

RESPONSE OF THE CHANCERY DIVISION

To the Consultation Paper on the General Pre-Action Protocol

1. The key responses are
 - We reiterate in the strongest terms our view that there cannot be a pre-action protocol of general application to all Chancery proceedings
 - Any pre-action protocol must avoid being prescriptive.

2. The judges of the Chancery Division prepared a Response dated 14th May 2007 to the earlier draft proposals. Whilst the questions of interpretation raised in that Response are addressed in the revised protocol, the present proposals have taken no account of the clearly stated view that “we would not support the universal and automatic application of the pre-action protocol regime to cases in the Chancery Division”. The Response gave detailed reasons for that view (see paragraphs 8 to 13 inclusive) supported by specific examples: those reasons remain valid today, though not addressed at all in the present draft protocol or practice direction.

3. Shortly put, within the very wide range of subject matter dealt with in the Division there are well established approaches (“protocols”) specifically adapted to the particular needs of those proceedings and known to and routinely applied by the specialist practitioners in each field. They are of such diversity that an individual “formal protocol” (of the type listed in paragraph 1.2 of the General Protocol) is not warranted: indeed the Division declined to endorse a formal pre-action protocol in probate proceedings meticulously prepared by the Association of Contentious Trust and Probate Specialists because it did not favour the proliferation of protocols. Some of these protocols have a statutory origin and are embedded in our substantive law (e.g. the “statutory demand” procedure in personal bankruptcy). The rigid imposition of a General Protocol with sanctions for non-compliance is likely to disrupt the targeted arrangements which at present operate so efficiently. Thus the insistence upon “a letter before the claim” is likely to introduce an

element of contention which is at present absent from some Chancery proceedings: in other cases (the appointment of provisional liquidators or insolvency officeholders to protect the interests of creditors or members of the public) it is likely to inhibit the rapid Court intervention which the jurisdiction has been developed to provide; in others it will duplicate existing procedures; in others (particularly intellectual property cases) it will itself expose the writer to liability; and in yet others it will be entirely without point because the Court application is mandatory or occasioned by the absence of a competent other party.

4. We have thought through (which the draftsman of the protocol may be forgiven for not doing) how the proposed General Protocol will actually work in relation to the cases actually conducted in the Chancery Division. Many of these are far distant from the paradigm case that the rule framers appear to have had in mind (which seems to be a case between two parties where they can achieve what they want without the assistance of the Court). An extensive list would be wearisome (and inevitably incomplete). But take four very simple and routine examples which immediately spring to mind without any contrivance on our part:-
 - (a) Megacorp plc wishes to eliminate its share premium account and to increase its distributable reserves. To which of its 1.5 million shareholders does it address its “letter before claim”? Should it also include its 20,000 creditors? Why must it wait for the timetable in the protocol to expire before making its inevitable application? With which of the interested persons should it conduct negotiations (knowing full well that a consensual outcome binding everyone is impossible)? What is wrong with the present practice of the company issuing its petition, obtaining a ruling from the court as to which interests must be protected, for the Court then to give directions as to advertising for objections and providing a mechanism for the consideration of the objections, and for the Court then to make an order (as the Companies Act inescapably requires)?

- (b) Careful Fiduciaries Ltd is the trustee of Megacorp's pension fund. The Rules are unclear whether if you take a sabbatical then that counts as "pensionable service": the fund is in deficit and the answer affects different people's accrued rights in different ways. The trustee is entirely neutral and simply wants the Court to give the answer. Who writes the "claimant's letter"? The trustees who are neutral? Or each of the scheme members whose interests are differently affected? How are negotiations to be conducted that will result in an agreement binding on every scheme member? What is wrong with the present practice of the trustee applying to the Court, explaining the issue, the Court making representation orders and any relevant pre-emptive costs orders, the parties then to negotiate with the benefit of that oversight, and the Court to approve the compromise (or rule on the issue) and so by its order bind all present and future scheme members?
- (c) One consequence of the outcome of the pension case is that it is doubtful how it affects a scheme member's tax bill. The Revenue raises an assessment as a test case: the commissioners rule in favour of the member and the Revenue wishes to appeal to the High Court/Upper Tier Tribunal. How does the protocol work in this context?
- (d) The deficit on Megacorp's pension fund causes its bankers to be concerned and it threatens proceedings to recover its debt. Told by their advisers that the stated policy of the Court is that proceedings must be regarded as a last resort, the directors settle. This is hugely to the disadvantage of all other creditors of Megacorp. Why should the directors be procedurally discouraged from implementing the policy of the Insolvency Act 1986 to ensure that there is a regulated distribution of all assets under the supervision of the Court? And why if they are minded to make the application should they have to write a "letter before claim" (presumably to all 20,000 creditors) thereby bringing about the very collapse which it was the policy of the Enterprise Act 2002 to avoid?

