CIVIL JUSTICE COUNCIL

Review of Pre-Action Protocols

Phase Two Report (Final)

November 2024

Contents

1. Executive Summary

1.1 This is the second and final part of the Civil Justice Council's (CJC) bifurcated review of Pre-Action Protocols (PAPs). The CJC's interim report was published in November 2021[1] and Part I of the CJC's final report was published in August 2023.[2] In Part I the Working Group set out proposed reforms to the Practice Direction on Pre-action Conduct, including the creation of a new General Pre-Action Protocol, as well as recommendations setting out the principles that should guide the development of digitalisation of pre-action processes. The function of pre-action protocols in the Civil Justice System was set out at some length in both the Interim Report and the Final Report Part I, and will not be repeated here, save to emphasise the widespread consensus that pre-action protocols play a crucial role in facilitating proportionate dispute resolution in a justice system where very few cases ever require judicial adjudication on the merits. All the recommendations in Part I and Part II of the CJC's review are geared towards fine tuning this critical function, helping to ensure PAPs contribute towards a fair settlement of the dispute, or a narrowing of the issues and more proportionate litigation where settlement is not possible.

1.2 This short report sets out the CJC's recommendations for reform of litigation specific PAPs including the Personal Injury PAPs, the Housing PAPs, the Judicial Review PAP, the Debt PAP, the Construction and Engineering PAP, the Professional Negligence PAP, and the Media and Communications PAP. For the record, not all of the PAPs were covered in the CJC's Review. This report also recommends the creation of two new PAPs; one for dealing with child abuse claims and another for claims on the multi-track in the Business & Property Courts. The report does not discuss in detail the arguments for and against particular recommendations. These were set out in the Interim Report. However, where the Working Group has decided not to pursue certain proposals, or to adopt them in modified form, brief reasons are given for that decision.

[1] Civil Justice Council, 'Review of Pre-Action Protocols: Interim Report' (2021) <https://www.judiciary.uk/guidance-and-resources/civil-justice-council-launches-consultation-on-pre-action-protocols/>.

[2] Civil Justice Council, 'Review of Pre-Action Protocols: Final Report Part I' (2023) <https://www.judiciary.uk/guidance-and-resources/civil-justice-council-publishes-final-report-on-pre-action-protocols/>.

1.3 It now becomes the responsibility of the Civil Procedure Rule Committee (CPRC), and in some cases the Online Procedure Rule Committee (OPRC), to consider how to take forward the recommendations in Part I and Part II of our review. I wish to thank everyone involved in this review, including everyone who responded to the initial survey and to the consultation. I especially want to thank the chairs of the sub-committees on Personal Injury PAPs (Amanda Stevens), the Housing PAPs (Diane Astin) and the Judicial Review PAP (Maurice Sunkin and Jo Hickman), as well as Masood Ahmed on the Main Working Group for all their drafting and hard work in steering this review to a conclusion.

1.4 This review has truly been a collective effort and all members of the Working Group have contributed their expertise and time in reviewing consultation responses and developing these recommendations. Finally, I would like to thank the CJC Secretariat and especially Josh Gammage for his tireless work in helping put this report together.

Andrew Higgins

Chair of the Working Group

Professor of Civil Justice Systems, Mansfield College and University of Oxford Academic Member of the CJC

2. Mandatory Mediation Initiatives

The relationship between pre-action dispute resolution and mandatory mediation initiatives

2.1 A lot has happened in the dispute resolution field since the Interim Report flagged the possible introduction of a good faith obligation to try to resolve or narrow the dispute. The obligation itself was revised in Part I of the Final Report and the Ministry of Justice has introduced automatic referrals to mediation for small claims.[3] Meanwhile, the Court of Appeal handed down the landmark decision in Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416 ("Churchill"), clarifying that compulsory mediation would not constitute a breach of the right to fair trial under Article 6 of the European Convention on Human Rights provided any such process was conducted at proportionate cost, within a reasonable time, and the parties could still effectively access the court should the mediation not succeed. Following a recent consultation conducted by the CPRC, the Civil Procedure Rules (CPR) has been amended to reflect the decision in Churchill.4 CPR r1, 3, 28 and 44 have been amended to give greater emphasis on Alternative Dispute Resolution (ADR) and, in particular, the power of the court to mandate ADR.

2.2 The Working Group considered the impact that these current and possible future developments in mediation might have on any mandatory obligation to engage in a dispute resolution process at the pre-action stage. As outlined in Part I of the Final Report the Working Group believes that its recommendations on pre-action dispute resolution complement these developments.

[3] Correction: a previous version of this report referred to a Ministry of Justice Consultation on introducing mandatory mediation in road traffic accident matters. The consultation in fact referred to increasing and/or integrating mediation in small claims. This line has now been omitted.

[4] Civil Procedure (Amendment No.3) Rules 2024 (SI 2024/839).

2.3 This is for two related reasons. First, and most obviously, many of these developments relate to post issue mediation processes as opposed to obligations at the pre-action stage. Secondly, the Working Group accepts that there is a risk of unnecessary duplication were parties automatically required to engage in mediation both before and after issuing proceedings, particularly in small claims disputes. However as was stressed in Part I of this report, the Working Group is not recommending mandatory mediation but rather a non-prescriptive obligation to engage in a dispute resolution process as part of the PAP process. If parties choose to engage in a formal ADR process with the assistance of a third party at the pre-action stage, it is the Working Group's recommendation that those parties should be exempt from any automatic requirement to engage in mediation after issuing proceedings. The Working Group does not rule out the possibility that there may be some cases where the court considers the parties are sufficiently close that another round of mediation has a real prospect of finally resolving the dispute. In such circumstances the court may, following the decision in Churchill, order the parties to engage with another round of dispute resolution, even though the parties may have engaged with a dispute resolution procedure in compliance with a relevant PAP.5Clearly, whether another round of mediation or other form of dispute resolution is required should be left to the court's discretion. It is important that this is made clear to the parties from the outset and we therefore recommend that all PAPs which include a dispute resolution obligation be amended to state (i) the court has the power to compel parties to engage in a dispute resolution process and (ii) the court may refer the parties to ADR during proceedings even though the parties may have previously engaged with an ADR process in compliance with a relevant PAP. For present purposes, it suffices for the Working Group to observe that we believe an obligation to engage in a non-prescriptive dispute resolution process is compatible with any mandatory mediation requirement post issue, and the existence of the latter obligation may effectively incentivise the parties to engage in mediation, or other formal dispute resolution process, at the pre-action stage. The obvious hope is that these incentives will then reduce the number of cases in which issuing proceedings becomes necessary.

[5] For discussion see M. Ahmed 'Revisiting Compulsory Alternative Dispute Resolution in the English Civil Justice System' (2024) 43(4) *Civil Justice Quarterly* 265-283.

Recommendation

2.4 The Working Group believes that where parties engage in a formal dispute resolution process, with the assistance of a third-party neutral, at the pre-action stage they should be exempt from any automatic requirement to engage in mediation after proceedings are issued.

2.5 All PAPs which include a dispute resolution obligation should be amended to make clear that engaging in a formal dispute resolution process pre-action will exempt parties from any automatic requirement to engage in mediation post issue but that the court still retains a discretion to order mediation (or other forms of dispute resolution) post issue where it considers it appropriate to do so.

3. Pre-Action Protocols for Personal Injury

Introduction

3.1 The Sub-Committee's recommendations in earlier reports hold good following the consultation responses and interval of time that has elapsed since earlier reports were published. Notably we continue to recommend that:

3.1.1 A separate Protocol for child abuse claims is prepared.

3.1.2 There is no pressing need for a dedicated Protocol dealing with overseas travel claims; these claims are generally dealt with by specialist practitioners and are sufficiently diverse to likely not benefit from being straightjacketed into a single new Protocol.

3.1.3 The Protocols should begin with a simple navigational aid through the requisite processes.

3.1.4 The importance of ADR should be given greater prominence and explained more simply.

3.1.5 There is better alignment and prominence of the Serious Injury Guide alongside the Rehabilitation Code (as appropriate).

3.1.6 Template examples for the stocktake process should be provided and completion of the process should be obligatory.

3.1.7 On a purely administrative but nonetheless important note, the updating of Protocols needs to be slicker than it currently is. Requests to replace broken or out-of-date links to websites and materials embedded within the Protocols are responded to very slowly. This means that users who do not have access to the White Book online subscription service cannot rely upon the Protocols to provide assistance in accessing relevant websites and information leaflets or up-to-date telephone numbers.

3.1.8 The Sub-Committee is aware that documents that may be specified as a disclosure requirement within the various Protocols are subject to change (for example as new investigatory bodies are instituted and others are disbanded, or as legislative requirements change such as in the employment law field) and those changes should be reflected in a timely fashion. At present this is not the case and some very out-of-date information remains within the Personal Injury Protocols.

3.1.9 Whilst the vast majority of consultees would favour initiatives with third party providers, especially HMRC, to promote agreed timescales for production of documents, and thus reduce delay, it was not possible to identify a body that could lead on this work.

Pre-Action Protocol for Personal Injury Claims

3.2 Our main observations are as follows.

3.3 The substance of the Protocol holds good but the opening and closing sections require a drafting refresh. The language is overly "wordy" and core principles should be stated precisely and succinctly.

3.4 The recommendation at paragraph 3.3 is more than cosmetic – it is essential that that there is better navigation through the PAP from start to finish, and clarity around the reasons for using the Protocol, and what the final results should be pre-litigation. A simple flow diagram within the body of the Protocol might assist for the principal basic steps to be taken with relevant timescales (i.e., a navigational tool that is less complex than the existing one in the Appendix although that might remain for other parts of the process).

3.5 It is an unpromising and confusing start to commence with all the detailed exclusions - it would be preferable to have a signpost to a later paragraph or an Appendix for parties to check they are using the correct Protocol so as not to displace the prominence of the Objectives, which should be front and centre.

3.6 The objectives are repetitive and should be more focussed-on narrowing issues pre-action, reaching agreement where possible and the importance of ADR (particularly after the decision in Churchill).

