Following protocol

More stringent case management rules will encourage greater scrutiny of pre-action conduct but **Patrick Wheeler** is not convinced they will be effective at punishing non compliance

The Pre-Action Conduct (PDPAC) practice direction was introduced in April 2009 and applies to all civil disputes. With certain exceptions, it "describes the conduct the court will normally expect of the prospective parties prior to the start of proceedings". Its aims are to encourage parties if possible to settle disputes before issuing a claim, including using ADR and exchanging information, but if not, then to assist with efficient case management. Proportionate cost is strongly encouraged.

Paragraphs 4.3 - 4.6 set out detailed provisions on assessing compliance, give examples of and set out sanctions for non-compliance, including penal costs orders. The claimant should also state in the claim form or particulars of claim whether it has complied with the practice direction.

The Jackson report accepted that compliance with the PDPAC has not reduced costs. Rather, the provisions for exchanging information can easily be used as a device to generate disproportionate costs. While paragraph 6.2 specifically precludes such conduct there is little, if any, evidence to suggest that non-compliance attracts sanctions.

Pre-claim correspondence often contains lengthy complaints about non-compliance with the PDPAC, asserting that the court's attention will be drawn to the other party's failures. It is possible that pre-action conduct may be a factor in an overall costs assessment at the end of the case or at an interim hearing on a discrete issue. Until recently there were almost no reported cases on the application of these sanctions.

Greater awareness

A major problem is that there is no entitlement to costs unless and until a claim is issued. Costs sanctions are therefore ineffective until that time. Even then most parties seem disinclined to make a specific application to deal with non-compliance with the PDPAC. However, three recent cases seem to indicate a greater awareness of and focus on the effects of non-compliance with pre-action protocols on subsequent issues.

In *Webb Resolutions Limited v Waller Needham & Green (a firm)* [2012] EWHC 3529 (Ch) the claimant should (under the Professional Negligence Pre-Action Protocol) have disclosed two important documents, but failed to. The court refused the normal award of costs under CPR 36.10. The claimant was ordered to pay the defendant's costs after the expiry of the relevant period on the grounds that it was highly unlikely those costs would have been incurred had the claimant complied with its pre-action obligations.

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In *Chemistree Homecare Ltd v Abbvie Ltd* [2013] EWHC 264 (Ch) before issuing the claim, the claimant sent a draft application notice on Christmas Eve citing a number of grounds of complaint which it threatened to issue immediately after Christmas. When the application was eventually issued (on 4 January) most of the grounds were removed. The claimant was ordered to pay indemnity costs up to the service of the application notice.

Then in *Nelson's Yard Management Company and others v Eziefula* [2013] EWCA Civ 235 a failure to respond to pre-action correspondence about a party wall issue justified a departure from the usual costs rule under CPR 38(6)(1) on discontinuance of a claim.

Instead of the claimant paying the defendant's costs, the defendant's failure to engage with the claimant, such that the claimant issued an application for an injunction, resulted in an order to pay the claimant's costs up to service of the defence, with no order as to costs thereafter.

Reform

The Jackson report proposed the substantial repeal of the PDPAC on the basis that a one-size protocol does not fit all situations. Instead, it recommended:

- primary legislation to allow applications to be made before proceedings have been commenced for all serious breaches of pre-action protocols; and
- amendment of CPR 25.1 to provide the court with a range of remedies to assist any party who had been caused serious prejudice by failure of another party to comply with a pre-action protocol.

These recommendations seem unlikely to be adopted. Instead, the Civil Justice Council was tasked to come up with an alternative general protocol. A draft, prepared in May 2012, retains the principles of the PDPAC, but omits many of the more detailed provisions. However, there is currently no indication whether it, or anything else, will be implemented.

The only new rule effective from 1 April which seems to address pre-action costs is Practice Direction 3E paragraph 2.4. The court may not approve costs incurred before the date of any budget as part of the costs management process, but may record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

For the foreseeable future the PDPAC remains in place. With courts now encouraged to exercise stronger case management and control over costs, pre-action conduct which disproportionately increases costs should attract greater scrutiny. However, the limited nature of these new powers to make effective orders to punish non-compliance does not encourage optimism.

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