Quickguides

Pre-action Conduct in the English Courts

ashurst

Australia Belgium China France Germany Hong Kong SAR Indonesia (Associated Office) Italy Japan Papua New Guinea
Saudi Arabia Singapore Spain Sweden United Arab Emirates United Kingdom United States of America

Pre-action Conduct in the English Courts

This guide provides an overview of the pre-action conduct requirements applicable to any matter where there is a possibility of proceeding to litigation in the English courts.

Topics covered include:

- Why pre-action conduct is important
- Aims and objectives of the pre-action rules
- The rules governing pre-action conduct
- Circumstances in which the pre-action rules will not apply
- Pre-action conduct and what it entails
- Sanctions for non-compliance
- Practical tips

Pre-action Conduct in the English Courts

The Civil Procedure Rules (CPR) set out detailed rules and guidance governing the conduct of litigating parties' behaviour during the course of litigation. In addition, there are rules which set out how the courts expect parties to behave prior to commencement of any claim ("pre-action rules"). Non-compliance with these pre-action rules can result in a party being penalised at a later stage in the proceedings. Consequently, if you are considering commencing litigation, or you are aware that a counterparty may be considering commencing litigation against you, it is important to be familiar with the pre-action rules.

This guide aims to explain the importance of the pre-action rules and what they entail. It also sets out the circumstances in which you would be excused from complying with the rules and provides practical tips.

1. Why is pre-action conduct important?

The importance of pre-action conduct is best summarised by the update that was made to the Practice Direction on Protocols in April 2006:

> "the Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still being actively explored. Parties are warned that if the protocol is not followed then the Court must have regard to such conduct when determining costs."

The idea that litigation should be commenced only as a last resort is fully supported by the judiciary; parties and their lawyers have a positive duty to try and settle cases pre-action. The pre-action rules are specifically intended to encourage early settlement and therefore, if complied with, ensure that litigation is only commenced as a last resort. Non-compliance is taken seriously, particularly if the courts consider that compliance would have resulted in the avoidance of litigation. The range of sanctions is dealt with in more detail below.

2. Aims and objectives of the pre-action rules

The objectives of the pre-action rules are:

- to encourage the exchange of early and full information about a prospective claim;
- to enable parties to avoid litigation by settlement before proceedings are commenced; and
- to support the efficient management of proceedings where litigation cannot be avoided.

The rules make it clear that pre-action conduct is specifically **not** to be used as a weapon or tactical device to secure an unfair advantage for one party or to generate unnecessary costs.[1]

3. The rules governing pre-action conduct

The rules with regard to pre-action conduct can be found in the following:

- the pre-action protocols; and
- the Practice Direction on pre-action conduct (PDPAC).[2]

---

1 Paragraph 6.2 of the Pre-action Conduct Practice Direction.

2 These are available on the court service website at http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm.

The pre-action protocols

The pre-action protocols outline the steps that parties should take to exchange information about a prospective legal claim. There are currently thirteen official pre-action protocols under the CPR. These exist for:

- construction and engineering;
- defamation;
- personal injury;
- clinical disputes;
- professional negligence;
- judicial review;
- disease and illness;
- housing disrepair;
- possession claims based on rent arrears;
- possession claims based on mortgage or home purchase plan arrears in respect of residential property;
- claims for damages in relation to the physical state of commercial property at termination of a tenancy (the 'Dilapidations Protocol');
- low value personal injury claims in road traffic accidents; and
- low value personal injury (employers' liability and public liability) claims.

PDPAC

PDPAC came into force on 6 April 2009. It replaced the Practice Direction on Protocols and is a guide to pre-action conduct. The PDPAC is not mandatory – it specifies what **should** be done if reasonable, not what **must** be done. Having said that, the courts do have the discretion to order sanctions against a party that does not comply with the PDPAC when it should.

The PDPAC is structured as follows:

- Section 1 sets out the aims and scope;
- Section II looks at the approach of the courts (namely how they will determine compliance and sanctions for non-compliance);
- Section III sets out guidance on pre-action procedure when no protocol applies; and
- Section IV sets out requirements that apply in every case.

Relationship between the pre-action protocols and PDPAC

If a particular pre-action protocol applies then it will be necessary to look at both the relevant protocol and section IV of the PDPAC. For those cases which fall outside the protocols, PDPAC is the only source with regard to the pre-action conduct that should be adopted.