3.7 There should be an index to the sections of the Protocol, which is hyperlinked in online editions.

3.8 This Protocol began life before the low value Protocols and was designed mainly for fast-track claims but is in fact the only Protocol now covering higher value personal injury and that needs to be made clear. In particular, the process for nomination of experts is wholly unsuited to claims outside the fast track, but the existing Protocol already makes that plain, without setting out an alternative process. The wording is however somewhat buried within the overall section heading "Experts" so there could be virtue in improving the structure of that particular section with better use of sub-headings.

3.9 Many consultees noted the core principles for higher and lower value claims are the same, and whilst catastrophic injury claims have a very different pathway to lower value ones, the present system is not obviously failing and the overall sentiment was that prescribing workflows for those specialist claims could have unintended consequences and should be avoided.

3.10 We considered whether the section concerning whiplash claims is still required and concluded that on balance it should be retained, but that it should be moved to a later paragraph or an Appendix.

3.11 The Rehabilitation section needs to signpost to the Serious Injury Guide for claims in excess of £250k damages and should highlight that by agreement it can be applied to lower value injuries where there will be an element of continuing future loss. Some consultees suggested that where a proposal to commence rehabilitation is not accepted by a Compensator, their reasons should be given. The Sub-Committee finds it hard to disagree with this stance given the greater encouragement towards transparency and good communications. Consultees who regularly work for insurers were able to articulate some cogent reasons for not being able to agree rehabilitation when sought, and the Sub-Committee considers that expressing those reasons would promote understanding, whereas a flat refusal can sour ongoing relations. Equally many Compensators encouraged claimants to be more open with the nature of the rehabilitation sought (where known) and it seems appropriate for claimants to provide that information and for this to be included into the revised Protocol that is drafted.

3.12 We are aware that the CPRC has a sub-committee reviewing Health & Safety Executive (HSE) disclosure – it has not produced recommendations yet, but they may need to tie into this updated PAP re. Disclosure lists.

3.13 There should be an additional section about fatal cases with a list of disclosure requirements pre-action, such as death certificate, copy autopsy reports and coroner's verdicts and disclosed inquest material, grant of probate, identification of inquest timetables and likely dependants.

3.14 The section concerning disclosure and the "cards on the table approach" should state that there should be early notification of any known Magistrate or Crown Court proceedings (including HSE and police investigations) with court listing information.

3.15 Consultees frequently expressed the view that there should be a more level playing field in respect of disclosure of documents relating to liability, such that both sides should provide reasons for not disclosing particular documents which appear to be relevant. Restraint was however urged from promoting "trial by correspondence" on why certain documents had not been disclosed. The Sub-Committee recommends a reasonable and proportionate approach which does nonetheless seek the provision of brief reasons from both parties.

3.16 The Sub-Committee has noted a broad consensus expressed by consultees that it would be helpful for claimants to set out what medical records they already have available at the time of writing the Letter of Claim and a practical suggestion that claimants should generally release such records electronically to a defendant at the relevant time, unless requested not to.

3.17 The provisions concerning Acknowledgment to the Letter of Claim should add a requirement to supply the name of the liability insurer as soon as known, with full contact details (address/email/telephone) and name(s) of those with conduct. If this information is not available at the acknowledgement stage it should be supplied as soon as possible without waiting for all the information needed to complete the Letter of Response.

3.18 There should be an exhortation to communicate any known vulnerabilities as soon as possible.

3.19 Vulnerability issues should be identified using similar wording to that currently found in Directions Questionnaires, e.g., if you believe that you are vulnerable, please explain what steps, support or adjustments you wish the other party to consider.

3.20 The ADR section should be situated before the Stocktake section but after other investigatory steps have been identified for completion first. There should be explicit reference to the Churchill decision.

3.21 There should be a template for what a Stocktake should encompass - maybe in an Appendix. As part of the stocktake exercise there should be encouragement for the parties to agree the relevant complexity banding for cases to which Fixed Recoverable Costs will apply if proceedings are issued. The stocktake should also reference any vulnerabilities. For claims where no agreement can be reached, the reasons should be captured, including whether or not there is an agreement on complexity and banding regarding track allocation as well as whether it is agreed that there are special vulnerability issues, and the reasons for any disagreement on vulnerability.

3.22 The Sub-Committee has noted that those working regularly with Litigants in Person believe that the term "Stocktake" may not be readily understood and consideration should therefore be given to either renaming it (for example to "List of Issues") or providing adequate explanatory material. The Sub-Committee notes that the term features in the existing Protocol but nonetheless, with the greater prominence to be afforded to it going forwards, believes the comment is worthy of further attention.

3.23 The section dealing with Special Damages should make clear that TBC is generally unhelpful and that as many past losses should be particularised as possible, with heads of future loss identified even if those are TBC. Whilst many consultees considered that quantum work should be kept to a minimum ahead of acceptance of liability, there is a balance to be struck to ensure adequate reserving and allocation of claims to the relevant seniority of claims handler. Therefore, the provision is directed towards disclosure of such information as the claimant has available without heavy frontloading of work commencing quantum investigations in order to satisfy the requirements of the Protocol. This recommendation dovetails with one to encourage parties to think about identifying and notifying track and banding as soon as realistically possible, should the matter proceed into litigation. It could be noted that it is acceptable at this early stage to note General Damages as TBC (but plainly if Judicial College Guideline brackets can be identified, then there is no merit in withholding that information).

3.24 There should be a separate section, clearly headed, exhorting the benefits of good communication between the parties.

3.25 Most consultees favoured consideration and filing of the Stocktake document with the Direction Questionnaires and the Sub-Committee is content with that approach.

Pre-Action Protocol for the Resolution of Clinical Disputes

3.26 The same points concerning an index and better navigation apply to this Protocol as to the Personal Injury one above.

3.27 Objectives should be loud and clear at the outset.

3.28 Exclusions should be moved to an Appendix.

3.29 'Woolly' narrative language in the opening paragraphs should be removed now that the Protocol is old and well understood - the focus should be sharper and drafted more concisely.

3.30 Overall structure should follow as identified for the Personal Injury Protocol.

3.31 Alongside the litigant in person section there should be one addressing vulnerability, as set out in the Personal Injury Protocol. When outlining disclosure requests, there should be a change of emphasis to mandate disclosure of Patient Safety Incident Response Framework and Health Services Safety Investigations Body reports (including witness statements) and for claimants to request any relevant coronial documents directly from the Coroner, as an interested party (including investigation reports, any unseen medical records and expert reports). The interface of the Protocol with the Early Notification Scheme for Severe Birth Injury should also be made explicit.

3.32 Under a new "Good Communication" section there should be reference to the Duty of Candour (introduced after this old Protocol was first issued) and use of Apologies (provided for by the Compensation Act and Saying Sorry initiative published on 10th September 2018), making clear that the apology should be substantive rather than a token gesture to be meaningful. Those involved in mediating clinical negligence disputes emphasised the importance of communicating "lessons learned", as appropriate, within this section because of the value it brings to efforts to resolve claims.

3.33 We note that this PAP will need to be revisited when the Department of Health and Social Care Low Value Clinical Disputes Protocol goes live.

Pre-Action Protocol for Disease and Illness Claims

3.34 Consistent with our recommended approach in the other Protocols, we suggest the introductory history to the Protocol should be removed in order that the aims are clearly in view from the outset.

3.35 Overall, we considered that this Protocol is easier to navigate than the older ones, and therefore does not require so much redrafting.

3.36 As discussed in relation to other Protocols, the section on ADR at 2A.1 needs replacing with a common paragraph which addresses the decision in *Churchill*.

3.37 As with the Personal Injury Protocol, the provisions concerning Acknowledgment to the Letter of Claim should add a requirement to supply the name of the liability insurer as soon as known, with full contact details (address/email/telephone) and name(s) of those with conduct. If this information is not available at the acknowledgement stage it should be supplied as soon as possible without waiting for all the information needed to complete the Letter of Response.

3.38 The section headed "Resolution of Issues" needs to be re-titled "Stocktake" and to cover the same standard points as in the other Protocols.

3.39 The curious positioning of Annex E dealing with Noise Induced Hearing Loss (NIHL) claims needs to be addressed; ideally this should form a separate Protocol rather than remain as a "protocol within a protocol". The position of some in the Sub-Committee is that inclusion of NIHL claims within an Annex makes the Protocol unwieldy and not particularly user friendly. The same comment does not apply to Mesothelioma claims referenced in Annex C, as these still follow the usual route for other disease cases until they are issued and may require the specialist fast track procedure.

3.40 We question why there is no workflow diagram, similar to that utilised in the Personal Injury Protocol, especially as an aim of the redrafting process is consistency of drafting approach and layout between all the injury Protocols.

3.41 We are unclear as to why section 8 only suggests a Schedule of Special Damages should be supplied where liability has been admitted. It would be better to request any available supporting documents at least for past losses and to identify all provisional heads of loss,

provided that there is reassurance and a caveat that the requirement is to use reasonable endeavours and to update the information when it is possible to do so.

Pre-Action Protocol for Resolution of Package Travel Claims

3.42 The opening paragraphs are still considered fairly satisfactory, but we remain committed to the concept of harmonisation of layouts between all injury Protocols and the use of standardised wording wherever possible, such as in the ADR and Stocktake sections.

3.43 We believe it would be helpful to clarify that a single letter of claim only is needed for a "family" claim.

3.44 Furthermore, in a relatively low value holiday claim, in order to deal with the merits, initially the claimant only needs the defendant's disclosure as to whether they had a proper system in place to avoid the injury in question. Similar to our recommendations for the Personal Injury Protocol, if the defendant believes the claimant has relevant documents on liability (as distinct from causation) they can reasonably expect these to either be disclosed or some reason provided as to why the claimant considers that is not appropriate.

Closing Comments & Recommendations

3.45 The Sub-Committee was grateful for the interest the consultation generated and has been informed by the views expressed, although happily they were overall consistent with recommendations made previously. Some members of the Sub-Committee would be willing to assist the CPRC with redrafting in due course, should that be of assistance.

3.46 An additional recommendation has recently been put forward by the King's Bench Masters who handle multi-party litigation and Group Litigation Orders on a regular basis. It has become apparent that Practice Direction 19 B of the CPR is not working well and that what is required is a new specialist Pre-Action Protocol. This was not consulted upon but seems worthy of further consideration in conjunction with those who manage such work in practice and in the courts.

