RESPONSE OF MANCHESTER CIVIL JUDICIARY

TO THE CONSULTATION PAPER ON THE GENERAL PRE-ACTION PROTOCOL

This paper has been prepared jointly by His Honour Judge Holman, the Designated Civil Judge, and District Judge Graeme Smith.

1. **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.**

   Yes. It is an improvement.

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

   We believe that it would be highly undesirable to create exceptions.

3. **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.**

   It is desirable to use language consistent with that found in the CPR and other Practice Directions. We have a number of comments on the drafting. We note that the stated purpose is with litigants in person in mind. Our comments on the drafting are contained in Appendix A to this response.

4. **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.**

   Yes other than in relation to limitation periods.

6. **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 do not consider that this would be helpful. There are too may variables and it is quite impossible to cater for all eventualities.

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

   Yes

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

   Yes. It gives a useful steer without detracting from Part 35.

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

   Time limits are a matter of law. There is a good policy reason for them, and defendants should not, in our view, be placed under pressure to forego their statutory rights**.**

   It is unhelpful (and, we would say, inappropriate) for the PD and the Protocol to send out conflicting messages (which the drafts presently do). We note that all the specific Pre-Action Protocols except one expect time limits to be observed, and an application for a stay to be made if it is needed. The only exception is the housing disrepair PAP and, surprisingly in our view, the court is enabled to consider sanctions if the refusal to grant an extension is deemed unreasonable. We do not feel that it is for the court to tell a potential party that it is being unreasonable in refusing not to take the time bar point when Parliament has stipulated clear time periods. It should not be forgotten that we are generally talking of six or twelve years, not three or one.

   The proper way forward is, as contemplated in the other PDs and the draft PD annexed to the Consultation Paper, for the Claimant to issue and then to apply for a stay. This has the advantage too of enabling the court to get to grips with the case at an early stage, which is important where the cause of action arose several years ago.

   In our view, paragraph 9.2 is weighted against the Defendant (e.g. use of the word "will"). After the first sentence, we suggest wording along the following lines: "In that case, and if the relevant law applicable to the matter in dispute permits, the claimant should propose a reasonable period of time for compliance with this Pre-Action Protocol and invite the defendant to agree to a fixed date before which a statutory time bar defence will not be raised. The defendant should consider this request, but is under no obligation to agree to it."

   The default position is clear from paragraph 9.3.

APPENDIX A

PRACTICE DIRECTION

4.6 The second bullet point about indemnity costs is wrong. Costs still have to be reasonably incurred and reasonable in amount. It is proportionality which is removed from the equation. Also the burden shifts from the receiving party to the paying party. See CPR 44.4. We suggest for the wording in brackets: "which means that the paying party has to show that the costs are unreasonable".

6.4.1 We feel that "other than in exceptional circumstances" is misleading. The problem is how to explain simply – not easy with limitation! We suggest "must normally be started".

"Could" should be "can" and "would" should be "will be entitled to raise". This reflects the fact that a defendant can decide not to take a limitation point.

PROTOCOL

3.4 Costs are a mater of discretion. "May" is better than "Will".

6.3.1 We suggest that there is included a reference to the National Mediation Helpline – this is the recommended contact point for the court staff where mediation is sought after the start of proceedings and indeed the NMH is mentioned in the Allocation Questionnaire.

7.2 Typographical error on line 2: consider, not considered

First bullet point: this is unclear. What meaningful difference is there between "less than a month" and "a matter of weeks"? We suggest "within one month at the most and preferably within no more than 2 weeks".

7.4 Final bullet point, final sub-paragraph. We feel that the reference to increasing "the defendant's costs" has the potential to confuse. We presume it is meant to indicate that the defendant may incur a greater liability for costs (whether the claimant's or his own). We suggest it would be better to state specifically "increase the defendant's liability for costs".

7.8 This may be unfair if the claimant's letter does not comply with the requirements of the Protocol. We suggest there is an additional paragraph earlier in this section making it clear that, if the defendant considers that the letter of claim does not comply (other than in minor details), he should say so in the acknowledgement and identify the respects in which it is not compliant.

7.15 On third line, replace "should" by "must".

8.4 We think that (a) is somewhat inelegant and it is not necessary to descend into issues about joint or separate letters of instruction. We suggest removal of "whether instructed jointly or separately".

8.6 Typographical error in heading – "instructing" not "instruction".

Second bullet point: the words "an indication of " are unnecessary – the field has simply to be stated.

8.11 We are concerned by (c). We are unclear as to its purpose, although we note that similar wording appears, for example, in the personal injury protocol. Rightly or wrongly the Court of Appeal held in *Jackson v Marley Davenport*, where it was apparent that the expert had amended his report, that the original report was privileged, and this, it should be noted, was where the report had been prepared after permission had been given by the court, whereas the situation in this section relates to reports before proceedings have begun. This sub-paragraph should be deleted. The earlier sub-paragraphs are adequate – either the other party agrees or the court directs.

9.1 Same comment regarding "exceptional circumstances" – see PD 6.4.1

As in 6.4.1 we are unclear as to the reason for using the subjunctive in the last sentence: "could" and "would". Substitute "can" and "will be entitled to raise".

9.2 See our comments on Question 9. We object to the wording used – "will" denotes compulsion. There should be an application for a stay.