In each of these cases the General Pre-Action Protocol adds nothing but cost, delay and confusion.

5. It should not be thought from our instant examples that our concerns are limited to company or trust matters. Our earlier response contained a fuller list (itself still illustrative). We have now proffered straightforward examples so that the point (which is of the very greatest concern to us) should be put as simply as possible. Nor should it be thought that the point is limited to large multi-party cases. The owner of a very modest leasehold property seeking to acquire his freehold is equally adversely affected by the present proposals.
6. We have also related the current proposal to the procedural rules which already exist (and it is to be remembered that for Chancery Judges these are not to be found simply in the CPR but also in (for example) the Insolvency Rules, the Companies (Unfair Prejudice Applications) Proceedings Rules, the Insolvent Companies (Disqualification of Unfit Directors) Rules, the Non-Contentious Probate Rules (a misnomer!) the Court of Protection Rules etc., none of which operates in isolation from the CPR. The policy embodied in many of these Rules is that the Court should take immediate control, and the rules contemplate that the rights of persons *who are not parties* may be affected by the commencement of proceedings (e.g. ss 129(2) and 127 of the Insolvency Act 1986, or Insolvency Rule 4.23). The policy of the proposed procedural rule will run counter to the policy embodied in these existing rules.
7. We would restate with as much force as we can command our view that it is profoundly undesirable to introduce a General Protocol which in many cases within this Division will have to be routinely disapplied if it is not to obstruct the attainment of “the overriding objective”. We must also record our firm dissent from proposition that “the Courts take the view that starting a court claim is a step of last resort”. A substantial part of the work of this Division concerns issues the outcome of which will bind persons who are not parties to the action (because they are unborn or unascertained or lack competence or because the action seeks a class remedy). The approach of the Division is generally to encourage the commencement of proceedings in order that the

Court can *from the earliest stage* manage the resolution of the issue and in particular control the expenditure of costs.

8. There are, of course, cases within the Chancery Division which are closer to the paradigm case. In relation to these cases
 - (a) Some judges oppose the introduction of a General Protocol as untargeted and simply generative of costs:
 - (b) Some judges acknowledge the advantage of the guidance contained in a General Pre-Action Protocol *but only on the footing that it is not prescriptive in its terms (because the more it requires the more costly compliance is).*

Every judge is deeply concerned at the level of costs generated by compliance with the existing protocols and at the absence of tangible advantage in the conduct of cases resulting from adherence to them. The mandatory and highly prescriptive steps required by the present draft result in effect in pleadings and disclosure (but without the control exerted by procedural judges). Protocols themselves are becoming instruments of oppression. Every judge is also concerned that inappropriate procedural hurdles should not be placed in the way of those seeking justice. We have no way of knowing that justice was in any sense done in cases which do not enter the system.

9. We address the specific questions raised in the consultation.
10. “*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?*”
See paragraph 3ff. Some of us see protocols as without point and simply generative of costs. Some of us can see that a widely-addressed formal encouragement to consider settlement might confer an advantage if (but only if) it is not so prescriptive as to generate costs out of proportion to the benefits gained and itself become oppressive. Anything which emphasises the power of the Court to take any step for the purpose of managing a case and furthering the overriding objective is to be welcomed. But the question itself (and this response) will highlight the circumstance that a pre-action protocol is only

truly enforceable if it fails and a case is commenced: it is that event which gives the court the “case management” and “cost sanction” power (and there it is really CPR 44.3(5)(a) that is the lynchpin). The Court will not be able to control the use of pre-action protocols where powerful and well-resourced claimants exploit their prescriptive language, formal structure, defined timetables and costs of compliance to procure submission. Even those of us who acknowledge the advantage in a Pre-action protocol in some cases consider that a mandatory requirement to use (even where no benefit can be gained) is to throw upon the parties an entirely unnecessary cost burden which cannot fairly be dealt with either during nor at the end of the litigation

11. *“Are there particular classes of case or types of circumstances where the General pre-action protocol should not apply?”*

Yes, most certainly. We have noted above (and the Chancery Division explained at greater length and in more detail in its initial response) that a General Pre-Action protocol is inappropriate in many Chancery cases and counterproductive in some. We most emphatically urge the incorporation