Amanda Stevens

4. Pre-Action Protocols for Housing

Overview

4.1 This section outlines the recommendation of the Housing Sub-Committee of the Pre-Action Protocol Working Group. The group has not re-convened in full. Its conclusion has been agreed by the Sub-Committee's Chair Diane Astin, the Main Working Group, and the Main Working Group Chair Andrew Higgins.

4.2 The group recommends that its Interim Report proposals are adopted in full and without modification, subject to possible re-examination at a later date. This recommendation is informed by the likelihood of regulatory change in the near future. The reasoning for this decision is set out in full below.

Interim Report

4.3 The Housing Sub-Committee produced interim recommendations in the CJC Pre-Action Protocol Interim Report (November 2021). The Main Working Group since agreed to bifurcate its output. Following the 2021 Interim Report, the group produced a Phase One Report in August 2023.

4.4 The Phase One Report examined the roles of PAPs generally in the Civil Justice system, making recommendations to cases covered by the existing Practice Direction on Pre-Action Conduct. Phase two of the work is focused on potential reforms to litigation specific PAPs. This encompasses the work of the Housing Sub-Committee, which reported on Pre-Action Protocols for Housing Conditions Claims, Possession Claims by Social Landlords, and Possession Claims based on Mortgage Arrears (Residential Property).

4.5 It was proposed by the main Working Group that the sub-committees should consider, in light of the Phase one Report of August 2023, their interim recommendations, specifically whether they should be adopted in full, taking account of the following:

- Responses to the Working Group's consultation.
- The recommendations of the CJC August 2023 'Review of Pre-Action Protocols: Phase One' report.
- Any developments since November 2021 that may materially impact on proposals, including any developments in the digitalisation sphere.
- Any further substantive points relating to the content of the recommendations.

Potential Regulatory Change

4.6 The Main Working Group was reconstituted for phase two in January 2024 and first met in March 2024. On 12 September 2024, the Renters' Rights Bill completed its first reading in the House of Commons.[6] The Bill proposed–

> … to make provision changing the law about rented homes, including provision abolishing fixed term assured tenancies and assured shorthold tenancies; imposing obligations on landlords and others in relation to rented homes and temporary and supported accommodation; and for connected purposes.

4.7 The proposed legislation poses substantial changes to the housing regulatory regime, affecting the nature, structure, and obligations of tenancy agreements. This directly impacts the disputes covered by the Pre-Action Protocols for Housing Conditions Claims and Possession Claims by Social Landlords.

Recommendation

4.8 The Chair of the Sub-Committee believe the group's Interim Report recommendations remain applicable and should be adopted in full. This position may need to be re-evaluated once the Renters' Right Bill, alongside any other legislative change, is implemented. The

[6] Renters' Rights Bill HC Bill (2024-2025) [8] <https://bills.parliament.uk/bills/3764>.

Working Group agreed that the full Sub-Committee did not need to be re-convened to make this decision.

Diane Astin

5. Pre-Action for Judicial Review

Introduction

5.1 Before turning to matters of substance it should be noted that the membership of the Sub-Committee has been strengthened by the inclusion of Lam Tran from Ministry of Justice Policy and Gurpreet Rai from the Metropolitan Police. This strengthened membership goes some way to address the observation that the Sub-Committee had not included those who represent defendants (see e.g., The Constitutional and Administrative Law Bar Association's response to the consultation). The Sub-Committee would also like to extend its thanks to Jo Hickman, for her contribution as chair in phase one of this work.

5.2 The Sub-Committee remains strongly of the view that there should be a distinct Judicial Review (JR) PAP that reflects the special needs and character of JR proceedings while aligning as closely as possible with the approach in a new General PAP and embracing the philosophy and lexicon of the new General PAP.

5.3 The Sub-Committee enthusiastically endorses the five general principles set out in the CJC's *Review of Pre-Action Protocols* (Final Report Part 1, August 2023, at 1.89, p.72), namely that:

- 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.

Enhanced Good Faith Obligation

5.4 The new JR PAP should ensure that each of the above principles is applied by the parties in good faith. This enhanced good faith obligation should be fundamental to the conduct of the parties both at the pre-action stage and after proceedings have commenced. The duty of

candour is an important aspect of the good faith obligation and more is said about this below.

5.5 For reasons set out in Appendix 8 to the Interim Report the Sub-Committee remain of the view that the JR PAP should avoid prescriptive pre-action steps and there should be no 'stocktake' duty.

Involvement of the Administrative Court

5.6 In the Interim Report the Sub-Committee 'provisionally' recommended that the Administrative Court is closely involved in the development and drafting of the new JR PAP in conjunction with the CPRC (para. 4.60). After further consideration the Sub-Committee now firmly recommends that the new JR PAP be designed, maintained and developed in conjunction with the Administrative Court having regard to experience in other areas of the law.

5.7 In order to ensure access to justice for litigants in person, given the lack of legal aid lawyers and legal aid for pre-action work, the Sub-Committee asks that the new JR PAP be kept simple and clearly worded (e.g., principles such as the duty of candour should be explained in terms understandable to laypersons); that a computerised portal is not compulsory; and that the cost situation remains as is now.

5.8 It may be helpful to point to two issues that illustrate the matters that could helpfully be considered in any work by the CJC and CPRC with the Administrative Court about how best to improve the JR PAP. The first concerns the application of the duty of candour at the pre-action stage and the second concerns what may be termed "shield letters".

Duty of Candour

5.9 The duty of candour is an important element of the enhanced good faith obligation. However, the Sub-Committee recognises that views have differed as to whether the duty of candour arises at the pre-action stage.

5.10 *The Independent Review of Administrative Law 2021*, for example, observed that [para. 4.117]:

> "…the duty of candour is owed to a court, so it is hard to see how the duty can arise before a court is engaged in considering a claim for judicial review."

5.11 On this basis, its report concluded that [para. 4.131]:

> "The duty of candour does not formally arise until proceedings are issued. However, it should be emphasised that there are obligations on defendants under the Pre-Action Protocol to help claimants understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents".

5.12 By contrast, more recent clarification indicates that the duty of candour is not limited in this way. *The Administrative Court Judicial Review Guide* 2023, for example, explains that [para. 15.3.2.]:

> "The duty of candour has been recognised as applying at all stages of judicial review proceedings, including when responding to the pre-action letter […]

5.13 *The Administrative Court Judicial Review Guide* cites *R (HM) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin), where [at para. 16] the Divisional Court (Lord Justice Edis and Mr Justice Lane) proceeded on the basis that the following statement in the Treasury Solicitor's Guidance (January 2010) accurately reflects the law:

> "The duty of candour applies as soon as the Department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings, including letters of response, under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance, witness statements and counsel's written and oral submissions."

5.14 Given the Divisional Court's clear view that the duty of candour applies at the pre-action stage, the Sub-Committee recommends that the CJC and CPRC work with the Administrative Court to ensure that the wording of the JR PAP fully reflects the requirements of the enhanced good faith obligation, including the duty of candour, at the pre-action stage.

"Shield letters" and Delay

5.15 The Courts have referred to "shield letters", where a claimant writes candidly and openly, asking the public authority (and any interested party) what their position would be about the appropriate time to raise identified point(s) and whether they will take a delay point if a challenge is raised at a later stage. If clear letters are written accepting the reasonableness of waiting for a later stage, these can properly be relied on as a 'shield' against criticism and as good evidence of reasonableness of action and good reason for any extension of time. See *Armstrongs Aggregates Ltd v Natural England* [2022] EWHC 2009 (Admin) [2023] Env LR 9 [para. 18] and cases there cited.

ADR in judicial review

5.16 As many of the consultation respondents noted, ADR in judicial review cases is rare. There are several reasons for this including that judicial review often involves a binary dispute on a legal issue which only the court can resolve. Some cases are so urgent ADR would impede, rather than facilitate, timely resolution. However, as recognised as long ago as *Cowl and others v Plymouth City Council* [2001] EWCA Civ 1935, there are also some judicial review cases where ADR will be appropriate and the court can make case management directions to enable it to happen. *Churchill v Merthyr Tydfil County Borough Council* confirms the court's powers extend to compelling parties to engage in ADR, even when one is unwilling.

5.17 This development underscores the importance of the points made in the current protocol at paragraphs 9-11 and paragraph 6.2.6 of the Administrative Court Guide: before proceedings are issued, the parties are required to consider whether ADR such as round table discussions, mediation or an Ombudsman scheme is appropriate, the court may require an explanation for refusal to engage and there may be cost consequences. This is an area where further guidance might be helpful especially for litigants in person.

5.18 Going forward, we recommend that the protocol should prompt the proposed claimant to confirm in their pre-action letter that they have considered ADR, indicate whether they believe any form of ADR is appropriate before and/or after the proposed claim is issued and, if so, why. It should also prompt the proposed defendant to indicate in its response whether it is willing to engage in ADR and, if so, the form it considers is appropriate. If a proposed

defendant rejects an ADR proposal made by the proposed claimant, it should give its reasons. This will mean the parties' respective positions on ADR are clear at an early stage. In cases where ADR is appropriate, it should encourage ADR to be attempted (for example, during an agreed stay if proceedings have had to be issued) and assist the court in considering whether case management directions should include provision for ADR.

Legal Aid

5.19 The Sub-Committee recognises that extending legal aid funding is a matter of policy beyond the scope of the current work to reform the JR PAP. However, for reasons explained in Appendix 8 to the Interim Report, effective achievement of the five principles identified by the CJC and set out above is likely to be heavily dependent on the quality of advice and representation available to claimants. While recognising that extending legal aid is a matter for others, the Sub-Committee observes that claimants often have difficulty obtaining high quality advice and representation at the pre-action stage because not all claimants are eligible, there are shortages of specialist solicitors especially outside London, and the rates and overall amounts paid by the Legal Aid Agency for pre-action work are not considered realistic by claimant solicitors.

Summary Costs Procedure

5.20 In JR the courts have developed a clear and efficient procedure to deal with the question of which party should pay costs when a case settles without a hearing and the normal rules for summary assessment following one day hearings apply. See *the Administrative Court Judicial Review Guide 2023* at paragraphs 25.3-25.5.

