Civil Procedure Rule Committee: Pre-Action Protocol for Debt Claims

A response by
The Chartered Institute of Legal Executives

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For further details

Should you require any further information, please contact:

Louise Tyrrell
Policy and Law Reform Officer
ltyrrell@cilex.org.uk
01234 845764

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Introduction

1. The Chartered Institute of Legal Executives ('CILEx') is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. We represent around 22,000 members, including approximately 7,500 qualified lawyers.

2. We work closely with Government and the Ministry of Justice and we are recognised as one of the three core branches of the legal profession.

3. Throughout this response, we will refer to creditors as claimants and debtors as defendants.

4. Chartered Legal Executives offer legal businesses and clients a combination of practical knowledge and experience, together with specialist academic legal knowledge. They make an important contribution to the delivery of effective legal services. Our members, including Chartered Legal Executives tend to develop expertise in specific areas of law, including civil litigation (over 6,000 members currently specialising in this area) and more specifically, debt recovery (currently over 1,500 members specialising in this area). Our members represent both claimants and defendants.

General comments on the pre-action protocol

5. We welcome the opportunity to comment on the proposed protocol. Our comments include those expressed by our members working in this area.

6. Comments were requested on the contents of the protocol and not the principle. A balance must be struck in the drafting of any protocol to ensure it is fair to all parties and reflect the views of both claimant and defendant.

7. It is recognised that a vast number of debt claims settle without proceedings. The protocol has been drafted to deal with those cases which do not, with examples being provided such as where there are disputes about the identity of the parties, or where the debt has been assigned a number of times. We are concerned this raises issues of proportionality (which the protocol wants to achieve) and that the draft has adopted a 'one size fits all' approach.

8. Our concern is reinforced by our members, and was also raised by Jackson in his review of civil costs[1] that if a pre-action protocol adopts a 'one size fits all' approach, it can often lead to pre-action costs being incurred unnecessarily.

[1] "Review of Civil Litigation Costs: Final Report" Lord Justice Jackson. Part 6, Chapter 35, Paragraph 6.2

9. One member stated *'…far from encouraging financial rectitude, the protocol will aid …debtors who wish to avoid, defeat, delay or evade payments of debts rightfully due to their creditors. So, unless there is some good reason to think that implementation of the protocol will reduce the prevalence of financial credit in society, I believe the Protocol could well be counter-productive'.*

10. There is no distinction in the current draft protocol between regulated and unregulated debts. Some requirements in the protocol are already established in legislation or in alternative regulatory requirements. For example, any claims under the Consumer Credit Act. Such duplication is not proportionate, and may increase costs. It also has the potential to confuse defendants.

11. We are concerned about the potential difficulties that including such documentation with an initial letter of claim may cause to vulnerable defendants.

12. If additional costs are unnecessarily incurred, the cost of the debt recovery process will increase. This would be detrimental, not only to the defendant in a particular case, but to consumers as a whole. Major companies may increase their charges, resulting in all customers being penalised.

13. No cost-benefit analysis appears to have been carried out when looking at implementing this protocol. There is also a substantial environmental impact if the current protocol is implemented.

14. In the current draft, there is no recognition that that in practice, the letter of claim will not be the first time the claimant and defendant have engaged in discussion. There also appears to be an assumption that the claimants want to issue proceedings. Proceedings are often a last resort for many claimants, and may only be taken if there has been no engagement prior to that stage.

15. The documents that are required in the draft to be sent do not seem to fit well with the current drive for digital correspondence.

16. It is currently expected that the protocol is sent to the defendant, so they have access to it. The protocol includes a lot of technical language. This may not be easy to read or digest for some defendants. It should be redrafted throughout to avoid legal or partisan language.

17. It would be appropriate to consult with the voluntary sector about how this may look. This would also be an advantage as they may be approached by defendants upon receipt of a letter of claim.

Initial information to be provided by the claimant

18. It is right that defendants are provided with details of any claim against them. However, Paragraphs 3.1 and 3.2 do not address any difference between regulated and unregulated debts. This is where the 'one size fits all' approach is problematic. Some claimants will provide prescribed information to defendants throughout the lifetime of an agreement. This may take the form of regular statements or other information.