Overriding objective

All pre-action requirements should be interpreted in the context of the overriding objective which is to deal with cases justly and includes: minimising unnecessary expenditure, conserving court resources, making sure the parties are on an equal footing, and ensuring that cases are dealt with fairly, expeditiously and proportionately, having regard to the complexity, importance, value of the claim and the respective financial positions of the parties.

4. Circumstances in which the pre-action rules will not apply

Pre-action conduct will not be appropriate in all cases. Circumstances where it will not be appropriate include:

- applications where telling the other party in advance would defeat the purpose of the application, for example, an application for a freezing order;
- where there are statutory or contractual time limits for starting proceedings and compliance with the pre-action conduct requirements would mean that the defendant can rely on a limitation defence; and
- where there was a legitimate concern that the other side would commence proceedings in another jurisdiction in breach of a jurisdiction clause.

If you need to commence proceedings without reference to the pre-action requirements it is sensible to explain your reasons in correspondence once proceedings have been issued and try to agree with the other side to go through the appropriate pre-action steps. If not, the defendant could apply for a stay of proceedings to ensure that you take steps to comply with the relevant pre-action requirements.[3]

5. Pre-action conduct: what it entails

What follows is a general guide to pre-action conduct requirements in most cases.[4] It is important to remember that the courts only expect parties to comply in substance.

Exchange of information

Parties are expected to exchange sufficient information to allow them to understand each other's position and make informed decisions about settlement and how to proceed. Generally, this will comprise the following:

- Claimant sends the defendant a letter of claim. The letter should be concise, providing enough information so as to enable the defendant to understand and investigate the issues without needing to request further information. It should also attach any key documents.[5]
- The defendant provides a full written response within a reasonable period, preceded (if a full response is not practicable) by a written acknowledgment of the letter before claim. As a general rule, the acknowledgement should be within 14 days of receipt of the letter before claim.
- The claimant replies providing any requested documents within as short a period as practicable or explaining in writing why such documents are not provided. If a counterclaim has been made, the claimant should respond with the same information equivalent to a defendant's full response.

---

3 *Cundall-Johnson & Partners -v- Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC) where the TCC stayed proceedings which had been commenced before the claimants had sent a pre-action letter of claim as required by the applicable pre-action protocol.

4 This guide does not specify the particular requirements of each pre-action protocol or the PDPAC. The relevant protocol (if one applies) and the PDPAC should be consulted in every case to see which particular requirements apply.

5 The pre-action protocols and PDPAC set out in detail the information that should be provided. They are available on the court service website: http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm.

- After these letters have been exchanged and the matter has not been settled, the parties should seek to reduce the issues that remain outstanding so as to narrow the scope of proceedings. The parties should then review their position again to see if proceedings can still be avoided.

Obligation to consider Alternative dispute resolution (ADR)[6]

Parties are expected to make appropriate attempts to resolve the matter without recourse to litigation and consider the use of ADR. The court may require evidence that the parties considered some form of ADR.

The pre-action rules recognise that ADR will not be appropriate in all cases: parties cannot be forced to mediate. However, in circumstances where the court considers that a form of ADR would have been appropriate and, in particular where one of the parties is pressing for the matter to be mediated or otherwise resolved by ADR, the courts may impose costs sanctions if they consider that the relevant party was unreasonable in refusing to consider ADR.[7]

Proportionality

Parties are expected to act in a reasonable and proportionate manner and the costs of compliance with the PDPAC should be proportionate to the sums at stake.[8] One of the main criticisms of the pre-action rules is that they have added to the expense of civil litigation. The requirement of proportionality is intended to ensure that parties do not spend too much time dealing with pre-action steps.[9] PDPAC also makes it clear that parties should not use pre-action conduct requirements tactically. Examples of such behaviour would include making a document request that goes beyond the key documents in an attempt to avoid making an application for pre-action disclosure.

6. Sanctions for non-compliance[10]

In considering whether there has been non-compliance, the court will look at whether the parties have complied in substance with the pre-action rules; minor lapses will be ignored. Consideration will also be given to proportionality – what level of compliance is required given the size and nature of the claim – and the urgency of the matter. Examples of non-compliance would include providing insufficient information to enable the other party to understand the issues, not acting within a time limit, unreasonably refusing to take part in ADR and not disclosing documents requested without good reason.[11]

In deciding whether to impose sanctions the court will look at the overall effect of non-compliance. If, in the opinion of the court, non-compliance has led to a claim being started that might otherwise have been avoided, or has led to costs being incurred that would otherwise not have been incurred, the court will consider imposing sanctions.