5.21 The CJC raised the possible need for a new summary costs procedure to resolve costs disputes over matters where the substantive dispute is settled at a pre-action stage but there remains disagreement about costs [Final Report Part 1, paras 6.1- 6.13]. There was no strong call for such a procedure in JR from consultees (only one consultee expressed support for such a procedure in JR) and possible disadvantages were identified: JUSTICE expressed concern that without adequate provision for legal aid "there may not be legal aid costs protection for PAP work should there be a summary costs assessment". Costs exposure at the PAP stage could easily deter potential claimants with limited means from using the PAP

procedure, which often results in timely settlement of disputes. Costs exposure at the PAP stage could similarly deter potential defendants form settling cases at the earliest possible stage. With such factors in mind, and in the light of the experience of those on the Sub-Committee with substantial experience representing claimants, the Sub-Committee do not currently consider such a procedure to be necessary in judicial review proceedings.

Maurice Sunkin

6. Pre-Action Protocol for Construction and Engineering Disputes

6.1 In the Interim Report, the Working Group indicated that it was not minded to recommend major changes to the Construction and Engineering PAP ('C&E PAP') given that it recently underwent reform and those using it were generally satisfied with it. However, the Working Group was also of the opinion that some changes were worth considering and, in this regard, the following consultation questions in the Interim Report were directed to those using the C&E PAP:

- Question 55. Would you support aligning the time limits for responding to the pre-action letter of demand to those suggested for revised general PAP (14 days with a right to extend for a further 28 days to obtain further information?)
- Question 56. Do you support the retention of the referee procedure?
- Question 57. Would you support the formal incorporation of a standard of disclosure and, if so, which standard?

6.2 The Working Group also considered the following potential changes to the C&E PAP:

- making engagement with the C&E PAP compulsory (subject to limited exceptions);
- introducing a standard of disclosure;
- introducing a stocktake obligation as set out in the revised General PAP; and
- revising the provisions concerning the parties' dispute resolution obligations.

Compulsory engagement with the Construction and Engineering PAP

6.3 Engagement with the C&E PAP is not compulsory. Thus, a claimant is not required to comply with the C&E PAP before commencing proceedings "if all the parties to the proposed proceedings expressly so agree in writing."[7] Therefore, the parties can, if they agree, opt-out of the C&E PAP and can proceed to issuing court proceedings or initiate any other dispute resolution procedure.[87] The Working Group considered whether parties should be permitted to choose whether to engage with the C&E PAP. The protocols play a significant role in furthering the principle of proportionality. They help to facilitate party cooperation and the early settlement of disputes, and they help the courts to effectively and efficiently manage cases that cannot be resolved at the pre-action stage. Nor would the C&E PAP require parties to duplicate any dispute resolution process the parties have already engaged in, or have agreed to engage in as an alternative to court adjudication. On balance, however, and with guidance from the CJC, the WG has decided to retain this relatively recent change to the C&E PAP.

6.4 It is recommended that the C&E PAP include a similar exception to those set out in draft BPC PAPs, namely:

- In urgent cases. An urgent case would include, for example, where a limitation period is short or is about to expire, where a party is applying for an urgent injunction, or where complying with a protocol might prejudice a party's legitimate interest in relation to the venue for determination of the dispute. A 'necessary' case would include, for example where a delay in starting proceedings might prompt forum-shopping in other jurisdictions. If proceedings are started, then the court has the power to stay the proceedings, either of its own motion or upon application by either party, while particular steps are taken to comply with this protocol.

- Where the parties have constructively engaged with an agreed process (e.g. an escalation clause or tiered dispute resolution clause) to try to resolve their dispute

[7] C&E PAP para. 2.2.
[8] E.g. commencing arbitration if the parties agree.

before issuing proceedings, whether following a prior agreement in a contract or an agreement entered into after any dispute has arisen.

- A claimant shall not be required to comply with this Protocol before commencing proceedings if all the parties to the proposed proceedings expressly so agree in writing.

Timeframes

6.5 This consultation question and the responses to it have been superseded by the final recommendations of the Working Group on the General PAP. In the Interim Report, the Working Group proposed that under the proposed new General PAP the defendant should be given 14 days to respond to the claimant's letter of claim and for that time period to be extended by the defendant by a further 28 days if additional information is required for its response.[9] These timeframes have been superseded by the recommendations in the Final Report Part I and the General PAP which require the defendant to acknowledge the letter of claim within 21 days of receiving it and to provide a full reply within 90 days of receiving the letter of claim.

6.6 The majority of respondents objected to shortened timeframes for a range of reasons including the considerable amount of time it takes to investigate the complex factual and legal issues which arise in such disputes, the need to collate and review voluminous contractual and other technical documents, and the involvement of multiple parties which further increases the complexity of the issues and the time it takes to prepare letters of response. In some instances, expert input may be required before a letter of response is produced which further increases the time it takes to prepare a letter of response. A small number of respondents proposed that it would be more appropriate to align the timeframes with those under the Professional Negligence PAP which allows up to three months for a letter of response to be prepared.

6.7 Given that the C&E PAP has recently undergone major changes and for the reasons explained above, we do not recommend making any changes to the current timeframes nor do we recommend aligning the timeframes with the Professional Negligence PAP. On the whole, the C&E PAP has been working well thus far and feedback from those using it is

[9] CJC, Pre-Action Protocols Interim Report, para. 3.20.

positive. Furthermore, we believe that para. 10.1 of the C&E PAP provides the parties with the necessary flexibility to agree on any further extensions of time while preserving the need for compliance with the procedural steps under the C&E PAP.

Protocol Referee Procedure

6.8 The Protocol Referee Procedure ('PRP') forms part of the C&E PAP[10] and is administered by the Technology and Construction Solicitors' Association (TeCSA).[11] The PRP aims to assist the parties in participating in and complying with the C&E PAP. Under the PRP procedure, the parties can appoint a Protocol Referee to give directions for the conduct of the C&E PAP or settle the issue of non-compliance with the C&E PAP. The decision of the Protocol Referee is binding on the parties.

6.9 The responses to the question of whether the PRP should be retained were mixed. The principal argument in favour of removing the PRP was its apparent lack of use by the parties. One leading defendant insurer law firm explained it has never encountered a claimant wanting to use the PRP and that it has never seen it being used in practice. Similarly, another defendant insurer law firm argued that the PRP is not generally used by claimants or defendants and therefore there was little value in retaining it. However, others were more positive and explained that the PRP serves a useful procedure in resolving disputes at the pre-action stage and that the threat of using the procedure by one of the parties can serve as an effective way to resolve disputes. We believe that the PRP is a useful tool which the parties can utilise to enforce compliance with the C&E PAP without the need for the parties to wait until proceedings are issued and further costs are incurred before raising the issue before the court. We therefore recommend retaining the PRP.

[10] C&E PAP para. 11.1 provides "For the purposes of assisting the parties in participating in and complying with the Protocol, the parties may agree to engage in the current version of the Protocol Referee Procedure."

[11] The Protocol Referee Procedure is published jointly by TeCSA and TECBAR on their respective websites. See https://tecsa.org.uk/

Disclosure Standard

6.10 As with the majority of PAPs, the C&E PAP does not have a formal disclosure standard. The vast majority of respondents opposed the introduction of a formal disclosure standard on the grounds that the nature of construction and engineering disputes are such that they involve voluminous contractual and other documents which incurs a vast amount of time and cost to the parties, and the introduction of a disclosure standard would simply lead to the front loading of substantial costs. This was a view shared by both claimant and defendant law firms. Others argued that the risks of frontloading of costs would also deter claimants from bringing claims. Some pointed out that the current system worked well because the parties (i.e. contractors, subcontractors, clients) would have worked together before the dispute and therefore they are likely to be willing to share any necessary documents. Those arguing in favour of a formal disclosure standard proposed that a system in-line with the Initial Disclosure procedure which operates in the Business & Property Courts under PD51U should be introduced. Although we see the value of having a formal disclosure standard, we are persuaded by the argument that any formal standard disclosure procedure would risk a substantial front loading of costs which would undermine the principle of proportionality.

Stocktake Obligation

6.11 Although there is no standalone stocktake mechanism within the C&E PAP, there is an obligation on the parties to attempt to narrow the issues as part of the pre-action meeting.[12] Paragraph 9.3 of the C&E PAP explains that the aims of the pre-action meeting is for the parties is to agree on the main issues in the case, to identify the root cause of disagreement, and to consider: (i) whether, and if so how, the case might be resolved without recourse to litigation; and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective. If proceedings are issued, then the parties are required to agree:

[12] C&E PAP para. 9.

- If there is any area where expert evidence is likely to be required, how expert evidence is to be dealt with including whether a joint expert might be appointed, and if so, who that should be; and (so far as is practicable);

- the extent of disclosure of documents with a view to saving costs and to the use of the e-disclosure protocol; and

- the conduct of the litigation with the aim of minimising cost and delay.

6.12 There is also a 'report-back' procedure to the court whereby the parties may, or the court may require the parties, to disclose any agreements concluded between the parties and the fact of whether alternative means of resolving the dispute were considered or agreed. We believe that the salient features of the recommended stocktake procedure are already embedded within the pre-action meeting. Similar to the stocktake procedure under the General PAP, the pre-action meeting (including the 'report-back' procedure) requires the parties to focus on narrowing the issues in dispute and to consider how the matter can be resolved without recourse to litigation. It also requires the parties to consider, in light of the overriding objective, what steps could be taken to conduct the litigation proportionately. We do not, therefore, recommend that the stocktake requirement be implemented within the C&E PAP.

Enhancing the role of dispute resolution in-line with the obligation in the General PAP

6.13 The pre-action meeting is a dispute resolution procedure which forms a significant aspect of the C&E PAP.[13] It is intended to be a without prejudice meeting between the parties with the aim of encouraging the early settlement of disputes and, where settlement is not possible, narrowing the issues in dispute before the court proceedings are commenced. A particularly unique feature of the pre-action meeting dispute resolution procedure is the incorporation of a stocktake procedure and a mechanism for the parties to 'report-back' to the court. Although para. 9 makes clear that the C&E PAP does not "prescribe in detail the manner in

[13] The pre-action meeting is explained in detail in para. 9 of the C&E PAP.

which the meeting should be conducted", it does set out the expectation of the court as to who should attend the meeting (e.g. those with authority to settle the dispute).[14] The parties are not confined to only using the pre-action meeting - Para. 9.3 provides that the pre-action meeting can "take the form of an ADR process such as mediation" and therefore the parties are at liberty to choose the most appropriate form of dispute resolution procedures for their dispute. A further unique feature of the parties' dispute resolution obligation is the right of any of the parties attending the meeting (or at the court's request) to disclose certain details regarding the pre-action meeting. The details of the pre-action meeting which may be disclosed includes:

- That the meeting took place, when and who attended;
- the identity of any party who refused to attend, and the grounds for such refusal;
- if the meeting did not take place, why not;
- any agreements concluded between the parties; and
- the fact of whether alternative means of resolving the dispute were considered or agreed.[15]

6.14 The C&E PAP goes further than any other PAP in the manner in which the importance of the parties' dispute resolution obligations is reinforced at the pre-action stage. The pre-action meeting, the incorporation of a stocktake requirement and the right of the parties to disclosure and/or the courts to order disclosure of certain details of the pre-action meeting are all features which demonstrate the strengths of the current dispute resolution requirements under the C&E PAP.