(a) In paragraph 1 of a new subparagraph 1.3 stating: **“The term “dispute” does not include work in preparation for an application to the Court (a) for the exercise its supervisory jurisdiction in relation to trusts, estates, property or companies; (b) for any class remedy (such as insolvencies) ; (c) where the circumstances are such that (regardless of any consents) it is necessary or expedient to apply to the Court; or (d) where the dispute concerns intellectual property rights in relation to which a threats action may be brought”.**

(b) In paragraph 3 a qualification to the first sentence in this form **“(unless either the need for urgent relief or for secrecy renders it inappropriate or the court’s decision will be binding upon a significant number of individuals or a section of the public)”.**

12. *“Do you have any comments on the language used and the drafting of the revised Practice Direction and General pre-action protocol?”*

- We doubt the utility of drafting the General Pre-Action Protocol with litigants in person particularly in mind. In our experience litigants in person do not read the Civil Procedure Rules before commencing proceedings. Legal practitioners do.
- We think an important consideration is how the language may be deployed in cases that do not come to Court (see above)
- We register strong dissent from the general proposition that “the Courts take the view that starting a court claim is a step of last resort” (but the sting of this is in some measure drawn if our amendment to insert paragraph 1.3 is accepted).
- We consider the language far too prescriptive and the procedure too rigid. Parties should in essence be free to negotiate in a way that best suits their particular needs and should not be exposed to penalty for failure to adhere to some generic model.
- The Practice direction fails to make clear whether a failure to adhere to the protocol will lead to a different substantive costs order being made or whether the failure is a factor to be applied by the costs judge in the course of assessment. If the former then the satellite litigation generated by the present protocols (under CPR 44.3(5)) will become a feature of every case.
- On a point of detail, we do not understand the reference to “paragraph 5 below” in paragraph 3.2 of the draft.

13. *“Do you agree with the approach taken to ADR in the General Pre-Action protocol?”*

A hesitant “Yes, if the amendments suggested in this paper are accepted”. The requirement to consider whether some form of alternative dispute resolution might be engaged before commencing proceedings is without point where only the commencement of court proceedings will enable the parties to achieve the alteration in rights which they seek. So the amendment is vital.

But even then, the emphasis on ADR as an *alternative* to court proceedings would not accord with our experience. The Judges, Masters and Registrars of the Chancery Division deploy ADR as *a tool in case management* i.e. once the Court process has defined the issues and compelled disclosure of all documents (however inconvenient). This is where we see its most effective use: paragraph 6.4 should most certainly be strengthened. One of the dangers of a Pre-Action Protocol is that it forces parties to negotiate at a time of the Court's (not their own) choosing, and so devalues settlement ("We have already tried that and spent enough fruitlessly").

14. *"Do you agree with the required steps set out in the General Pre-Action protocol and in particular the approach taken to time limits?"*

No. Even if the amendment is made we think the timetable is too prescriptive and is unfair on defendants. Why should a claimant have as long as he/she likes to prepare a letter of claim and then by doing so be able to exert time pressure on a defendant? We would prefer a formula such as

"The defendant should respond as soon as is reasonably practicable. If the Court is called upon to consider this question it is likely to take into account a range of factors including, how long ago the events giving rise to the claim occurred, the precision with which the claim is made, the material that is provided to the defendant to assist in the consideration of the claim, the material that ought with reasonable diligence to be otherwise available to the defendant and the size and nature of the claim advanced"

15. *"Would it be helpful to include a "model" letter (non mandatory) before claim (for a standard consumer claim) as an annexe to the General Pre-Action protocol?"*

We have nothing to contribute.

16. *"You agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?"*

We have nothing to contribute.

17. *"Do you agree with the approach taken to experts in the General Pre-Action Protocol?"*

Broadly “Yes”. But the point should clearly be made that agreement upon the identity of a single joint expert does not necessarily involve agreement upon instructions to that expert, and that separate instruction of a single joint expert is perfectly possible.

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

Emphatically not. Parliament has with the benefit of detailed advice declared the law on limitation. It is not for Courts by procedural devices to encourage parties to disapply that law and to substitute for the considered provisions of the Act and of the CPR bargains of their own making. Why should the court favour claimants? The claimant who has left it so late that he cannot comply with a pre-action protocol may on that account be penalised in costs: that is the risk involved in not bringing in your claim within a reasonable time.

Mr Justice Norris
Chief Master Winegarten
Mr Registrar Simmonds