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COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

PRE-ACTION CONDUCT

Under the Civil Procedure Rules 1998 (“the CPR”), a claimant is expected to take certain steps before issuing court proceedings, including exchanging information with the intended defendant, and attempting to settle the matter in dispute. Some types of civil claim have their own formal guidelines for pre-action conduct known as pre-action protocols and, where there is none, parties are expected to comply with the Practice Direction on Pre-Action Conduct (“the PDPAC”).

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PRE-ACTION PROTOCOLS

There are currently 17 pre-action protocols in force. These are listed in the CPR. They include professional negligence claims; media and communication claims such as for defamation and misuse of private information; construction and engineering disputes and judicial review. They also include debt claims where the creditor is a business and the debtor is an individual (including a sole trader).

THE PDPAC

The PDPAC applies to disputes where there is no pre-action protocol in place. Before proceedings are issued, the Court expects the parties to have exchanged sufficient information to understand each other's case and to try to settle the dispute without resorting to proceedings, for example by using a form of Alternative Dispute Resolution ("ADR"). ADR can range from a without prejudice meeting or phone conversations to a formal mediation with an accredited mediator.

Under the PDPAC, the claimant must first send a letter before claim to the intended defendant which explains the claim and what the claimant requires.

The defendant should respond in a reasonable time, from 14 days in a straight forward case to (at most) 3 months in a very complex one. The reply should state whether the claim is accepted and, if not, the reasons why it is disputed as well as setting out details of any counterclaim. Both parties should disclose the key documents on which they rely.

REVIEWING POSITION

After the parties have complied with the applicable pre-action protocol or the PDPAC, they should review their respective positions and the evidence disclosed to see if proceedings can be avoided. If they cannot be avoided, the parties should seek to narrow the issues in dispute before the claimant issues proceedings.

MISUSE OF THE PRE-ACTION PROTOCOL AND PDPAC

A person who knowingly makes a false statement in a pre-action protocol letter or other document prepared in anticipation of legal proceedings may become subject to proceedings for contempt of court.

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FAILURE TO COMPLY

If there is a failure to comply with the applicable pre-action protocol or PDPAC before proceedings are issued, the Court has various options available to it. These are set out at paragraphs 13 to 16 of the PDPAC.

In particular, the Court will take into account a party's non-compliance when giving directions for the management of the proceedings and when making orders for costs. Minor or technical infringements, however, are unlikely to be of concern to the Court, especially when the matter is urgent (for example the claimant needs to apply for an injunction).

The Court may in certain cases stay the proceedings if the non-compliance of either party is considered sufficiently serious – for example if there has been an unreasonable refusal to engage in ADR – and can require certain steps to be taken before the stay is lifted.

The Court can also impose sanctions on a non-compliant party, including:

- ordering the party at fault to pay the costs or part of the costs of the other party (including on the indemnity basis);

- if the party at fault is the successful claimant, depriving the claimant of interest on the judgment sum for a specified period and/or awarding interest at a lower rate than would otherwise have been the case;
- if the party at fault is an unsuccessful defendant, awarding interest to the claimant for a specified period at a higher rate than would otherwise have been the case (but not to exceed 10% above base rate).

LIMITATION PERIODS

Compliance with a pre-action protocol or the PDPAC does not stop time running for any limitation period which may apply to the claim. If the impending expiry of a limitation period obliges the claimant to commence proceedings before the parties have complied with their obligations under the applicable protocol or the PDPAC, they should apply to the court for a stay of the proceedings while they then take steps to comply.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice. For further guidance on the topic please contact Gavin Kramer at gavin.kramer@collyerbristow.com or on +44 (0) 7956 381277 or contact any member of the commercial disputes team.



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