6.15 Although we do not recommend any changes to the structure of pre-action meeting, we believe that para. 9 can benefit from changes which would strengthen the parties' dispute resolution obligations. The first is the need for para. 9 to have a new subparagraph which lists the range of dispute resolution procedures available to the parties and to provide a brief explanation of the nature of each procedure. The dispute resolution procedures which are

[14] See C&E PAP paras. 9.2.1 – 9.2.4.
[15] C&E PAP para. 9.5 – 9.5.5.

suitable for the types of disputes covered by the C&E PAP include mediation, expert determination, mini-trial and early neutral evaluation.[16] We also recommend that para. 9 is amended to refer to the freedom of the parties to make settlement offers. The second change would be to explain the potential adverse consequences for the parties should they choose not to engage with a dispute resolution procedure. This would be in-line with the approach taken in the General PAP and should include reference to the court's powers to make adverse costs orders and the power of the courts to stay proceedings to enable the parties to engage with the C&E PAP.[17]

Other Issues

6.16 The Working Group believes that the current text on non-compliance in para. 4.1 should be amended in line with para. 5.12 of the General PAP as follows:

> "The Court will take into account compliance with this protocol when giving directions. Directions shall be tailored to reflect the steps undertaken by the parties at the pre-action stage."

6.17 This will put beyond the doubt the power of the court to take into account compliance and non-compliance and make appropriate directions taking into account the steps completed by the parties at the pre-action stage.

Recommendations

6.18 Engagement with the C&E PAP should be made mandatory subject to limited exceptions including the existing right to opt out by mutual consent.

6.19 The current timeframes have been working well for those using the C&E PAP and, therefore, we do not recommend any changes.

6.20 The PRP should be retained as a tool to enforce compliance with the C&E PAP.

[16] In particular reference to early neutral evaluation which is also discussed and explained in detail in the Technology and Construction Court Guide (TCC Guide) – see TCC Guide 7.5.

[17] *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416.

6.21 Introducing a formal standard disclosure risks the substantial front-loading of costs and thereby risks undermining the principle of proportionality. We do not, therefore, recommend introducing a formal disclosure standard.

6.22 The current without prejudice meeting already embeds a form of stocktake procedure which includes a mechanism whereby the parties must report back to the court. We do not recommend introducing the stocktake procedure proposed the General PAP.

6.23 We recommend minor amendments to para. 9 to include a list of dispute resolution procedures and reference to the courts' powers to penalise the parties in costs/stay proceedings for non-engagement with a dispute resolution procedure.

6.24 The current text on non-compliance in para. 4.1 should be amended in line with para. 5.12 of the General PAP.

7. Pre-Action Protocol for Professional Negligence

7.1 The following consultation question in the Interim Report was directed to those using the Professional Negligence PAP ('PN PAP')

- Question 58. Would you support aligning the time limits for responding to the pre-action letter of claim to those suggested for revised general PAP (14 days with a right to extend for a further 28 days to obtain further information)?

7.2 The Working Group also considered the following potential changes:

- Whether the revised General PAP procedure should be introduced into the PN PAP; and
- whether the current dispute resolution obligation in the PN PAP should be revised.

Timeframes

7.3 As with the C&E PAP, the consultation question on timeframes and the responses to it have been superseded by the final recommendations of the Working Group on the General PAP.

7.4 The current timeframes under the PN PAP are more generous than those under the General PAP. The PN PAP requires the defendant to acknowledge the letter of claim within 21 days of receiving after which the defendant has three months from the date of acknowledgement to investigate and respond. The three-month time period may be extended by agreement under para. 8.1 of the PN PAP. Where the defendant is experiencing difficulties in complying with the time period and has explained this to the claimant, then the claimant "should agree to any reasonable requests for an extension of the three month period."[18] Given that the

[18] PN PAP para. 8.1 provides "If the professional is in difficulty in complying with the three month time period, the problem should be explained to the claimant as soon as possible and, in any event, as long as possible before the end of the three month period. The professional should explain what is being done to resolve the problem and when the professional expects to be in a position to provide a Letter of Response and/or a Letter of Settlement. The claimant should agree to any reasonable requests for an extension of the three month period."

timeframes under the PN PAP are generous and provide the parties with the option to agree further extensions under para. 8.1, it was not surprising that there was strong opposition from both claimants and defendants to altering the current timeframes. A large defendant insurer firm argued that the current timeframes was fair, proportionate and reasonable and should be retained. It went on to explain that one of the principal reasons why the PN PAP has been successful is because it allows the defendant sufficient time to investigate the claimant's allegations and to respond properly. Others argued that professional negligence disputes are often complex, document heavy and involve multiple parties all of whom will be involved in the preparation of the letter of reply. This longer chain of communication with multi parties requires a longer time frame which the current PN PAP provides. We appreciate that, on the whole, the PN PAP has worked well thus far. We appreciate that sufficient time must be given for allegations, which are often detailed and complex, to be investigated and for input to be obtained from multiple parties including the insured and insurers. We also believe that the current timeframes strike the correct balance between claimants seeking to bring legitimate claims and the defendants having sufficient time to investigate and respond to those claims. We therefore do not recommend aligning the current timeframe with the revised General PAP.

Stocktake

7.5 Unlike the C&E PAP, the PN PAP has a separate, standalone stocktake procedure which requires the parties to (i) review their respective positions; (ii) consider the papers and evidence and whether proceedings can be avoided; and (iii) narrow the issues. We believe that the current procedure is not structured enough, and the language is too 'woolly' in explaining and reinforcing the importance of the parties' obligations to undertake a stocktake. Furthermore, we believe that the PN PAP stocktake may allow parties to take a light touch approach to narrowing the issues or it may simply be ignored by the parties. We believe that the approach PN PAP would benefit from adopting the stocktake procedure as set out in the General PAP – it will place a clear obligation on the parties to cooperate with each other in narrowing the issue and completing and filing a stocktake report which will, in turn, assist the courts in managing the dispute more efficiently.

Dispute Resolution

7.6 One of the strengths of the PN PAP is its promotion of a range of dispute resolution procedures, including novel dispute resolution procedures to resolve professional negligence disputes.[19] The PN PAP contains a comprehensive list of dispute resolution procedures which include mediation, arbitration, adjudication, early neutral evaluation and ombudsman schemes. We would recommend two changes to the dispute resolution provisions. The first is a minor change. We believe that the explanation of the nature of each dispute resolution procedures should be expanded as had been done in the General PAP. The second change would be to include an explanation of the potential adverse consequences for the parties should they choose not to engage with a dispute resolution procedure. This would be in-line with the approach taken in the General PAP and should include reference to the court's powers to make adverse costs orders against the defaulting party and the power of the courts to stay proceedings to enable the parties to engage with the PN PAP.

Other Matters

7.7 The Working Group believes that the current text on non-compliance in para. 3 should be amended in line with para. 5.12 of the General PAP as follows:

> "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."

[19] For example, the Professional Negligence Adjudication Scheme which is was originally inspired by the adjudication process commonly used in construction disputes. The Adjudication Scheme is a voluntary process by which an independent adjudicator provides the parties with a decision that can resolve the dispute either permanently or on a temporary basis, pending subsequent court determination. The Adjudication Scheme is administered by the Professional Negligence Bar Association https://pnba.co.uk/adjudication-scheme/. For a detailed evaluation of the Adjudication Scheme, see M. Ahmed 'A Novel ADR Procedure for Professional Negligence Disputes' (2019) 35(1) *Journal of Professional Negligence* 54-70.

7.8 This will put beyond the doubt the power of the court to take into account compliance and non-compliance and make appropriate directions taking into account the steps completed by the parties at the pre-action stage.

Recommendations

7.9 The current stocktake procedure be replaced with the revised General PAP stocktake procedure.

7.10 The current timeframes work well for the parties and therefore we do not recommend any changes.

7.11 Although the PN PAP provides a comprehensive list of a range of dispute resolution procedures, we recommend expanding the explanation of each procedure.

7.12 We recommend amending the PN PAP to make reference to the courts' powers to penalise the parties in costs/stay proceedings for non-engagement with a dispute resolution procedure.

7.13 Para. 3 of the PN PAP on compliance should be amended in line with para. 5.12 of the General PAP.

8. Pre-Action Protocol for Debt Claims

Questions specifically related to the debt protocol

8.1 It may be helpful by recapping the consultation questions in the Interim Report that were directed towards the Debt Protocol:

- Question 50. Do you support the introduction of a good faith obligation to try to resolve or narrow the dispute and the requirement to file a joint stocktake report, on condition that debtors have access to legal assistance to complete both requirements?

- Question 51. Would you support aligning the time limits for responding to the pre-action letter of demand to those suggested for the revised general PAP (14 days with a right to extend for a further 28 days to obtain further information including legal advice)? What changes, if any, would you make to the rules on when litigation can be commenced?

- Question 52. Do you think the contents of the pre-action letter of claim should be more prescriptive and, if so, what content should be prescribed?

- Question 53. Do you think the language of the pre-action protocol should be made more user friendly and do you support changing the terms creditor and debtor to claimant and defendant?

- Question 54. Do you support integrating the PAP for debt claims into the Money Claim Online (MCOL) portal (or any successor platform)?

Introduction of dispute resolution obligation and formal stocktake requirement

8.2 As noted in the Interim Report, the Debt PAP includes steers towards ADR (para. 6) and a requirement to engage in a stocktake (para. 8). Respondents were asked whether there

should be a mandatory obligation to engage in a dispute resolution process and the stocktake requirement should be formalised, in line with the proposals for the General PAP.

