

# PRE-ACTION CONDUCT

## SECTION I – INTRODUCTION

### 1. AIMS

- 1.1** The aims of this Practice Direction are to –
- (1) enable parties to settle the issue between them without the need to start proceedings (that is, a court claim); and
  - (2) support the efficient management by the court and the parties of proceedings that cannot be avoided.
- 1.2** These aims are to be achieved by encouraging the parties to –
- (1) exchange information about the issue, and
  - (2) consider using a form of Alternative Dispute Resolution ('ADR').

### 2. SCOPE

- 2.1** This Practice Direction describes the conduct the court will normally expect of the prospective parties prior to the start of proceedings.
- 2.2** There are some types of application where the principles in this Practice Direction clearly cannot or should not apply. These include, but are not limited to, for example –
- (1) applications for an order where the parties have agreed between them the terms of the court order to be sought ('consent orders');
  - (2) applications for an order where there is no other party for the applicant to engage with;
  - (3) most applications for directions by a trustee or other fiduciary;
  - (4) applications where telling the other potential party in advance would defeat the purpose of the application (for example, an application for an order to freeze assets).
- 2.3** Section II deals with the approach of the court in exercising its powers in relation to pre-action conduct. Subject to paragraph 2.2, it applies in relation to all types of proceedings including those governed by the pre-action protocols that have been approved by the Head of Civil Justice and which are listed in paragraph 5.2 of this Practice Direction.
- 2.4** Section III deals with principles governing the conduct of the parties in cases which are not subject to a pre-action protocol.
- 2.5** Section III of this Practice Direction is supplemented by two annexes aimed at different types of claimant.
- (1) **Annex A** sets out detailed guidance on a pre-action procedure that is likely to satisfy the court in most circumstances where no pre-action protocol or other formal pre-action procedure applies. It is intended as a guide for parties, particularly those without legal representation, in straightforward claims that are likely to be disputed. It is not intended to apply to debt claims where it is not disputed that the money is owed and where the claimant follows a statutory or other formal pre-action procedure.

- (2) **Annex B** sets out some specific requirements that apply where the claimant is a business and the defendant is an individual. The requirements may be complied with at any time between the claimant first intimating the possibility of court proceedings and the claimant's letter before claim.
- 2.6** Section IV contains requirements that apply to all cases including those subject to the pre-action protocols (unless a relevant pre-action protocol contains a different provision). It is supplemented by **Annex C**, which sets out guidance on instructing experts.

### 3. DEFINITIONS

- 3.1** In this Practice Direction together with the Annexes –
- (1) 'proceedings' means any proceedings started under Part 7 or Part 8 of the Civil Procedure Rules 1998 ('CPR');
  - (2) 'claimant' and 'defendant' refer to the respective parties to potential proceedings;
  - (3) 'ADR' means alternative dispute resolution, and is the collective description of methods of resolving disputes otherwise than through the normal trial process; (see paragraph 8.2 for further information); and
  - (4) 'compliance' means acting in accordance with, as applicable, the principles set out in Section III of this Practice Direction, the requirements in Section IV and a relevant pre-action protocol. The words 'comply' and 'complied' should be construed accordingly.

## SECTION II – THE APPROACH OF THE COURTS

### 4. COMPLIANCE

- 4.1** The CPR enable the court to take into account the extent of the parties' compliance with this Practice Direction or a relevant pre-action protocol (see paragraph 5.2) when giving directions for the management of claims (see CPR rules 3.1(4) and (5) and 3.9(1)(e)) and when making orders about who should pay costs (see CPR rule 44.3(5)(a)).
- 4.2** The court will expect the parties to have complied with this Practice Direction or any relevant pre-action protocol. The court may ask the parties to explain what steps were taken to comply prior to the start of the claim. Where there has been a failure of compliance by a party the court may ask that party to provide an explanation.

#### **Assessment of compliance**

- 4.3** When considering compliance the court will –
- (1) be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings;
  - (2) consider the proportionality of the steps taken compared to the size and importance of the matter;
  - (3) take account of the urgency of the matter. Where a matter is urgent (for example, an application for an injunction) the court will expect the parties to comply only to the extent that it is reasonable to do so. (Paragraph 9.5 and 9.6 of this Practice Direction concern urgency caused by limitation periods.)

