

SUPREME COURT OF JUDICATURE

PRACTICE DIRECTION

Pre-Action Protocols Generally

1. PART 1 - GENERAL

- 1.1.** The following Practice Direction is issued by the Honourable Chief Justice pursuant to Part 4 of the *Rules of the Supreme Court, 2008* (hereinafter referred to as the RSC) in relation to pre-action protocols.
- 1.2.** Approved pre-action protocols for specific areas of practice are also being issued with this Practice Direction. Other pre-action protocols may subsequently be issued.
- 1.3.** Pre-action protocols outline the steps which parties should take to seek information and to provide information to each other about a prospective legal claim.
- 1.4.** The objectives of pre-action protocols are:
 - (1) to encourage the exchange of early and full information about the prospective legal claim;
 - (2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;
 - (3) to support the efficient management of proceedings under the RSC where litigation cannot be avoided.

2. PART 2 - COMPLIANCE WITH PROTOCOLS

- 2.1.** The Court may treat the standards set out in protocols as the normal reasonable approach to pre-action conduct. The Court will expect all parties to have complied substantially with the terms of an approved protocol. If proceedings are issued the Court may take into account the failure of any party to comply with a pre-action protocol when deciding whether or not to make an order under Part 26 (The Court's powers of management) or Part 65 (Costs).
- 2.2.** The Court will expect all parties to have complied, as far as reasonably practicable, with the terms of an approved protocol. If proceedings are issued and parties have not complied with this Practice Direction or a specific protocol, the Court will decide whether sanctions should be applied. The court is not likely to be concerned with minor infringements of the Practice Direction or protocol. The Court may look at the effect of non-compliance on the other party when deciding to impose sanctions.

3. PART 3 - NON-COMPLIANCE WITH PRACTICE DIRECTION OR PROTOCOL

- 3.1.** Parties will not be expected to observe this Practice Direction -
- (a) in urgent claims;
 - (b) where a period of limitation is about to expire and the period between the expiration of the limitation and the date on which the claimant instructs an attorney-at-law to act on his behalf is too short to allow for compliance with this Practice Direction;

(c) where, for other good and sufficient reason, it can be shown that there should not be compliance and the reasons for non-compliance are set out fully in the claim form or statement of case.

3.2. In a case where the limitation period is about to expire, the claimant's attorney-at-law should give as much notice of his intention to issue proceedings as is practicable and, in appropriate cases, the Court may be invited to extend the time for service of the claimant's supporting documents, if any, and/or for service of any defence or, alternatively, to stay proceedings while the recommended steps are followed.

3.3. Where, in the opinion of the Court, non-compliance has led to commencement of proceedings which might otherwise not have needed to be commenced, or has led to the incurring of costs which might otherwise not have been incurred, the Court may make such order as it deems just and expedient including -

(a) an order that the party at fault pay the whole or part of the costs of the proceedings or of the other party or parties;

(b) an order that the party at fault pay those costs on an indemnity basis.

3.4. The Court will exercise its powers under paragraph 3.3. with the objective of placing the innocent party in no worse a position than he would have been in had there been compliance with the Practice Direction or protocol.

4. PART 4 - EXAMPLES OF NON-COMPLIANCE

4.1. A claimant may be found to have failed to comply with a protocol where, for example, he fails -

(a) to provide sufficient information; or

(b) to follow the procedure required by the protocol.

4.2. A defendant may be found to have failed to comply with a protocol where, for example, he fails -

(a) to make a preliminary response to the letter of claim within the time fixed for that purpose by the relevant protocol;

(b) to make a full response within the time fixed for that purpose by the relevant protocol; or

(c) to disclose documents required to be disclosed by the relevant protocol.

5 PART 5 - PRE-ACTION CONDUCT IN CASES NOT COVERED BY A PROTOCOL

5.1. In cases not covered by an approved protocol, the Court will expect the parties, in accordance with the overriding objective and the matters referred to in Part 1.1. (2)(a), (b) and (c) of the RSC, to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid litigation.