8.3 The responses to this consultation were very evenly balanced. Most debt claims are not contested and pre-action letters of claim receive no response. Many Claimant/creditor representatives were opposed to the introduction of these requirements on the grounds it would add unnecessary costs and delay for undisputed claims. Some Claimant/creditor representatives indicated they would support these processes only in those small category of cases where there was a genuine dispute about the existence of a debt. Defendant/debtor representatives who opposed these proposals raised concerns, as outlined in the Interim Report itself, about the power imbalances between Claimant/creditors and Defendant/debtors. In the words of the Money Advice Trust:

> "There is a substantial inequality between the status of claimants and defendants in debt claims. There is an imbalance in access to justice for defendants using the PAP. They will be at a serious disadvantage in navigating the requirements and risking costs by taking action, which will prolong the stressful experience of litigation and risk substantial expenses."

8.4 The Working Group wishes to reiterate, as set out in the Interim Report, that these proposals were only ever intended to apply where the Defendant/debtor responded to the pre-action letter of claim. Accordingly, in the vast majority of cases, the dispute resolution obligation and stocktake requirements would not apply. The real question, therefore, is whether these obligations should apply in the small number of cases where there was a response from the Defendant/debtor or the even smaller number of cases where the Defendant/debtor disputes the debt.

8.5 The Working Group considered this a genuinely difficult question. However, because opposition to these proposals was spread across Claimant/creditor representatives and Defendant/debtor representatives, the power imbalances between the parties, and the need to keep costs down for claims that are typically of very modest value, the Working Group felt on balance that these obligations should not be applied to the debt protocol. That conclusion was reinforced by the fact most of these claims will now be subject to opt-out mediation

processes once proceedings are started.[20] Should it be subsequently decided that the optimal timing of dispute resolution processes in debt claims is the pre-action stage, then this recommendation should be revisited.

Alignment of Timeframes with the General PAP

8.6 This consultation question and the responses to it have been superseded by the final recommendations of the Working Group on the General PAP. Whereas in the Interim Report the proposed timeframes for pre-action letters of claim and replies for the General PAP were tighter (14 days with 28 day extensions) than the 30 days (with possibility of extension where advice has not been obtained), the recommended time frames for the General PAP in the final report are now significantly longer than those in the Debt PAP (90 days in total).

8.7 Accordingly, many of those campaigning for alignment of the time frames, on the grounds that the Debt PAP provided Defendant/debtors with too much time to delay proceedings, would now oppose alignment.

8.8 There were a small number of respondents to the consultation who advocated for longer time frames. The Working Group's conclusion is that the current 30 days provides a fair balance between the interests of the Defendant/debtor considering their position and responding to the pre-action letter of claim and delaying responses in order to delay or avoid payment. However, the Working Group does believe there is a case for allowing Defendant/debtors to extend this time frame in appropriate circumstances. At present the 30 day timeframe can only be extended where the Defendant (D) has unable to obtain debt advice. It does not, for example, allow D to ask for further time to consider the claim for *other* reasons, e.g. language, disability, illness, being abroad or the late receipt of documents due to a change of address. The Working Group believes all these reasons may constitute good reasons for extending the time frame for providing a response.

[20] Practice Direction 51ZE – Small Claims Track Automatic Referral To Mediation Pilot Scheme: <https://www.justice.gov.uk/documents/cpr-166-pd-update.pdf>

Should the Debt Protocol be more prescriptive in its obligations on creditors?

8.9 The Interim Report asked respondents whether letters of demand should be more prescriptive, including requiring the production of certain documents, such as consumer credit agreements where applicable, and identifying possible legal defences debtors may have including limitations defences. The thinking behind this proposal, was that given the predominantly business to consumer structure of the PAP,[21] there is a reasonable case for regulating the content of the pre-action letter of claim in a manner consistent with that relationship, rather than treating the PAP process as merely facilitating the resolution, or narrowing, of a purely private dispute between formally equal parties. The current protocol already does this to a significant degree, and the Interim Report asked whether it should go further.

8.10 The Debt PAP limits the contractual information to be supplied to the written agreement itself, omitting any reference to the existence or date of other relevant documents such as a default notice or notice of termination (consumer credit claims[22]), notice to keeper (parking charges claims[23]), or notice of assignment (assigned claims[24]), all of which are prerequisites to liability, but places the onus on the Defendant/debtor to find out about such documents via legal advice, which may be optimistic in the case of a consumer unfamiliar with consumer law, facing a small value claim, even though they are entitled to the protection offered by section 62 of the Consumer Rights Act 2015 (unfair terms) and section 71(2) of that Act (namely, the duty on the court to consider fairness, whether it has been raised or not).

8.11 A feature of consumer debt claims is the frequent ignorance of the debt by the Defendant/debtor, caused or exacerbated by the fact that they fact that they were only familiar with the name of the supplier[25] or the trading name of the Claimant/creditor[26], many years may have elapsed since the agreement was taken out and the default

[21] Though the PAP also applies to claims against sole traders and other entities that are not incorporated.
[22] Consumer Credit Act 1974, section 87.
[23] Protection of Freedoms Act 2012, Schedule 4.
[24] Law of Property Act 1925, section 136(1).
[25] E.g., in a debtor-creditor-supplier agreement.
[26] E.g., a credit card.

occurred[27], they may have changed address and not received correspondence, and the debt may have been assigned and then pursued by a third-party debt collection agency. The Claimant/creditor is under no duty under the protocol to make reasonable efforts to ascertain the Defendant/debtors current address in a case where the debt is several years old. A creditor who issues court proceedings against a debtor whom he has reason to believe may no longer be living at the same address has a duty to take reasonable steps to ascertain the address of the defendant's current residence.[28] But given there is no similar obligation in the protocol, a Defendant/debtor may be deprived of the protections and opportunities to resolve the claim that the protocol is intended to provide.

8.12 A number of claimant representatives responded to the consultation by explaining that claimants went to considerable lengths to locate Defendant/debtors, to explain the origins of the debt, and to discuss alternative ways to pay. The Working Group does not doubt that all responsible Claimant/creditors will take these steps. The Working Group also accepts that some debtors may feel overwhelmed if there is too much information included in pre-action letter of claims. Nonetheless, the Working Group does believe that there is a case for greater prescription in the PAP. Specifically:

- The pre-action letter of claim provide fuller disclosure about the origins of the debt including notices previously sent by the claimant regarding the debt; and

- The pre-action letter of claim provide generic information about legal defences that may be available, including limitation defences and any other statutory defences that may be relevant (e.g. section 62 of the Consumer Rights Act 2015).

- Where the creditor does not have a current email address for the debtor (see incorporation of the PAP into the MCOL below), and has reason to believe that the defendant no longer resides at their last known address, that the defendant has a positive duty at the pre-action stage to take reasonable steps to ascertain D's current address.

[27] The limitation period only begins to run from the date of the *termination notice*: BMW Financial Service (GB) Ltd v Hart [2012] EWCA Civ 1959 (CA), and this may be considerably later than the first default.

[28] CPR 6.9(3).

8.13 We should stress that greater prescription does not necessarily mean greater length. In this regard, the degree of prescriptiveness must also take account of the need to ensure the pre-action letter of claim is as user friendly as possible. We address this issue in the next section.

Making the PAP more user friendly; changing some of the language

8.14 While some respondents to the consultation felt that the Debt PAP was already as user friendly as possible, most supported this proposal. A number of respondents said that the information sheet provided to debtors was more user friendly than the language of the PAP itself. The Working Group accepts that the wording of the PAP is principally directed to creditors, explaining the process they must follow before issuing proceedings, whereas the information that is included in the pre-action letter of claim, which includes the Information Sheet and the Reply Form, is what the debtors are most likely to engage with. Accordingly, it is the latter that should be a priority for improving "user-friendliness." There is a connection here with the prescriptiveness of the PAP. The more prescriptive the PAP letter of claim is, the less need there will be more debtors to look beyond it, including at the PAP itself.

8.15 Of course, with a proposal of this nature the devil is in the detail, and a number of respondents suggested that any changes should be based on user led research. The Working Group fully agrees with this suggestion.

8.16 A majority of respondents also agreed with the proposal to replace the terms creditor and debtor with the more neutral terms claimant and defendant. This might help reduce stigma for those in debt and it would also address the rather unusual anomaly that the descriptions of the parties assumes the outcome of any dispute between them. While this assumption will prove correct in the majority of cases - because the debt is not disputed - in principle it is generally better to avoid terms that imply legal liability, or culpability, until that position is accepted by the parties or determined by a court. However, it was also clear from consultation responses that the terms creditor and debtor and now firmly entrenched in this sector, and some respondents felt that the terms defendant and/or claimant could be confusing to consumers. Accordingly, the Working Group believes that user lead research into making the PAP more user friendly should also consider whether the terms claimant and defendant would be understandable to consumers. Subject to the outcomes of that

research, the Working Group recommends that the terms creditor and debtor be replaced with claimant and defendant.

Possible Integration with the MCOL

8.17 The Interim Report consulted on whether the Debt protocol should be integrated into the Money Claims Online portal (or any successor platform). The PAP does not presently encourage digital communications. Para. 3.3 provides that the Letter of Claim should be sent by post, and if Claimant/creditor has additional contact details for the debtor, such as an email address, they may use that method. Only if the Defendant/debtor has previously specified that they do not want to be contacted by post, is the Claimant/creditor encouraged not to use post.

8.18 The PAP requires the debtor to send their reply by post to the creditor's address, without the option to reply by other means, e.g., email. Given the number of pages of documents which the Defendant/debtor has to fill out and return, it is inevitable that they will incur additional travel and postage costs, which might be reasonably avoided if a digital process were used.

8.19 A majority of respondents were in favour of integrating the Debt protocol into the MCOL portal, which would go a long way to streamlining pre-action communications between creditor and debtor. Some respondents noted that this may disadvantage the digitally excluded and that the debtor should be free to respond to pre-action letters of claim either by post or digitally. The Working Group agrees with this suggestion. The Working Group also believes that there should be a requirement on creditors to send the pre-action letter of claim by post *and* digitally (either by email directly, or through the portal when incorporated, where digital contact details are known) as a means of maximising the prospect that the letter of claim will come to the attention of the debtor, and facilitating a response either digitally or by post.