## Examples of non-compliance

- 4.4** The court may decide that there has been a failure of compliance by a party because, for example, that party has –
- (1) not provided sufficient information to enable the other party to understand the issues;
  - (2) not acted within a time limit set out in a relevant pre-action protocol, or, where no specific time limit applies, within a reasonable period;
  - (3) unreasonably refused to consider ADR (paragraph 8 in Part III of this Practice Direction and the pre-action protocols all contain similar provisions about ADR); or
  - (4) without good reason, not disclosed documents requested to be disclosed.

## Sanctions for non-compliance

- 4.5** The court will look at the overall effect of non-compliance on the other party when deciding whether to impose sanctions.
- 4.6** If, in the opinion of the court, there has been non-compliance, the sanctions which the court may impose include –
- (1) staying (that is suspending) the proceedings until steps which ought to have been taken have been taken;
  - (2) an order that the party at fault pays the costs, or part of the costs, of the other party or parties (this may include an order under rule 27.14(2)(g) in cases allocated to the small claims track);
  - (3) an order that the party at fault pays those costs on an indemnity basis (rule 44.4(3) sets out the definition of the assessment of costs on an indemnity basis);
  - (4) if the party at fault is the claimant in whose favour an order for the payment of a sum of money is subsequently made, an order that the claimant is deprived of interest on all or part of that sum, and/or that interest is awarded at a lower rate than would otherwise have been awarded;
  - (5) if the party at fault is a defendant, and an order for the payment of a sum of money is subsequently made in favour of the claimant, an order that the defendant pay interest on all or part of that sum at a higher rate, not exceeding 10% above base rate, than would otherwise have been awarded.

## 5. COMMENCEMENT OF PRE-ACTION PROTOCOLS

- 5.1** When considering compliance, the court will take account of a relevant pre-action protocol if the proceedings were started after the relevant pre-action protocol came into force.
- 5.2** The following table sets out the pre-action protocols currently in force and the dates that they came into force –

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<i>Pre-Action Protocol</i>	<i>Came into force</i>
Personal Injury	26 April 1999
Clinical Disputes	26 April 1999
Construction and Engineering	2 October 2000
Defamation	2 October 2000
Professional Negligence	16 July 2001
Judicial Review	4 March 2002

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<i>Pre-Action Protocol</i>	<i>Came into force</i>
Disease and Illness	8 December 2003
Housing Disrepair	8 December 2003
Possession Claims based on rent arrears	2 October 2006
Possession Claims based on Mortgage Arrears etc.	19 November 2008

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## **SECTION III – THE PRINCIPLES GOVERNING THE CONDUCT OF THE PARTIES IN CASES NOT SUBJECT TO A PRE-ACTION PROTOCOL**

### **6. OVERVIEW OF PRINCIPLES**

- 6.1** The principles that should govern the conduct of the parties are that, unless the circumstances make it inappropriate, before starting proceedings the parties should –
- (1)** exchange sufficient information about the matter to allow them to understand each other's position and make informed decisions about settlement and how to proceed;
  - (2)** make appropriate attempts to resolve the matter without starting proceedings, and in particular consider the use of an appropriate form of ADR in order to do so.
- 6.2** The parties should act in a reasonable and proportionate manner in all dealings with one another. In particular, the costs incurred in complying should be proportionate to the complexity of the matter and any money at stake. The parties must not use this Practice Direction as a tactical device to secure an unfair advantage for one party or to generate unnecessary costs.

### **7. EXCHANGING INFORMATION BEFORE STARTING PROCEEDINGS**

- 7.1** Before starting proceedings –
- (1)** the claimant should set out the details of the matter in writing by sending a letter before claim to the defendant. This letter before claim is not the start of proceedings; and
  - (2)** the defendant should give a full written response within a reasonable period, preceded, if appropriate, by a written acknowledgment of the letter before claim.
- 7.2** A 'reasonable period of time' will vary depending on the matter. As a general guide –
- (1)** the defendant should send a letter of acknowledgment within 14 days of receipt of the letter before claim (if a full response has not been sent within that period);
  - (2)** where the matter is straightforward, for example an undisputed debt, then a full response should normally be provided within 14 days;
  - (3)** where a matter requires the involvement of an insurer or other third party or where there are issues about evidence, then a full response should normally be provided within 30 days;
  - (4)** where the matter is particularly complex, for example requiring specialist advice, then a period of longer than 30 days may be appropriate;

- (5) a period of longer than 90 days in which to provide a full response will only be considered reasonable in exceptional circumstances.
- 7.3 Annex A sets out detailed guidance on a pre-action procedure that is likely to satisfy the court in most circumstances where no pre-action protocol applies and where the claimant does not follow any statutory or other formal pre-action procedure.
- 7.4 Annex B sets out the specific information that should be provided in a debt claim by a claimant who is a business against a defendant who is an individual.