19. There are also claimants of varying size, structure and legal standing. They will have different abilities in terms of producing documents. Some claimants will also have their own set of procedures, which they follow in terms of documents produced. This will need to be taken into account, and any burden must not be disproportionate, either for the claimant preparing the information, or the defendant receiving it.

20. In practice, it will not always be clear at the point of sending the letter of claim, whether a debt will be disputed. It would be disproportionate to gather and send the required information, if a claim was not disputed.

21. It would be more appropriate for the claimant to set out information, which will allow the defendant to identify the debt referred to (for example, the full name of the claimant, the account number (or any other reference number) applicable, the amount currently outstanding, and details of the original (or subsequent) creditor(s) if the debt has been assigned.

22. The letter should also set out:

    a. the length of time in which the defendant has to respond to the letter, or a stated deadline;
    b. details of how the money can be paid (for example, method or address for payment);
    c. details of where the defendant can find the details of the pre-action protocol;
    d. if regulator instalments have been offered by or on behalf o the defendant, or are being paid, an explanation as to why a court claim is being considered;
    e. that the defendant can contact the claimant to discuss repayment options, providing relevant contact details;
    f. the requirement of the defendant to complete the defendant reply form, by a certain time; and
    g. that free independent advice and assistance can be obtained from various organisations, and providing the defendant with details.

23. If the above information is provided by the claimant, and the defendant identifies the debt, and it is not disputed, then no further information is required to allow the parties to engage, and attempt to resolve the problem.

24. Members have expressed a concern that additional costs incurred in order to adhere to the requirements will mean that costs are passed on to customers in the form of higher interest or other charges, fees or fines.

25. Regarding the period of 28 days (paragraph 3.1(g)) given to a defendant to return the defendant's reply form, member input suggests that 28 days to return the form itself is longer than necessary. The completion of the form itself is not onerous.

Response by the defendant

26. It should be clear in the protocol that the defendant should return the completed reply form within the specified period. This should be made clear in the prescribed text included in the letter of claim. This will encourage engagement between the parties. It would be appropriate to include a requirement on the defendant to actively engage with the claimant in an attempt to resolve any dispute.

27. If the defendant is seeking legal advice, then a further 14 days could be provided as a minimum, with additional reasonable time if the appointment date falls outside of the 28 days.

28. The same would apply to paragraph 4.3 of the draft protocol. Provided the defendant tells the claimant they intend to take legal advice by returning the form, a further 14 days could be allowed. Again, additional reasonable time can be allowed if the appointment falls outside of the 28 days.

29. Guidance should be provided as to what constitutes a reasonable time. The existing pre-action protocol suggests 14 days is a reasonable time in a simple debt claim.

30. A member suggested that if the date for the appointment for independent legal advice falls outside of the 28 day period, a further 14 days can be given to the defendant to respond. This would be 42 days from the date the defendant was originally put on notice of legal action.

31. In practice, defendants may have already been given the opportunity to seek legal advice, or have been provided with information or contacts to do so. Many claimants welcome defendants seeking productive and practical legal advice, to ultimately resolve the dispute. However, simply providing a

defendant with 28 days is not appropriate in all instances. This does not take into account a situation where a defendant has previously been granted time by the claimant to take advice on the same matter.

32. There is also the potential problem that allowing too long will ultimately result in more interest accruing. This would not be beneficial to either party.

Disclosure of documents – where any aspect of the debt is disputed (other than the terms of any payment arrangement)

33. If a defendant disputes a debt. Full reasons for the dispute should be provided.

34. If the debt is disputed, that is when it becomes appropriate and proportionate for the claimant to send further information. If necessary, at this stage, the claimant can provide the following information or documentation (if appropriate):

    a. A statement of the account, with a breakdown of all sums currently outstanding, including interest charges and all other charges included in the debt, together with calculations;
    b. The contract or agreement between the parties (usually relevant in regulated debt claims), or details of how the existence of the agreement is demonstrated, and could be set out at court if appropriate (which would usually apply to unregulated claims);
    c. Where the debt arises from an oral agreement, who made the agreement, what was agreed (including, as far as possible, what words were used) and when and where it was agreed;
    d. In the case of a debt which has been assigned, details of the original debt and creditor, together with details of the relevant notices of assignment.

35. Paragraph 5.2 should be removed. It constitutes the provision of legal advice. This is not appropriate for a pre-action protocol.