The sanctions that can be imposed are many and varied. The courts can take non-compliance into account when making case management directions or when making orders as to costs and interest rates on sums due. In addition, the court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a pre-action protocol and the court can take into account any non-compliance when considering an application for relief from any sanction imposed for failure to comply with any rule, practice direction or court order. If non-compliance is brought to the attention of the court at an early stage in the proceedings then it can order a stay of proceedings until steps that ought to have been taken have been taken.

---

6 ADR provides contracting parties with alternatives to arbitration and litigation offering faster, less expensive and more flexible methods of dispute resolution. The main types include structured negotiation, mediation, expert determination and early neutral evaluation.

7 Whether costs sanctions will be appropriate will be decided in line with the principles set down in the Court of Appeal decision in *Halsey -v- Milton Keynes General Trust* [2004] EWCA Civ 576.

8 Paragraph 6 PDPAC.

9 This is particularly true of the Commercial Court: the revised Commercial Court Guide (30 April 2009) makes it clear that parties are not expected to engage in elaborate or expensive pre-action procedures and encourages restraint (Section B3).

10 Guidance on the court's attitude to compliance and the sanctions available can be found in Section II of the PDPAC: http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_pre-action_conduct.htm.

11 These are set out in paragraph 4 of the PDPAC.

7. Practical tips

If it does become necessary to issue proceedings without having gone through the pre-action conduct requirements, ensure that when you serve the claim form, you make it clear to the other side that you intend to request a stay so that the pre-action obligations can be complied with and the parties can endeavour to seek a settlement of the dispute. This will fend off any subsequent applications for costs penalties or sanctions in light of the non-compliance.

Pre-action conduct is not intended to be used as a tactical device – the protocols are flexible and it is more important to follow the spirit rather than the letter. If it is clear that the other side is trying to use the rules to gain a tactical advantage, make sure that this fact is pointed out to them. In particular, be aware that your obligations are limited to the exchange of letters, key documents and a settlement meeting.

If you are the defendant and the claimant has not complied with the pre-action requirements, ensure that you document this fact and inform the other side of this fact as soon as possible. This will strengthen any future arguments for imposition of sanctions for non-compliance.

The legal costs incurred pre-action only become recoverable once proceedings are commenced and only those costs referable to the claims actually pursued are recoverable. The practical implications are as follows:

- If a case settles and proceedings are not issued, the court will not have any jurisdiction over costs. In those circumstances it is sensible to deal with costs in any settlement agreement.
- If, as a potential defendant, you manage to persuade the claimant to drop certain claims and proceedings are issued on the other claims, if ultimately successful, you will not be able to recover the pre-action legal costs referable to the abandoned claims.[12]
- If, as a potential defendant, you manage to persuade the claimant to completely abandon its claim, the legal costs you incurred in doing so will not be recoverable. This may seem unjust but is a result of the desire to create a cost-effective way of resolving disputes without litigation.

Potential defendants should therefore ensure that they comply with the pre-action requirements but think carefully before incurring substantial legal expenses pre-action.

[12] *McGlinn -v- Waltham Contractors Limited* [2005] EWHC 1419.

Ashurst Quickguides

Ashurst's Quickguides are a regularly updated mini-library of short legal summaries on a range of key issues relevant to businesses. For a full list of current titles and the most up-to-date versions, please visit the publications section of our website (www.ashurst.com).

If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.

Simon Bromwich
Dispute resolution managing partner
T: +44 (0)20 7859 1572
E: simon.bromwich@ashurst.com

David Capps
T: +44 (0)20 7859 1397
E: david.capps@ashurst.com

Mark Clarke
T: +44 (0)20 7859 1562
E: mark.clarke@ashurst.com

Tom Connor
T: +44 (0)20 7859 1638
E: tom.connor@ashurst.com

Lynn Dunne
T: +44 (0)20 7859 3242
E: lynn.dunne@ashurst.com

Ronnie King
T: +44 (0)20 7859 1565
E: ronnie.king@ashurst.com

James Levy
T: +44 (0)20 7859 1810
E: james.levy@ashurst.com

Angela Pearson
T: +44 (0)20 7859 1557
E: angela.pearson@ashurst.com

Tim Reid
T: +44 (0)20 7859 1548
E: tim.reid@ashurst.com

Edward Sparrow
T: +44 (0)20 7859 1573
E: edward.sparrow@ashurst.com

Iain Travers
T: +44 (0)20 7859 1618
E: iain.travers@ashurst.com