Other Issues - Compliance

8.20 The Working Group believes that the current text on non-compliance in para. 7.1 should be amended in line with paragraph 5.12 of the proposed General PAP as follows:

> "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."

8.21 This will put beyond the doubt the power of the court to take into account compliance and non-compliance and make appropriate directions taking into account the steps completed by the parties at the pre-action stage.

Recommendations

8.22 The steers towards ADR and the non-prescriptive stocktake should remain in place.

8.23 The timeframes for responding to a pre-action letter of claim remain the same, but the circumstances in which the Defendant/debtor can obtain an extension of the timeframe for providing their response should be broadened to include other good reasons.

8.24 The PAP should be made more prescriptive in terms of the obligations on creditors. Specifically:

8.24.1 The pre-action letter of claim should include greater disclosure about the origins of the debt including notices previously sent by the claimant regarding the debt; and

8.24.2 Generic information about legal defences that may be available, including limitation defences and any other statutory defences applicable (e.g. section 62 of the Consumer Rights Act 2015).

8.25 There should be a positive obligation on creditors to take reasonable steps to identify the debtor's current address where they have reason to believe that the debtor no longer resides at their last known address, if the creditor does not have a current email address for the debtor.

8.26 There should be user lead research, under the auspices of the CPRC, into ways in which the Debt PAP can be made more user friendly. The terms creditor and debtor should be replaced with the terms claimant and defendant subject to the outcome of the user led research.

8.27 The debt protocol should be incorporated into the MCOL (or any successor platform). Creditors/claimants should be required to use the portal (or email directly until the PAP is incorporated into the Portal) where the debtors/defendants email address is known and to

send the pre-action letter of claim by post. Debtors/defendants can choose whether to respond digitally or by post.

8.28 Paragraph 7.1 of the Debt PAP should be amended to bring it into line with paragraph 5.12 of the proposed General PAP.

9. Pre-Action Protocol for Media and Communications Claims

9.1 The Media & Communications PAP (M&C PAP) was updated after a consultation following the formation of the Mediation and Communications List in 2017. It applies to cases within the scope of CPR r. 53.1.

9.2 As noted in the interim report, the structure of the M&C PAP is consistent with the structure of the proposed General PAP. It already includes a steer towards ADR in paras 3.8 and 3.9 and a standalone stocktake requirement at para. 3.11.

9.3 However, we believe that the PAP, in line with the recommendations for the General PAP, could benefit from adoption of the mandatory pre-action dispute resolution obligation. Indeed, the Working Group's view is that most disputes covered by the PAP were eminently suitable for ADR processes. Similarly, adopting the formal stocktake requirement would provide a more structured approach to narrowing the issues and in promoting more efficient litigation and judicial case management if proceedings are issued.

9.4 The Working Group concluded that there should be no change to the short timeframes for PAP exchanges, given that time is frequently "of the essence" in claims covered by the PAP.

Recommendations

9.5 The M&C PAP be amended to include the mandatory pre-action dispute resolution obligation set out in the proposed General PAP.

9.6 The M&C PAP be amended to incorporate the formal stocktake requirement set out in the proposed General PAP.

10. A new Pre-Action Protocol for Multi-Track Litigation in the Business and Property Court

10.1 In Part I of the Final Report the Working Group noted that there was concern amongst commercial lawyers that a more structured PAP process would not provide the flexibility needed of complex high value commercial litigation. The report flagged the possibility of creating a separate bespoke PAP for such litigation and indicated that the scope and content of such a PAP would be addressed in this report.

10.2 Following consultation with Business and Property Court (B&PC) users, including the London Solicitors Litigation Association (LSLA) and Commercial and Chancery Bars, the Working Group has concluded that a separate PAP is warranted for multi-track litigation in the B&PC. The Working Group felt that litigation on other tracks - which would generally be lower value, more straightforward commercial claims - would still benefit from the more structured PAP steps contained in the proposed General PAP.

10.3 The Working Group, in close consultation with B&PC users, have produced a draft PAP for B&PC multi-track litigation (set out in **Appendix 1**), designed to demonstrate how the PAP should differ from the General PAP. The Working Group believes that this protocol should be mandatory, but with a number of important exceptions. As with the General PAP this would include urgent cases and the Working Group anticipates that urgency in the context of multi-track B&PC litigation may include the need to protect an English court's jurisdiction to determine the claim (e.g. to give effect to an exclusive jurisdiction clause). Similarly, the PAP would not apply where parties had already engaged with an agreed process (e.g. an escalation clause or tiered dispute resolution clause) to try to resolve their dispute before issuing proceedings, whether following a prior agreement in a contract or an agreement entered into after any dispute has arisen. Finally, the Working Group believes parties should also have a right to opt out of the PAP by written consent in recognition that some disputes

that would be covered by the new PAP would involve international parties who have opted to submit their disputes to the English courts.

10.4 One area where the Working Group concluded that the B&PC PAP should not differ, where it would apply, is on the need for parties to engage in a pre-action dispute resolution process. Many of the concerns first raised about this obligation were addressed in Part I of the Final Report. The proposed obligation was modified from that set out in the Interim Report to clarify its scope and operation. As was stressed in that report, the obligation was entirely non-prescriptive but required the parties to engage with each other directly, or with the assistance of a neutral third party, to see whether the dispute could be resolved or narrowed.[29] The Working Group believes that this obligation would be as just useful in high value commercial litigation as it would be to other categories of litigation for which it has been recommended.

10.5 By contrast, the Working Group concluded that it would be inappropriate to include a formal stocktake procedure in the PAP. Producing a list of issues which are agreed and still in dispute may be helpful in some cases at the pre-action stage. However, the Working Group fully accepts that in many cases this process may only be productive and proportionate after the close of pleadings, and in some cases after further interlocutory steps including disclosure. Accordingly, the proposed stocktake procedure in the B&PC multi-track PAP merely reminds the parties of the need to review their respective positions and continue to consider whether there are ways that the issues can be narrowed.

10.6 The remainder of the B&PC multi-track PAP is broadly consistent with the proposed General PAP with some minor modifications. Ultimately the drafting of a B&PC multi-track PAP would be a matter for the CPRC.

10.7 Finally, given the introduction of the B&PC multi-track PAP would cover litigation where parties took little or no steps under the Practice Direction on Pre-action Conduct, the Working Group believes that it would appropriate to review the operation of the new PAP within a reasonable time of its introduction. The review could assess how it was working in practice, whether it was achieving its goals, and what changes, if any, were required.

[29] CJC, review of Pre-action Protocols – Final Report Part I paras. [4.22]-[4.23].

Recommendations

10.8 There should be a bespoke PAP for multi-track claims in the B&PC. Other claims in the B&PC should be governed by the proposed new General PAP.

10.9 It is recommended that the B&PC multi-track PAP be mandatory subject to exceptions for urgent cases (including protecting jurisdictional interests), where the parties had engaged or agreed to engage in an equivalent dispute resolution process, and where the parties had agreed in writing to opt out of the PAP. It is recommended that the B&PC multi-track PAP includes a non-prescriptive pre-action dispute resolution obligation, but should not include a structure stocktake obligation, of the kind set out in the proposed General PAP. A draft B&PC multi-track PAP can be found at **Appendix 1.**

Appendix 1: Business and Property Courts Draft Pre-Action Protocol

Draft General Pre-Action Protocol for Multi-Track Claims in the Business & Property Courts of England & Wales

Introduction

1. The pre-action protocols set out the steps parties must take before starting proceedings. A party must not start court proceedings without first complying with this protocol, a specific applicable protocol, or the General Pre-Action Protocol if the parties have agreed to follow that protocol. Compliance with a protocol is mandatory except:
   1.1. In urgent cases. An urgent case would include, for example, where a limitation period is short or is about to expire, where a party is applying for an urgent injunction, or where complying with a protocol might prejudice a party's legitimate interest in relation to the venue for determination of the dispute. A 'necessary' case would include, for example where a delay in starting proceedings might prompt forum-shopping in other jurisdictions. If proceedings are started, then the court has the power to stay the proceedings, either of its own motion or upon application by either party, while particular steps are taken to comply with this protocol.
   1.2. Where the parties have constructively engaged with an agreed process (e.g. an escalation clause or tiered dispute resolution clause) to try to resolve their dispute before issuing proceedings, whether following a prior agreement in a contract or an agreement entered into after any dispute has arisen.
   1.3. A claimant shall not be required to comply with this Protocol before commencing proceedings if all the parties to the proposed proceedings expressly so agree in writing.
2. This protocol applies to disputes which are suitable to be allocated to the multi-track in the Business and Property Courts of England and Wales ('the B&PC') which decide specialist domestic

and international business cases. This protocol applies to the B&PC in London, Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle.[30]

3. This protocol only applies in place of the General Pre-Action Protocol and where no specific protocol or pre-action guidance applies. Where a specific protocol or pre-action guidance applies, the parties must follow that protocol or guidance rather than this protocol. Specific protocols include the Pre- Action Protocol for Construction and Engineering Disputes, TCC Guidance Note on Procedures for Public Procurement Cases, and the Pre-Action Protocol for Professional Negligence Disputes. For the avoidance of doubt, this protocol does not apply in the County Court.
4. Litigation should be a last resort, and the parties should engage with each other to try to resolve their dispute before issuing proceedings. The protocols are intended to encourage parties to engage constructively with each other in the early exchange of information and to provide a framework within which they can explore the early resolution of their dispute without the need to start court proceedings, or narrow the issues in dispute so that the matter can be resolved more quickly and at lower cost.
5. 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.
6. The general principles of this protocol are:
    6.1. Starting court proceedings should be a last resort.
    6.2. There must be an early exchange of relevant information, in order for the parties to understand the issues, to decide on how to proceed and to try to resolve the matter without proceeding to court.
    6.3. The parties should behave reasonably and proportionately.
    6.4. The parties should negotiate to try to settle their dispute or narrow the issues.

<u>False statements and contempt of court</u>

7. 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,

[30] See guidance in the Business and Property Courts of England and Wales Chancery Guide 2022 (in particular Appendix F) found at: https://www.judiciary.uk/wp-content/uploads/2023/06/Chancery-Guide-2024-web-26-6-24-.pdf

including criminal sanctions.

