HERBERT SMITH FREEHILLS

UK FLOATS TOUGHER PUSH TO SETTLE BUT ONE-SIZE STANCE LOOKS A POOR FIT FOR COMMERCIAL LITIGATION

02 February 2022 | Insight
Legal Briefings

Laudable aims but Civil Justice Council proposals for more robust pre-action protocols are problematic for commercial disputes

In November 2021, the Civil Justice Council (CJC) published a report on the role pre-action protocols (PAPs) should play in the civil justice system, inviting views on reforms to the existing regime.

The interim report from the CJC, a non-departmental body that advises the Ministry of Justice on civil justice, describes its slate of proposed changes as "evolutionary rather than revolutionary". However, if its floated model of a new general protocol is applied to substantial commercial claims, it would represent a major departure from current practice, with a significantly more prescriptive approach to pre-litigation conduct. This has sparked some concern among commercial dispute practitioners.

THE REFORM PROPOSALS

The reform options canvassed include replacing the existing general Practice Direction-Pre-Action Conduct (PD-PAC) with a new general protocol, amendments to the existing area-specific PAPs, and the creation of new protocols in certain areas.

The broad objective of the mooted reforms is to increase the level of pre-action exchange and engagement between parties, encourage early settlement and reduce litigation costs by narrowing the issues in dispute. In principle, few would question the objectives but the difficulty lies in imposing obligations across a huge range of disputes without accommodating widely differing features.

The interim report acknowledges that civil litigation covers an extremely broad range of disputes and that a “one size fits all” approach is not realistic. However, this appears to be reflected only in discussion of whether proposed changes to the general protocol should be replicated in the area-specific protocols. Surprisingly, the report lacks substantive discussion of whether the changes proposed to the general/default protocol are necessary and appropriate to all of the categories of cases to which it would apply, including commercial disputes.

Among the suggested changes that would be problematic and arguably unworkable in commercial litigation are:

- Reducing existing time limits for pre-action correspondence.
- Requiring statements of truth for letters of claim and responses, and applying formal disclosure standards to pre-action document exchange.
- A “good faith obligation to try to resolve or narrow the dispute at the pre-action stage” with each party taking a “concrete step” toward settling the dispute, as one stage in a series of preconditions to commencing proceedings. Although the report states this would be “non-prescriptive”, it appears to contemplate that, in the absence of a formal settlement offer, the minimum required would be a meeting or discussions between the parties.
- A joint “stocktake” report as a final pre-condition to launching proceedings. This goes much further than current PD-PAC provisions that, following pre-action exchanges, each party should undertake a stocktake of its position to assess any potential for ADR or narrowing of issues. The proposed “stocktake” is a jointly-prepared document identifying: (i) issues of agreement and disagreement; (ii) the parties’ respective positions on each issue; (iii) what disclosure has been provided; and (iv), what further disclosure is sought by each party.
- Various measures to strengthen the mandatory status of PAPs (except in “urgent” cases) with expanded sanctions for non-compliance, including potential strikeout of claims/defences, and encouraging compliance to be determined at the start of proceedings.

The complexity of most commercial cases means these proposals would be likely to bring forward to pre-action stage very significant levels of case preparation currently undertaken over many months. Shifting disclosure obligations to pre-action stage also seems inconsistent with aims of the ongoing disclosure pilot in the Business and Property Courts.

THE ADR PROPOSAL

The suggestion of a new mandatory pre-action obligation to engage in settlement attempts is also surprising given that the issue of when civil litigants should be compelled to engage in ADR is the subject of a separate, ongoing review, following the CJC's *Mandatory ADR* report last summer and the Ministry of Justice's subsequent call for evidence.

In that context, we and many other commercial courts users have maintained that substantial commercial litigation is an area of civil justice where imposing mandatory ADR would be not only unnecessary but counterproductive to encouraging out-of-court resolution. The vast majority of commercial cases are already mediated at least once during the course of proceedings but there are numerous factors influencing the key question of when that will constructively occur. Those factors differ in each case, and the parties and their representatives are often best placed to assess this, prompted where needed by active judicial engagement. Compelling settlement discussions prematurely in such cases risks wasting time and costs, as well as driving parties further apart.

That applies particularly to suggestions of a pre-action "gateway" obligation. In most commercial cases, the parties and their legal team will have carefully considered the potential for out-of-court resolution before proceedings start. However, given the typical legal and factual complexity of such cases, and the interests at stake, it is rare both parties will have enough information to feel comfortable settling at that stage. It was for this reason the Commercial Court Long Trials Working Party in 2007 decided not to introduce a bespoke pre-action protocol for Commercial Court cases, instead recommending that parties complied with the minimum expectations of the pre-action protocol regime. This covers only key documents being exchanged, no expectation of lay or expert evidence being assembled by that stage, and recognising the possibility of launching proceedings without following pre-action procedures in appropriate cases. That recommendation was widely accepted and has since been reflected in the Commercial Court Guide, which emphasises that the parties "are not required, or generally expected, to engage in elaborate or expensive pre-action procedures, and restraint is encouraged".

The hope is that this spirit of pragmatic flexibility endures through the consultation when the CJC issues its final report and recommendations. Even then the matter ultimately rests with the Civil Procedure Rules Committee, which retains responsibility for drafting – or rejecting – any change to the rule book for civil justice in England and Wales.

Click here for more disputes news and analysis in our litigation blog

FEATURED INSIGHTS

HELPING YOU STAY AHEAD OF THE BIG ISSUES

BROWSE BY:

- TECH, DIGITAL & DATA

- GEOPOLITICS AND BUSINESS

- NEW BUSINESS LANDSCAPE

RELATED ARTICLES

Tax in M&A in the UK and Europe – What you need to know

Crypto winter is here – what does it mean for insolvency practitioners?

Deal or no deal? Bring disputes lawyers in early to close that deal

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

ANNA PERTOLDI
PARTNER, LONDON

+44 20 7466 2399
Anna.Pertoldi@hsf.com

MAURA MCINTOSH
PROFESSIONAL SUPPORT CONSULTANT, LONDON
+44 20 7466 2608
Maura.McIntosh@hsf.com

JAN O'NEILL
PROFESSIONAL SUPPORT LAWYER, LONDON
+44 20 7466 2202
Jan.ONeill@hsf.com