New Regime for Pre-Action Steps: Fewer Carrots – More Stick

The advent of the new Uniform Civil Rule (UCR) for all three of the Supreme, District and Magistrates Courts should simplify the lives of litigation lawyers in that there will be only one set of rules. There will, however, be significant challenges in coming to grips with the changes brought about in these new Rules.

One of the most significant areas of change concerns the steps to be taken prior to the issue of proceedings.

The Supreme Court has advised that the level of compliance with the pre-action protocols contained the previous Rules was unsatisfactory. The Joint Rules Advisory Committee (JRAC), being the body behind the Rule change, therefore decided in light of the benefits of pre-action requirements that further processes should be introduced to ensure the requirements are complied with.

Under the UCR, pre-litigation requirements are mandatory for claims but optional for originating applications. The numbering of the final version of the UCR might change, but the draft of the Rules current when this article was written provides for Pre-Action Steps in Chapter 7, Part 1, Divisions 1–6 and Alternative Pre-Action Steps in Chapter 7, Part 2. The relevant Rules are Rules 61 and 62.

A number of the exemptions contained in the old Rules have been retained and there is an exemption if there is a statutory time limit of three months or less (see Rule 61.8 for the exemptions). In the CPD sessions held so far to promote familiarisation with the UCR, Justice Blue has emphasised though that the mere fact that a time limitation of three or six years is about to expire is **not** a reason in itself not to comply with the requirements. Justice Blue has specifically said that "*parties should not be able to avoid the need for compliance by being dilatory*". It can be expected that the consequences of non-compliance (see below) will be enforced more stringently under the new Rules.

The existing obligation to give notice of a personal injury in the case of medical negligence has been extended to personal injury claims generally. This obligation does not however apply to compulsory third-party claims or workers compensation claims which already have their own similar statutory requirements.

Rule 61.7 (3) provides that (subject to the exemptions set out in R.61.8) before commencing a claim in the Court, the applicant **must** have served on the respondent a pre-action claim. The requirements for a pre-action claim are set out in R.61.7 (1) (a) – (l). Notably, this document now also provides for an estimate in the prescribed for of the total costs likely to be incurred by the applicant if the matter proceeds to trial. There are further requirements in respect of a personal injury claim set out in R.61.7 (2) (a) – (g).

Once a pre-notice claim has been served, in personal injuries matters, a respondent has 30 days to respond; in general matters a respondent has 21 days to respond. This seems an extraordinarily short time for a response to be provided, especially if there are insurers involved. The shortness of this time limit will put pressure on respondents.

The requirements for a response are set out in R.61.9 (1) (a) – (i) and include (unless the action is a personal injury claim) an estimate in the prescribed form of the total costs likely to be incurred by the respondent if the matter proceeds to trial. Further requirements in respect of personal injury claims are set out in R.61.9 (2) (a) and (b).

Significantly, R.61.9 (4) also provides that a respondent is not excused from serving a pre-action response by reason of a defect or omission in the pre-action claim in complying with a paragraph of R.61.7 (1) or (2).

A respondent can state an intention in the response to make a counter-claim against the applicant. If a counter-claim is so notified then the applicant must also respond in accordance with R.61.9. Provision is also made for bringing third parties into the process by a respondent issuing a pre-litigation notice to a third party (see R.61.10 (2)).

The previous requirement of a pre-action meeting in construction disputes has been extended to apply to claims

generally, but the meeting can be by audio-visual link or by telephone. The meeting is to take place within 21 days after the last pre-litigation response. Rule 61.12 sets out who is to attend and what is to occur at the pre-action meeting. At the meeting each party **must** negotiate in good faith with a view to settling the dispute and **should** identify the main issues in dispute and consider how they might be resolved without recourse to litigation, amongst other things. This is a new step in most matters and will take some getting used to!

In debt collection matters, the applicant may elect instead to serve a final notice, which is modelled on the existing final notice used in the Magistrates Court. In minor civil actions, the applicant must either serve written notice of intention to issue an action of a final notice. The existing procedure in the Magistrates Court for entering into an enforceable payment agreement has been retained and extended to all Courts.

An applicant who institutes proceedings by way of claim is required to answer on the Claim questions as to whether the pre-litigation steps were taken and, if no pre-ligation notice was served, to plead the applicable ground of exemption in the statement of claim.

If the Claim form discloses that the pre-litigation steps were **not** taken, the first directions hearing in the proceeding will be a special direction hearing to address compliance. The Court may order that steps that should have been taken be taken.

There is a default costs rule that **a party in default pays the costs of the other parties' attendance at the special directions hearing on an indemnity basis fixed in a lump sum and payable forthwith** (see R.61.14). This is a new tool in the Court's armoury and should be the "*big-stick*" that is necessary to ensure compliance with the new regime of pre-action steps—**practitioners need to sit up and take notice**.

Further, an applicant who institutes a proceeding without having given a pre-litigation notice will ordinarily not be able to recover the costs of preparing and filing the claim. The Court also has a discretion to take non-compliance into account when making costs orders after the final determination of the action.

It can be expected that other changes will feature in future Riskwatch articles, however, the changes to the pre-action steps are perhaps the most significant and should be immediately noted by all litigation lawyers.