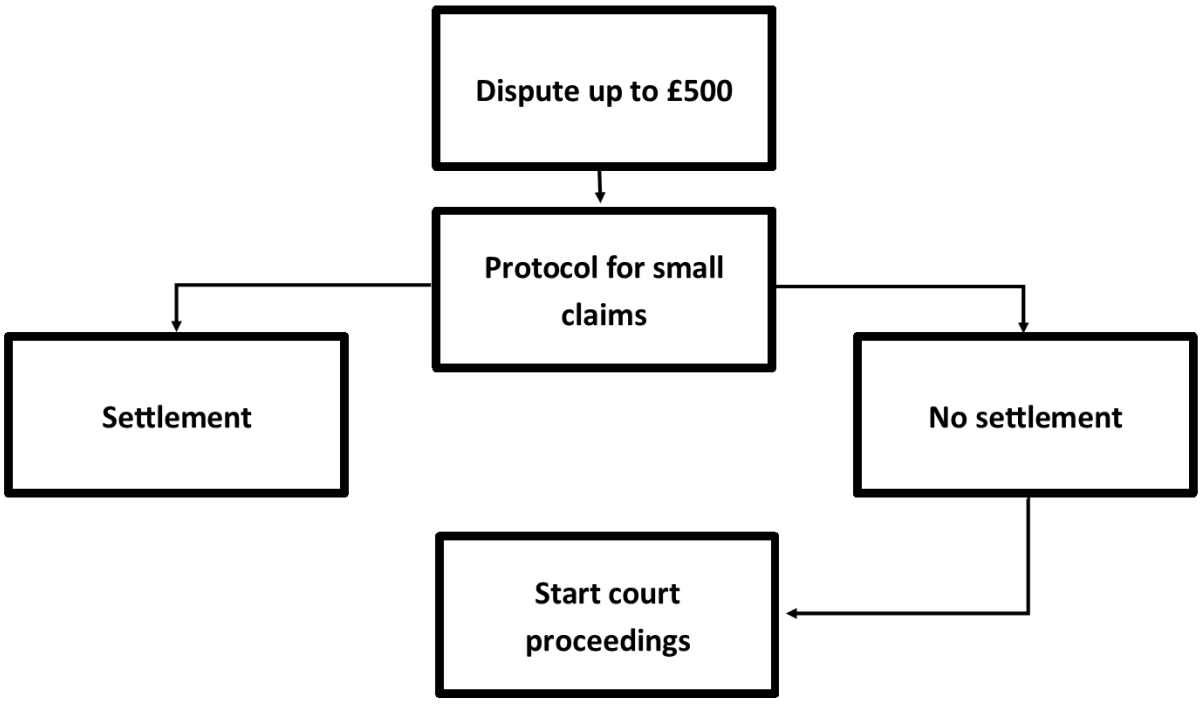
[44] A link will be created to the relevant PAP once adopted.

2. Taking reasonable steps

2.1 You should take reasonable steps that will help to identify, narrow and resolve the issues in dispute.

2.2 You should not take unnecessary steps which will increase the time and cost in resolving the dispute, for example, by refusing to disclose relevant documents.

2.3 The diagram below sets out the steps which the parties should take before starting court proceedings:



3. Being truthful and criminal consequences

3.1 The parties should at all times be truthful and open in their pre-action dealings and communications with each other about their dispute. As the matter progresses, you will be required to give signed confirmation of the truth of certain matters in the dispute.

3.2 There are serious criminal consequences for anyone providing false information in a document which contains a statement of truth, whether the document has been prepared

before court proceedings have started or during court proceedings. A statement of truth confirms that a party believes that the facts in a document are true.

4. Steps to be taken before starting court proceedings

4.1 You should take two steps before starting proceedings. The first step – early exchange of relevant information – is mandatory, and the second step – engaging in a dispute resolution process – is optional but strongly encouraged.

(i) Mandatory step: Early exchange of relevant information

4.2 Before starting court proceedings the claimant should write to the defendant explaining what the claim is for, the legal basis of the claim, how much is being claimed and how it is calculated.

4.3 The defendant should reply within 30 days of receiving the claimant's letter, and explain whether it has accepted the claim and, if not, the amount that is disputed and the reasons for disputing the amount. The defendant should also explain whether it is claiming any money from the claimant and provide reasons for claiming the amount and how it is calculated.

4.4 Unless the parties' letters contain an offer to settle the dispute, they can be used in court proceedings if the matter cannot be settled.

4.5 The following are examples of information which may be helpful to share:

- If your dispute is about an agreement or contract, set out the date of the agreement, what was agreed and by whom.
- You should provide any documents to the other party to help them understand your position.

(ii) Optional step: Engage with dispute resolution process

4.6 Most cases settle before court proceedings are started, and most cases that are started in court settle before coming before a judge to make a decision.

4.7 The parties are therefore strongly encouraged to engage in a dispute resolution process with each other before any proceedings are issued. This may help the parties to resolve their dispute without the need to go to court. There is no obligation on the parties to reach a settlement and you are free to argue your claim or defence before a judge.

4.8 Dispute resolution processes may involve:

- Mediation: This is a confidential process in which a neutral third party (called a 'mediator') listens to the parties' views and helps them to reach a settlement. The parties are free to decide on whether to settle their dispute and the terms of any settlement. Anything discussed during the mediation cannot, without the consent of all the parties, be used in any subsequent court proceedings if the mediation does not result in a settlement;
- Ombudsman schemes: these schemes help to resolve disputes between consumers and companies e.g. the Energy Ombudsman;
- Dispute resolution schemes that the parties have joined e.g. airline alternative dispute resolution schemes for flight delays;
- A pre-action meeting: this is a confidential meeting between the parties which can be held either virtually, in person, or by telephone, to discuss the scope of their dispute, its root causes, and ways it might be resolved or narrowed. Anything discussed during the meeting cannot, without the consent of all the parties, be used in any subsequent court proceedings if the meeting does not result in a settlement.

4.9 If proceedings are started, the parties will be required to engage in mediation. Where the parties have engaged in mediation under this protocol, and the dispute does not settle, then the parties will not be required to engage in another mediation if court proceedings are started.

4.10 None of the communications between the parties for the purpose of dispute resolution can be shown to the court except in the following situations:

- The parties may make "open offers" to resolve the dispute which can be shown to the court where the offer states it is an "open offer".

- The parties may make an offer that is "without prejudice save as to costs" which means that any settlement offers that are made should not be shown to the court except when the court is deciding the issue of costs of the proceedings.

5. Consequence of not complying with this protocol

5.1 The court will consider whether all parties have complied with this protocol.

5.2 If the parties have failed to comply with the guidance in this protocol, the court may:

- Pause the proceedings to allow the parties to comply with this protocol;
- Where there has been repeated failures to comply, the court may sanction the parties. Sanctions are penalties which the court may impose on a party for failing to comply with this protocol, any court orders, or court rules. For example, the court may make an order that the party at fault pays part or all of the costs of the other party.

6. Time limits for starting court proceedings

6.1 This protocol does not change the time limits for starting court proceedings (i.e. the time limits within which claims should be started and which are set by the law). If proceedings are started to comply with a time limit before the parties have followed the steps in this protocol, the parties should apply to the court to pause the proceedings in order to allow them to comply with this protocol.