## 8. ALTERNATIVE DISPUTE RESOLUTION

- 8.1 Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR (see paragraph 4.4(3)).
- 8.2 It is not practicable in this Practice Direction to address in detail how the parties might decide to resolve a matter. However, some of the options for resolving a matter without starting proceedings are –
- (1) discussion and negotiation;
  - (2) mediation (a form of negotiation with the help of an independent person or body);
  - (3) early neutral evaluation (where an independent person or body, for example a lawyer or an expert in the subject, gives an opinion on the merits of a dispute); or
  - (4) arbitration (where an independent person or body makes a binding decision), many types of business are members of arbitration schemes for resolving disputes with consumers.
- 8.3 The Legal Services Commission has published a booklet on ‘Alternatives to Court’, CLS Direct Information Leaflet 23 ([www.clsdirect.org.uk](http://www.clsdirect.org.uk)) which lists a number of organisations that provide alternative dispute resolution services. The National Mediation Helpline on 0845 603 0809 or at [www.nationalmediationhelpline.com](http://www.nationalmediationhelpline.com) can provide information about mediation.
- 8.4 The parties should continue to consider the possibility of reaching a settlement at all times. This still applies after proceedings have been started, up to and during any trial or final hearing.

## SECTION IV – REQUIREMENTS THAT APPLY IN ALL CASES

### 9. SPECIFIC PROVISIONS

- 9.1 The following requirements (including Annex C) apply in all cases except where a relevant pre-action protocol contains its own provisions about the topic.

#### **Disclosure**

- 9.2 Documents provided by one party to another in the course of complying with this Practice Direction or any relevant pre-action protocol must not be used for any purpose other than resolving the matter, unless the disclosing party agrees in writing.

## **Information about funding arrangements**

- 9.3** Where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k), that party must inform the other parties about this arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim.

(CPR rule 44.3B(1)(c) provides that a party may not recover certain additional costs where information about a funding arrangement was not provided.)

## **Experts**

- 9.4** Where the evidence of an expert is necessary the parties should consider how best to minimise expense. Guidance on instructing experts can be found in Annex C.

## **Limitation Periods**

- 9.5** There are statutory time limits for starting proceedings ('the limitation period'). If a claimant starts a claim after the limitation period applicable to that type of claim has expired the defendant will be entitled to use that as a defence to the claim.
- 9.6** In certain instances compliance may not be possible before the expiry of the limitation period. If, for any reason, proceedings are started before the parties have complied, they should seek to agree to apply to the court for an order to stay (i.e. suspend) the proceedings while the parties take steps to comply.

## **Notifying the court**

- 9.7** Where proceedings are started the claimant should state in the claim form or the particulars of claim whether they have complied with Sections III and IV of this Practice Direction or any relevant protocol.

## **Transitional Provision**

- 9.8** The amendments to paragraph 9.3 do not apply to a funding arrangement entered into before the 1st October 2009 and paragraph 9.3 in force immediately before that date will continue to apply to that funding arrangement as if paragraph 9.3 had not been amended.

# ANNEX A

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## GUIDANCE ON PRE-ACTION PROCEDURE WHERE NO PRE-ACTION PROTOCOL OR OTHER FORMAL PRE-ACTION PROCEDURE APPLIES

### 1. General

- 1.1** This Annex sets out detailed guidance on a pre-action procedure that is likely to satisfy the court in most circumstances where no pre-action protocol or other formal pre-action procedure applies. It is intended as a guide for parties, particularly those without legal representation, in straightforward claims that are likely to be disputed. It is not intended to apply to debt claims where it is not disputed that the money is owed and where the claimant follows a statutory or other formal pre-action procedure.