8. 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.

Proportionality

9. Only reasonable and proportionate steps should be taken by the parties to identify, narrow and resolve the legal and factual issues. The parties should only incur proportionate costs when complying with this protocol having regard to the overriding objective.
10. Where a party incurs disproportionate costs in complying with this protocol, those costs may not be recoverable from another party as part of the costs of the proceedings.
11. If a party is found to have made a claim or defence that shows no reasonable grounds for bringing or defending the claim, or to have acted dishonestly or engaged in unreasonable conduct which the court considers should be sanctioned, that party may be ordered to pay the other party's costs.

Steps to be taken before starting court proceedings

12. The parties must take three sequential steps before starting a claim. The three steps are:

12.1. Early exchange of information

12.1.1. The claimant must provide the defendant with a letter which concisely sets out the details of the claim, including the legal basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant and, if money, how the amount is calculated ('the letter of claim').

12.1.2. The defendant must, within 21 days of receiving the letter of claim (or within a reasonable period as agreed between the parties), send a letter of acknowledgement to the claimant:

12.1.2.1. acknowledging receipt of the letter of claim; and

12.1.2.2. detailing any additional information it requires from the claimant in order for it to provide a full response to the letter of claim. Any request for additional information must be reasonable and proportionate, [and the claimant must provide that information as soon as possible and, in any event, within 30 days of receiving the request.]

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

12.1.4. The defendant must provide a full reply as soon as reasonably practicable and no later than 90 days (or within a reasonable period of time as agreed between the parties) of receiving the letter of claim ("the letter of reply"). If the defendant fails to provide a letter of reply, the claimant can proceed to issue a claim in court. The letter of 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 and why.

12.1.5. If the defendant indicates that it may have a counterclaim, the defendant must concisely set out the details of the counterclaim in its letter of reply, including the legal basis on which the counterclaim is made, a summary of the facts, what the defendant wants from the claimant and, if money, how the amount is calculated.

12.1.6. The claimant must respond, in writing, to any counterclaim within a reasonable time. A reasonable time period for a response will generally be 28 days from the date of receiving the letter of reply. Where the claimant requires more than 28 days to provide a full response to a counterclaim, it must write to the defendant within that 28 day period stating the date by which it will respond fully, which (unless agreed by the defendant) should be no more than 90 days from the receipt of the letter of reply setting out the counterclaim. The claimant's response to any counterclaim should include confirmation as to whether the claim/counterclaim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the counterclaim are disputed and why.

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

12.2. Obligation to engage in dispute resolution process

12.2.1. The purpose of this part of the protocol is to ensure that, if possible, the parties reach a settlement before they incur the cost and time of litigation, and begin using court resources.

12.2.2. The parties to any dispute are therefore required to engage in a dispute resolution process with each other prior to any proceedings being issued. In certain cases (e.g. in a civil fraud claim), it may be necessary to issue proceedings without first engaging in a dispute

resolution process. The party issuing proceedings must explain to the court why it was necessary to issue proceedings without first engaging in a dispute resolution process. Where the parties have not engaged with a dispute resolution process at the pre-action stage and proceedings are issued, the court has the power to stay the proceedings to allow the parties to engage with a dispute resolution process.

12.2.3. A dispute resolution process may involve, but is not limited to:

- A meeting between the parties, either virtually, in person, or by telephone, to discuss the scope of their dispute and ways it might be resolved;
- Mediation: a neutral third party (called a 'mediator') assists the parties to try to resolve
- their dispute;
- Early neutral evaluation: non-binding evaluation by an independent lawyer who advises the parties on the strengths and weaknesses of their respective cases;
- Any applicable Ombudsman Scheme;
- Participation in any dispute resolution scheme including, but not limited to, schemes that the parties have already joined. Organisations often advertise the dispute resolution schemes they have joined, and consent to using, on their websites.

12.2.4. If proceedings are issued, the parties shall, without prejudice to matters of privilege, write to the court explaining the steps the parties have taken in trying to resolve the dispute, the reasons why such steps have failed, and what steps the parties have taken to resolve or narrow the issues in accordance with this protocol. Failure to have done so could result in sanctions being imposed (see paragraphs 16-17 below).

12.2.5. Even if the dispute is not resolved at this stage, positive engagement with a dispute resolution process can 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 in future.

12.3. Stocktake

12.3.1. Where the parties have complied with paragraphs 13.1 and 13.2 above but are unable to resolve the dispute, the parties must review their positions before either party starts court

proceedings and cooperate in trying to narrow the issues in dispute. The parties should consider whether it would be proportionate to produce a list of agreed issues and issues that remain in dispute. The failure to produce such a list does not, however, constitute a breach of this protocol.

12.3.2. The claimant should, before proceedings are issued, write to the defendant:

- confirming that it considers that paragraphs 13.1 and 13.2 above have been complied with;
- informing the defendant that it is about to issue proceedings; and
- asking the defendant whether it has instructed solicitors, or where solicitors are acting, whether they are instructed to accept service of proceedings.

12.3.3. The defendant or its solicitors (where acting) should respond as soon as possible and, in any event, within 7 days confirming the position in respect of service. The claimant's ability to confirm that it has complied with this protocol when issuing proceedings does not depend on receipt of this response.

12.3.4. The parties should continue to cooperate and narrow the issues in dispute before proceedings are issued and throughout the course of the proceedings.

Compliance with this protocol

13. The parties must comply with this protocol, the relevant specific protocol which applies instead, or any equivalent contractual pre-action or dispute resolution mechanism before issuing proceedings. The court will require the claimant to indicate when commencing proceedings whether there has been substantial compliance with this or a relevant specific protocol (e.g. the Pre-Action Protocol for Construction and Engineering Disputes or the Pre-Action Protocol for Professional Negligence Disputes) by completing and filing on CE-File Form [x[31]] with its claim form. Where a defendant

[31] Form to be designed to include wording:
I/We confirm we have complied with the B&PC Multi-track PAP/other specific PAP
I/We confirm that the letter of claim was sent on [date to be inserted]
A letter of response was received on [date to be inserted]/no letter of response was received
We exhausted a contractually agreed dispute resolution process with the final step taken on [date to be inserted]
We have issued without complying with a PAP because:
Limitation/Injunction/Other [with a box to insert details]
To include Statement of Truth

wishes to raise an issue of substantial non-compliance they should file a letter on CE-File setting out brief reasons why they consider that there has been substantial non-compliance and including "Pre-Action Non-Compliance" in the CE-File comments box. The court will not be concerned with minor or technical infringements, and a party may be penalised in costs for complaints about minor or technical infringements.

14. The court may decide that there has been a failure to comply with this protocol when a party has:
    14.1. not complied with one or more steps referred to in paragraph 13; or
    14.2. acted unreasonably in such a way as to undermine the objectives of the protocol.
15. Where proceedings are started and there has been non-compliance with this protocol, the court may order that:
    15.1. the parties are relieved of the obligation to comply or further comply with a protocol; or
    15.2. the proceedings are stayed while particular steps are taken to comply with the protocol (including engagement with a relevant dispute resolution process); or
    15.3. sanctions are to be imposed. These may include penalties in costs, such as disallowing the costs of relevant statements of case or awarding the costs of relevant statements of case on an indemnity basis where costs could have been avoided or reduced through compliance with the protocol.
16. When deciding whether to impose any sanctions, the court will, after proceedings are issued, consider whether the breach was serious or significant, whether there was a good reason for it, and all the circumstances of the case. The court may, after proceedings are issued, impose such sanctions as it considers appropriate and at such time as it considers appropriate.
17. The court will take into account compliance with this protocol when giving directions. Where the court considers it appropriate to do so directions may be tailored to reflect the steps undertaken (or which should have been undertaken) by the parties at the pre-action stage.

Limitation

18. Complying with this protocol does not stop statutory time limits from running for starting court proceedings. If a claim is started after the relevant limitation period has expired, the defendant will continue to be entitled to use that as a defence to the claim. If proceedings are started in order to comply with the statutory time limit before the parties have followed the steps in this protocol, the parties should apply to the court for a stay of the proceedings in order to allow them to comply

with this protocol and, if applicable, for an extension of time for service of the claim form.

Appendix 2: Membership

Main Working Group

1. Chair: Professor Andrew Higgins – Academic and Civil Justice Council Member
2. His Honour Judge Richard Roberts
3. District Judge Sunil Iyer
4. Deputy District Judge Jonathan Hassall
5. Dr John Sorabji – Associate Professor UCL Faculty of Laws and CJC Member
6. Nicola Critchley – Insurance Representative and Civil Justice Council Member
7. Diane Astin – Housing Representative and Civil Justice Council Member
8. Daniel Easton – Personal Injury Lawyer, Leigh Day
9. Andrew Skelly – Bar Council
10. Masood Ahmed – Associate Professor, University of Leicester
11. Brett Dixon – Law Society
12. William Wood KC – ADR Provider

Personal Injury Sub-Committee

1. Chair: Master Amanda Stevens
2. His Honour Judge Richard Roberts
3. Nicola Critchley – Insurance Representative and Civil Justice Council Member
4. Dan Easton – Leigh Day
5. Brett Dixon – Law Society

Judicial Review Sub-Committee

1. Chair: Professor Maurice Sunkin KC (Hon)– University of Essex
2. Mr Justice Fordham
3. Polly Glynn – Deighton Pierce Glynn
4. John Halford – Bindmans
5. Gurpreet Rai – Metropolitan Police
6. Lam Tran – Ministry of Justice, Constitutional Policy Division
7. Professor Sue Prince – Academic and Civil Justice Council Member

Table of abbreviations and acronyms

Abbreviation or acronym	Meaning
ADR	Alternative Dispute Resolution
B&PC	Business and Property Court
C&E PAP	Construction and Engineering PAP
Churchill	*Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416
CJC	Civil Justice Council
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rule Committee
HSE	Health and Safety Executive
JR	Judicial Review
LSLA	London Solicitors Litigation Association
MCOL	Money Claim Online
M&C PAP	Media & Communications PAP
NIHL	Noise Induced Hearing Loss
OPRC	Online Procedure Rule Committee
PAP	Pre-Action Protocol
PRP	Protocol Referee Procedure
TCC Guide	Technology and Construction Court Guide
TeCSA	Technology and Construction Solicitors' Association