CIVIL JUSTICE COUNCIL – CONSULTATION PAPER – GENERAL PRE-ACTION PROTOCOL AND PRACTICE DIRECTION ON PRE-ACTION PROTOCOLS

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 regret the proliferation of Rules and Practice Directions because it makes litigation more expensive and, for litigants in person, more difficult to understand their obligations and rights. One protocol of general application is greatly to be preferred to a large variety. The current 136 pages of different protocols make it difficult for litigants in person and junior litigators to find and use what they need. We very much regret that a strategic approach was not taken at the outset of this process. One general protocol should have been drafted and then used as the basis for any others that were thought to be vital. The current approach is illogical and has produced this unnecessary bulk. We hope that the opportunity will soon be taken to further simplify the protocols. This could be by reducing them to one protocol only or, at the very least by shortening the others and annexing them to this one.

Having said this, the proposed shorter practice direction placed in a more logical position as part of CPR 3 is a constructive step in the right direction. A general protocol will emphasise to those litigants in person who are able to access and comprehend the CPR that they are expected to behave in this way in *all* cases.

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.

No.

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.
Protocol

7.2 " a matter of weeks" in this context is not clear. Consider "no more than 2 or 3 weeks".

7.3 The last 3 bullet points would be difficult for a non lawyer to understand.
Consider instead of "the nature of the remedy sought" the words "what the claimant wants from the defendant"; consider instead of "if damages are claimed, a breakdown of how they have been calculated; and if a sum is claimed pursuant to contract, how it has been calculated" the words "if financial loss is claimed, an explanation of how it has been calculated". The third bullet point is not necessary.

7.4 – inconsistent use of "recipient"/"defendant". Also last line should read " starting a claim in court and may increase etc"

7.6 Consider heading "Defendant's acknowledgment of the letter before claim" so that a Defendant reading the headings to look for the parts that apply to him will spot this more easily.

7.10 Consider instead of “counterclaim” the words “counterclaim, that is a claim against the claimant”

8.6 –title, typographical error

8.8 “the first party” and “the second party” are too complex for litigants in person. Consider in second and third lines as alternative “the party seeking the expert evidence (“A”) must give the other party (“B”)..

Then in
8.9 .the list of experts, B may indicate in writing.

9.1 Consider explaining the effect of a “statutory defence of time bar” eg “and the claimant will lose the court claim” to be added at the end of the third sentence.

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

All but one of our Committee agrees. The statement “The parties must consider whether some form of alternative dispute resolution procedure might enable them to settle the dispute” is a good message, not only for litigants in person (at least those able to access and understand the CPR), but also for young practitioners who may not have been properly trained by their principals in this respect. The list of options in 6.2 is also very helpful particularly since it includes both informal (“discussion and negotiation”) and formal methods of ADR. A cross-reference to methods of appointing a single joint expert may be of assistance here.
Our Chair, however, considers that the words telling people that ADR is not mandatory should not be removed. His view is that the job of the courts is to provide people with swift access to a fair trial for those who want one, not to put obstacles in their way by leading them to believe that they “ought” to go to ADR.

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.
These are largely a matter of commonsense for an experienced litigator or a properly trained junior but those litigants in person able to access and understand the CPR will find it useful to have these points set out in one prominent place in the CPR.

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?

This would be helpful to those litigants in person able to access and understand the CPR.

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

The rationale for having them in the mortgagee possession protocol is clear and would not impose too much burden on such claimants. However, in the context of the general protocol to require, for example, a one-man business with a long term defaulting customer to take the approach set out in bullet points 2 and 3 seems unreal. Compliance with 7.4 is adequate.

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

Yes because it is a useful summary.
The paper should be amended, however, because 8.8 -8.9 is a procedure that can be used to identify who is to be the single joint expert where the parties *have* agreed to instruct a single joint expert, not merely when they cannot agree that there should be one.

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

This is a useful point to draw to the attention of novice's litigators and those litigants in person capable of accessing and understanding the CPR.