THE ASSOCIATION OF HER MAJESTY'S DISTRICT JUDGES

Response to the Civil Justice Council Consultation Paper on a General Pre-Action Protocol and a Practice Direction on Pre-Action Protocols

The Association represents all District Judges in the County Courts and District Registries of the High Court in England and Wales.

District Judges are responsible for case management of most civil claims issued in England and Wales, and conduct final hearings in over 80% of civil claims that go to trial. We welcome the opportunity to respond to this Consultation Paper and refer to the questions set out in it.

1. Question: Do you agree with the proposed new structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute? Please give reasons for your view.

We agree that the proposed structure is appropriate for the reasons set out in the Consultation Paper. Although creating a "one size fits all" protocol for situations where there is no specific protocol may give rise to problems, on balance we feel the structure will increase the chance of disputes settling without the need for a claim to be issued or at least help clarify the issues if a claim has to be started.

2. Question: Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply? If so please specify.

We feel that there may be several classes of case where it is doubtful whether the General Pre-Action Protocol (GPAP) should apply; for example we do not think it should apply to bankruptcy or winding-up petitions, although it could very usefully apply to some applications within insolvency proceedings in particular applications for possession and sale of the debtor's home. We are doubtful whether the GPAP should apply where there is a need for an urgent application for an injunction, for example under the Housing Act 1996 or the Protection from Harassment Act, particularly where the court's protection is sought on a without-notice basis, and similar considerations might apply to applications for search orders and freezing injunctions. We appreciate that these matters are addressed in paragraph 4.5 of the draft Practice Direction and comment further on that paragraph under Question 3.

3. Question: Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol? If so, please specify.

We agree that it is right to use language, both in the GPAP and in the Practice Direction, which is readily understandable by litigants in person. However, we do not agree that "should" and "must" have the same meaning. "Must" is mandatory whereas "should" indicates a desirable course of action or a likelihood. Having said that, we approve of the use of "must" and "will" in the drafts.
We are less happy about restricting references to the issue of court proceedings to "starting a court claim". Some proceedings which we feel should be covered by the GPAP such as applications within a bankruptcy for orders for possession and sale of a home are not commenced by a claim in the CPR meaning.

We make some specific drafting observations as follows:-
Practice Direction 4.5 We have made reference under Question 2. to urgent applications; we are concerned that this paragraph as presently drafted may act as a disincentive to the issue of genuinely urgent applications and would prefer to see something like "Where an urgent application has to be made to the court (for example an application for an injunction) the court will only expect the parties to comply with the relevant pre-action protocol if it is reasonably practicable to do so. The court will take account of the urgency of the application and such matters as the need to seek the protection of the court without giving notice to the other party when considering whether a pre-action protocol should have been complied with."
Practice Direction 4.6 We do not think the explanation in brackets of the indemnity principle is correct; it suggests that the court will allow unreasonable costs. Better might be "(which means that the court will resolve any doubt about whether costs are unreasonable in favour of the receiving party)".
GPAP 8.8 We find this ambiguous – is this provision dealing with disagreement between the parties about the need for an expert, whether the instruction should be on a single joint basis or the identity of the expert? On the assumption that the last is intended, better might be "If the parties cannot agree who should be nominated as single joint expert...".

4. Question: Do you agree with the approach taken to ADR in the General Pre-Action Protocol?

Yes

5. Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits. Please give reasons for your view.

We agree in general but have two comments. With regard to GPAP paragraph 7.4 we cannot believe that it is really necessary to enclose a copy of the GPAP. It will be an enormous waste of paper in the huge bulk of cases where the "dispute" is an unpaid debt. In such cases the debtor simply needs the information in paragraph 7.5 and the Annex.
Secondly, we are concerned in simple debt cases that the time limits are too generous. We see no reason why in such cases the debtor cannot give his response in his acknowledgement, within 14 days (which gives the debtor ample time to seek advice and engage with the creditor if he is going to), rather than "a number of weeks" as is proposed.

6. Question: Would it be helpful to include a 'model' letter (nonmandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?

We feel that this may be taking the "one size fits all" approach one step too far.

7. Question: Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?

Yes.

8. Question: Do you agree with the approach taken to experts in the General Pre-Action Protocol? Please give reasons for your view.

Subject to the drafting point mentioned under Question 3, we agree.

9. Question: Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the 'time bar' defence?

Yes. Clearly such an agreement would need to be clearly set out in writing.

For and on behalf of the Association

May 2008

District Judge Paul Mildred
Chairman, Civil Sub-Committee
Bournemouth Combined Court Centre
Deansleigh Road
Bournemouth BH7 7DS