- 5.2.** Parties to a potential dispute should follow a reasonable procedure, suitable to their particular circumstances, and which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation. Such procedure should normally include -
- (a) the claimant's writing to give details of the claim;
 - (b) the defendant's acknowledgement of the claim letter promptly;
 - (c) the defendant's giving a detailed written response within a reasonable time; and
 - (d) the parties' conducting genuine and reasonable negotiations with a view to settling the claim economically and without Court proceedings.
- 5.3.** The claimant's letter should -
- (a) give sufficient but concise details to enable the recipient to understand and investigate the claim without the need for extensive further information;
 - (b) enclose copies of the essential documents on which the claimant relies;
 - (c) ask for a prompt acknowledgement of the letter, followed by a full written response within a stated period that is reasonable; (For many claims, a reasonable period for a full response may be one month);
 - (d) state whether court proceedings will be issued if the full response is not received within the stated period;
 - (e) identify and ask for copies of any essential documents, not in his possession, which the claimant wishes to see;

- (f) state (if this is so) that the claimant wishes to enter into mediation or another alternative method of dispute resolution; and
- (g) draw attention to the court's powers to impose sanctions for failure to comply with this Practice Direction and, if the recipient is likely to be unrepresented, enclose a copy of the Practice Direction.

5.4. The defendant should acknowledge the claimant's letter in writing within 7 days of receiving it. The acknowledgement should state when the defendant will give a full written response. If the time for this is longer than the period stated by the claimant, the defendant should give reasons why a longer period is needed.

5.5. The defendant's full written response should, as appropriate, -

- (a) accept the claim in whole or in part and make proposals for settlement; or
- (b) state that the claim is not accepted.

5.6. If the defendant does not accept the claim or part of it, the response should -

- (a) give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions, if any, are accepted and which are in dispute;
- (b) enclose copies of the essential documents on which the defendant relies;
- (c) enclose copies of documents asked for by the claimant, or explain why they are not enclosed;

- (d) identify and ask for copies of any further essential documents, not in his possession, which the defendant wishes to see; and the claimant should provide these within a reasonable time or explain in writing why he is not doing so;
- (e) state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.

- 5.7. If the claim remains in dispute, the parties should promptly engage in appropriate negotiations with a view to settling the dispute and avoiding litigation.
- 5.8. Documents disclosed by a party in accordance with this Practice Direction may not be used for any purpose other than resolving the dispute, unless the other party agrees.
- 5.9. The resolution of some claim, but by no means all, may need help from an expert. If any expert is needed, the parties should, wherever practicable and to save expense, engage an agreed expert.
- 5.10. Parties should be aware that, if the matter proceeds to litigation, the court may not allow the use of an expert's report, and that the cost of it is not always recoverable.

6. PART 6 - COMMENCEMENT

- 6.1. The Court will take compliance or non-compliance with a relevant protocol into account where the claim was started after the coming into force of that protocol but will not do so where the claim was started before that date.
- 6.2. Parties in a claim started after a relevant protocol came into force, and who have, by work done before that date, achieved the objectives sought to be achieved by the

requirements of that protocol, need not take any further steps to comply with those requirements. They will not be considered to have failed to comply with the protocol for the purposes of Parts 3 and 4 of this Practice Direction.

7. PART 7 - NEGOTIATIONS/SETTLEMENT

- 7.1.** Parties and their legal representatives are encouraged to enter into appropriate negotiations with a view to settling their dispute and avoiding litigation. A protocol will not specify when or how this might be done but parties should bear in mind that the courts increasingly take the view that litigation should be a last resort, and that parties should take all reasonable steps to resolve their dispute amicably before a claim is issued.

8. PART 8 - SERVICE OF COMMUNICATIONS

- 8.1.** A claimant's letter, the defendant's response and any other communication in writing in compliance with this protocol may be personally delivered to the intended recipient or may be sent by post. This, however, is without prejudice to the parties agreeing on some other mode of transmission.
- 8.2.** Where the claimant's letter or the defendant's response or other communication is sent by post, it shall be deemed to have been received by the intended recipient on the 10th day after posting.

Dated the 18th day of November, 2008.

DAVID A.C. SIMMONS
Chief Justice