Taking steps to settle the dispute and alternative dispute resolution

36. It is correct to identify, that when parties must consider alternative dispute resolution (ADR), that not just formal mediation should be considered. It is entirely appropriate that other types of ADR may be suitable in individual cases.

37. A member raised unease around the requirement for ADR, saying it carries with it *'…an expectation or implication that the creditor must be willing to compromise and accept less than the amount of the debt. Yet a debt will have*

arisen under a contract for the sale of goods or supply of services…and is by definition an ascertained sum due – unlike a claim for damages, the amount of which falls to be ascertained by the court if the parties don't agree it.'

38. The member further suggested that there should be no such requirement for ADR in quantum meruit cases, unless there is a condition attached that the defendant must pay or deposit a percentage of the outstanding claim first.

39. It is not appropriate to recommend the use of the Financial Ombudsman in this context. The Financial Ombudsman would usually only become involved when complaints procedures within companies have been exhausted. It is extremely unlikely that the Financial Ombudsman would become involved in a debt claim. Additionally, it would not be appropriate in unregulated debt claims.

The court's general approach to compliance

40. CILEx supports the idea that courts can take into account the extent to which both parties comply with the protocol. This should be applied equally to both parties to ensure fairness.

41. The court must also decide each case on its own merits around the behaviour of both parties. Particularly if an order to pay costs, or part of the costs, are applied under the CPR[2] in small claims matters.

42. Paragraph 7.6 is not appropriate in a pre-action protocol. This should be included within any debt advice provided to the defendant.

Taking stock

43. A further 14 days referred to at paragraph 8.2 of the protocol is assumed to apply after both parties have unsuccessfully attempted ADR, and after the defendant has sought independent advice. This requirement should not be automatically applied in all cases.

44. A member reported that the protocol *'…ignores unscrupulous debtors with spurious defences whose purpose is to delay payment until they cease trading.'* The member made it clear that there may be occasions where it is necessary to issue proceedings immediately, without notice in order to get in the 'queue' to instruct bailiffs before it becomes ineffective. The protocol does not cover this, and should be considered for inclusion.

[2] Rule 27.14(g), Civil Procedure Rules

45. It is recognised that this requirement has probably been included to ensure that the claimant attempts to communicate with the defendant on at least two occasions prior to issuing proceedings. However, 14 days may be excessive.

46. If the protocol remains as drafted, in a case where a defendant does not communicate at all with the claimant in any pre-action correspondence, the claimant will be required to wait a minimum of 42 days between sending a letter of claim, and issuing proceedings.

47. It would be more appropriate if at paragraph 8.2 the words ‘at least 14 days’ should be replaced with ‘7 days’.

48. Between the two extremes, practically, the notice of intention to issue proceedings if the matter remains in dispute after both parties have taken steps to resolve it, could be included within the letter of claim.

49. It should be made clear that this section would not apply where no dispute has been raised.

Annex 1

50. In box 4, guidance should be included as to what particulars and relevant documents would be considered reasonable. There should also be an obligation to provide supporting evidence (again with guidance as to what is reasonable) for outgoings. Some defendants may be paid on a monthly basis, and have monthly outgoings rather weekly. There should be an opportunity to complete information on this basis.

51. Box 5 should be expanded to allow room for completion.

52. Box 6 should be removed. This may cause confusion, and along with Paragraph 5.2 of the protocol could constitute legal advice. Issues around whether a claim is time barred or otherwise enforceable, will be dealt with and made clear when the defendant seeks independent legal advice.

53. The obligation for defendants to complete and return this form, and the time limit they have to do so should be marked clearly on this form.

54. The form itself should be written in plain English. Again, it would be appropriate to consult with the voluntary sector or other organisations which deal with consumer advice.

Annex 2

55. We agree that details independent advice organisations should be included. However, the current draft is not fit for purpose; it has simply been taken from the current pre-action conduct practice direction. The Financial Conduct Authority provides a useful information sheet[3] which includes details of not-for-profit organisations for confidential and impartial debt advice.

56. It would be beneficial to consult with the Financial Conduct Authority regarding this list and the intended annex to the pre-action protocol, or to make reference to the more comprehensive list, which should be reviewed and updated as necessary from time to time.

[3] "Information Sheet 002 'default'. http://www.fca.org.uk/your-fca/documents/information-sheets/information-sheet-default