### 2. Claimant's letter before claim

- 2.1** The claimant's letter should give concise details about the matter. This should enable the defendant to understand and investigate the issues without needing to request further information. The letter should include –
- (1) the claimant's full name and address;
  - (2) the basis on which the claim is made (i.e. why the claimant says the defendant is liable);
  - (3) a clear summary of the facts on which the claim is based;
  - (4) what the claimant wants from the defendant;
  - (5) if financial loss is claimed, an explanation of how the amount has been calculated; and
  - (6) details of any funding arrangement (within the meaning of rule 43.2(1)(k) of the CPR) that has been entered into by the claimant.
- 2.2** The letter should also –
- (1) list the essential documents on which the claimant intends to rely;
  - (2) set out the form of ADR (if any) that the claimant considers the most suitable and invite the defendant to agree to this;
  - (3) state the date by which the claimant considers it reasonable for a full response to be provided by the defendant; and
  - (4) identify and ask for copies of any relevant documents not in the claimant's possession and which the claimant wishes to see.
- 2.3** Unless the defendant is known to be legally represented the letter should –
- (1) refer the defendant to this Practice Direction and in particular draw attention to paragraph 4 concerning the court's powers to impose sanctions for failure to comply with the Practice Direction; and
  - (2) inform the defendant that ignoring the letter before claim may lead to the claimant starting proceedings and may increase the defendant's liability for costs.

### **3. Defendant's acknowledgment of the letter before claim**

- 3.1** Where the defendant is unable to provide a full written response within 14 days of receipt of the letter before claim the defendant should, instead, provide a written acknowledgment within 14 days.
- 3.2** The acknowledgment –
- (1) should state whether an insurer is or may be involved;
  - (2) should state the date by which the defendant (or insurer) will provide a full written response; and
  - (3) may request further information to enable the defendant to provide a full response.
- 3.3** If the date stated under paragraph 3.2(2) of this Annex is longer than the period stated in the letter before claim, the defendant should give reasons why a longer period is needed.
- 3.4** If the defendant (or insurer) does not provide either a letter of acknowledgment or full response within 14 days, and proceedings are subsequently started, then the court is likely to consider that the claimant has complied.
- 3.5** Where the defendant is unable to provide a full response within 14 days of receipt of the letter before claim because the defendant intends to seek advice then the written acknowledgment should state –
- (1) that the defendant is seeking advice;
  - (2) from whom the defendant is seeking advice; and
  - (3) when the defendant expects to have received that advice and be in a position to provide a full response.
- 3.6** A claimant should allow a reasonable period of time of up to 14 days for a defendant to obtain advice.

### **4. Defendant's full response**

- 4.1** The defendant's full written response should –
- (1) accept the claim in whole or in part; or
  - (2) state that the claim is not accepted.
- 4.2** Unless the defendant accepts the whole of the claim, the response should –
- (1) give reasons why the claim is not accepted, identifying which facts and which parts of the claim (if any) are accepted and which are disputed, and the basis of that dispute;
  - (2) state whether the defendant intends to make a counterclaim against the claimant (and, if so, provide information equivalent to a claimant's letter before claim);
  - (3) state whether the defendant alleges that the claimant was wholly or partly to blame for the problem that led to the dispute and, if so, summarise the facts relied on;
  - (4) state whether the defendant agrees to the claimant's proposals for ADR and if not, state why not and suggest an alternative form of ADR (or state why none is considered appropriate);
  - (5) list the essential documents on which the defendant intends to rely;
  - (6) enclose copies of documents requested by the claimant, or explain why they will not be provided; and
  - (7) identify and ask for copies of any further relevant documents, not in the defendant's possession and which the defendant wishes to see.
- 4.3** If the defendant (or insurer) does not provide a full response within the period stated in the claimant's letter before claim (or any longer period stated in the defendant's letter of

acknowledgment), and a claim is subsequently started, then the court is likely to consider that the claimant has complied.

- 4.4 If the claimant starts proceedings before any longer period stated in the defendant's letter of acknowledgment, the court will consider whether or not the longer period requested by the defendant was reasonable.

## **5. Claimant's reply**

- 5.1 The claimant should provide the documents requested by the defendant within as short a period of time as is practicable or explain in writing why the documents will not be provided.
- 5.2 If the defendant has made a counterclaim the claimant should provide information equivalent to the defendant's full response (see paragraphs 4.1 to 4.3 above).

## **6. Taking Stock**

- 6.1 In following the above procedure, the parties will have a genuine opportunity to resolve the matter without needing to start proceedings. At the very least, it should be possible to establish what issues remain outstanding so as to narrow the scope of the proceedings and therefore limit potential costs.
- 6.2 If having completed the procedure the matter has not been resolved then the parties should undertake a further review of their respective positions to see if proceedings can still be avoided.

