

PRE-ACTION CONDUCT: HELP WHERE HELP IS NEEDED?

1. Introduction - the New Regime

In April 2009, a practice direction for pre-action conduct ("PDPAC") will be introduced to supplement Civil Procedure Rules ("CPR") Part 3. It describes the conduct that the courts will normally expect parties to a dispute to have followed before proceedings are started and will replace the current Practice Direction on Protocols ("PDP"). It is intended to have greater prominence in the CPR with clearer language and structure.

Since 2006, there has been extensive consultation on proposed changes to the PDP. The author of this article compiled the response of the London Solicitors Litigation Association ("LSLA") to the most recent consultation. Several of our concerns have been addressed in the current draft, but many others remain.

The current draft PDPAC (dated 17 December 2008) is divided into four Sections with Annexes covering general matters, debt claims, and experts. Some parts will only apply where no other protocol applies, but the rest will apply in all cases, including those to which the 10 subject-specific protocols apply.

It will not apply to applications for:-

- consent orders;
- orders where there is no defendant or respondent;
- directions by a trustee or other fiduciary;
- urgent "without notice" orders (e.g. freezing or search orders).

2. Aims

The stated aims of the PDPAC are to:

- give guidance on pre-action procedure, but not to impose any significant new requirements;
- encourage the exchange of information about the issues;
- enable parties to settle disputes without issuing proceedings;
- give guidance on instructing experts, and information to be provided in a debt claim;
- provide clearer and more accessible information to litigants in person and less experienced practitioners.

3. Guidance, but no new requirements?

Much of the PDPAC reorganises the PDP, and to a large extent this is helpful. But the PDPAC provisions will contain more than that mere guidance, including several changes which may well result in a change of interpretation. The courts seem likely to exercise their case management powers more actively if the guidelines are not followed.

Claimants will be required to certify compliance with the PDPAC (or other relevant protocol) in the claim form or particulars of claim. And if following completion of the PDPAC procedures the matter has not been resolved, the parties will be required to undertake a further review of their respective positions to see if proceedings can still be avoided. It is unclear how a party could demonstrate that it has complied with this. Will a party be put under pressure to waive privilege in its legal advice in order to do so?

4. Information exchange

While early exchange of information is to be encouraged, the new guidance on identifying and asking for copies of further relevant documents could potentially be used oppressively, either as a fishing expedition, or to attempt to require the claimant to obtain documents which it does not possess. This could result in increased time and cost.

5. Settlement discussions: ADR

The PDPAC will provide that proceedings should not normally be started while the parties are actively exploring settlement: proceedings should usually be a step of last resort. ADR procedures are a useful tool in achieving settlement, but time and money can be wasted if parties are pressurised into ADR (rather than risk a punitive costs sanction) before they are ready to take an objective view of the dispute and to consider a solution which offers benefits to both sides. An ADR attempt which fails in such circumstances can delay or even prevent subsequent settlement attempts.

Despite strong support for retaining the words "*It has been expressly recognised that no party can or should be forced to mediate or enter into any form of ADR*", these will be omitted.

6. Debt Claims

The guidance on information to be provided in a debt claim, where the claimant is an individual and the defendant is a business, seems unlikely to be contentious. While the new guidance may be clearer, it is questionable whether it is more accessible.

7. Experts

In addition to the extensive and detailed provisions which are set out the CPR, Annex C of the PDPAP will now add further guidance, despite concerns that some of the guidance was neither necessary nor helpful. In particular, the guidance could be read as putting pressure on parties to instruct a single joint expert or an agreed expert (which may not be the best or most appropriate option in every case) and to exchange correspondence on alternative experts, which may add to (rather than reduce) the costs involved.

8. Accessibility

The PDP and the subject-specific protocols all currently appear in Section C of Part 1 of the White Book. Neither the title to CPR Part 3 nor the PDPAP gives any clue that guidance on debt claims is also to be found here. Will an inexperienced practitioner or a litigant in person find it any easier to locate guidance on the steps to be taken before commencing proceedings or in debt claims here, rather than in the current location?

There may be further changes before the PDPAC is introduced, so there is still an opportunity for some or all of these concerns to be addressed.

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