# ANNEX B

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## INFORMATION TO BE PROVIDED IN A DEBT CLAIM WHERE THE CLAIMANT IS A BUSINESS AND THE DEFENDANT IS AN INDIVIDUAL

1. Where paragraph 7.4 of the Practice Direction applies the claimant should –
  - (1) provide details of how the money can be paid (for example the method of payment and the address to which it can be sent);
  - (2) state that the defendant can contact the claimant to discuss possible repayment options, and provide the relevant contact details; and
  - (3) inform the defendant that free independent advice and assistance can be obtained from organisations including those listed in the table below.

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### INDEPENDENT ADVICE ORGANISATIONS

<i>Organisation</i>	<i>Address</i>	<i>Telephone Number</i>	<i>e-mail Address</i>
National Debtline	Tricorn House 51-53 Hagley Road Edgbaston Birmingham B16 8TP	FREEPHONE 0808 808 4000	<a href="http://www.nationaldebtline.co.uk">www.nationaldebtline.co.uk</a>
Consumer Credit Counselling Service (CCCS)		FREEPHONE 0800 138 1111	<a href="http://www.cccs.co.uk">www.cccs.co.uk</a>
Citizens Advice	Check your local Yellow Pages or Thomson local directory for address and telephone numbers		<a href="http://www.citizensadvice.org.uk">www.citizensadvice.org.uk</a>
Community Legal Advice (formerly Community Legal Services Direct)		0845 345 4345	<a href="http://www.clsdirect.org.uk">www.clsdirect.org.uk</a>

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2. The information set out in paragraph 1 of this Annex may be provided at any time between the claimant first intimating the possibility of court proceedings and the claimant's letter before claim.
3. Where the defendant is unable to provide a full response within the time specified in the letter before claim because the defendant intends to seek debt advice then the written acknowledgment should state –
  - (1) that the defendant is seeking debt advice;
  - (2) who the defendant is seeking advice from; and
  - (3) when the defendant expects to have received that advice and be in a position to provide a full response.
4. A claimant should allow a reasonable period of time of up to 14 days for a defendant to obtain debt advice.
5. But the claimant need not allow the defendant time to seek debt advice if the claimant knows that –

- (1) the defendant has already received relevant debt advice and the defendant's circumstances have not significantly changed; or
- (2) the defendant has previously asked for time to seek debt advice but has not done so.

# ANNEX C

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## GUIDANCE ON INSTRUCTING EXPERTS

- 1.** The CPR contain extensive provisions which strictly control the use of experts both before and after proceedings are started. These provisions are contained in –
  - (1)** CPR Part 35;
  - (2)** Practice Direction 35; and
  - (3)** the Protocol for the ‘Instruction of Experts to give Evidence in Civil Claims’ which is annexed to that Practice Direction.
  
- 2.** Parties should be aware that once proceedings have been started –
  - (1)** expert evidence may not be used in court without the permission of the court;
  - (2)** a party who instructs an expert will not necessarily be able to recover the cost from another party; and
  - (3)** (it is the duty of an expert to help the court on the matters within the expert’s scope of expertise and this duty overrides any obligation to the person instructing or paying the expert.
  
- 3.** Many matters can and should be resolved without the need for advice or evidence from an expert. If an expert is needed, the parties should consider how best to minimise the expense for example by agreeing to instruct –
  - (1)** a single joint expert (i.e. engaged and paid jointly by the parties whether instructed jointly or separately); or
  - (2)** an agreed expert (i.e. the parties agree the identity of the expert but only one party instructs the expert and pays the expert’s costs).
  
- 4.** If the parties do not agree that the nomination of a single joint expert is appropriate, then the party seeking the expert evidence (the first party) should give the other party (the second party) a list of one or more experts in the relevant field of expertise whom the first party would like to instruct.
  
- 5.** Within 14 days of receipt of the list of experts, the second party may indicate in writing an objection to one or more of the experts listed. If there remains on the list one or more experts who are acceptable, then the first party should instruct an expert from the list.
  
- 6.** If the second party objects to all the listed experts, the first party may then instruct an expert of the first party’s own choice. Both parties should bear in mind that if proceedings are started the court will consider whether a party has acted reasonably when instructing (or rejecting) an expert.