1st November, 2004

PRE-APPLICATION PROTOCOL RE ANCILLARY RELIEF APPLICATIONS (Addendum to Practice Direction number 7 of 2004)

INTRODUCTION

1.1 The aim of this pre-application protocol is to ensure that:

(a) pre-application protocol disclosure and negotiation takes place in appropriate cases;

(b) where there is pre-application disclosure and negotiation, it should be dealt with:

(i) cost effectively

(ii) fully and openly

with the aim of placing the parties in a position to settle the case fairly and without litigation.

1.2 The court will be able to treat the standard set in the pre-application protocol as the normal reasonable approach to pre-application conduct. If proceedings are subsequently issued, the court will be entitled to decide if there has been non compliance with the protocol and, if so, whether non-compliance with the pre-application protocol merits consequences.

SCOPE OF THE PROTOCOL

2.1 The protocol is intended to apply for all claims for ancillary relief including all classes of case, ranging from a simple application for periodical payments to an application for a substantial lump sum and property adjustment order.

2.2 In considering the pre-application disclosure and negotiation, advocates should bear in mind the advantage of having a court timetable and court managed process. Further, advocates should always bear in mind throughout the process the advantages of mediation as a possible alternative or additional resource to advocate negotiation or court based litigation.

THE PROTOCOL

General principles

3.1 All parties must bear in mind the overriding objective of enabling the court to deal with cases justly.

3.1.1 Dealing with a case justly includes, so far as is practicable means:-

a) ensuring that the parties are on an equal footing;

b) saving expense;
c) dealing with the case in ways which are proportionate:
    i) to the amount of money involved;
    ii) to the importance of the case;
    iii) to the complexity of the issues; and
    iv) to the financial position of each party:
d) ensuring that it is dealt with expeditiously and fairly; and
e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

3.2 Further, all claims should be resolved and a just outcome achieved as speedily as possible without costs being unreasonably incurred. The needs of any children should be addressed and safeguarded. The procedures, which it is appropriate to follow, should be concluded with minimum distress to the parties and in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances.

3.3 The principle of proportionality must be borne in mind at all times. It is unacceptable for the costs of any case to be disproportionate to the financial value of the subject matter of the dispute.

3.4 Parties should be informed that where a court exercises a discretion as to whether costs are payable by one party to another, the discretion extends to pre-application offers to settle and conduct of disclosure.

Correspondence

4.1 The impact of any correspondence upon the recipient and in particular the parties must always be considered. Any correspondence which raises irrelevant issues or which might cause the other party to adopt an entrenched, polarised or hostile position is to be discouraged.

4.2 The tone and content of any initial letter will be important in setting the tone for future correspondence. The circumstances of parties to any application for ancillary relief are so various that it would be difficult to prepare a specimen first letter. The request for information will be different in every case. The client should approve any letter providing detailed information or requesting information in advance. Advocates writing to an unrepresented party should always recommend that s/he seek independent legal advice. A reasonable time limit for response for detailed information may be 14 days.

Negotiation and Settlement

5.1 During pre-application disclosure and negotiations, an application to the court should not be issued when a settlement is a reasonable prospect.

5.2 It is important to emphasise the obligation on the parties to make full and frank disclosure of all material facts, documents and other information relevant to the issues. Advocates owe their clients a duty to advise them in clear terms of this duty and the possible consequences of the breach of this duty This duty of disclosure is an ongoing

obligation and includes the duty to disclose any material changes after initial disclosure has been given.

Identifying the issues

6.1 Parties must seek to clarify their claims and identify the issues between them as soon as possible. So that this can be achieved they must provide full, frank and clear disclosure of facts, information and documents which are material and sufficiently accurate to enable proper negotiations to take place to settle their differences. Openness in all dealings is essential.

Disclosure

7.1 When parties carry out voluntary disclosure before the issue of proceedings the parties should exchange schedules of assets, income, liabilities and other material facts. A balance must be achieved between the disclosure of material documents and information and not incurring excessive or disproportionate costs.

Experts

8.1 Expert valuation evidence is only necessary where the parties cannot agree or do not know the value of some significant asset. The costs of a valuation should be proportionate to the sums in dispute. Wherever possible, valuations of properties, shares, etc, should be obtained from a single valuer instructed by both parties. To that end, a party wishing to instruct an expert should first give the other party a list of names of one or more experts in the relevant speciality whom he considers are suitable to instruct. Within 14 days the other party may indicate an objection to one or more of the named experts and, if so, should supply the names of one or more experts whom he considers suitable.

8.2 Where the identity of the expert is agreed, the parties should agree the terms of a joint letter of instructions.

8.3 Where no agreement is reached as to the identity of the expert, each party should think carefully before instructing his own expert because of the costs implications. Disagreements about disclosure such as the use and identity of an expert may be better managed by the court within the context of an application for ancillary relief.

8.4 Whether a joint report is commissioned or the parties have chosen to instruct separate experts, it is important that the expert is prepared to answer reasonable questions raised by either party.

8.5 When experts' reports are commissioned pre-application, it should be made clear to the expert that they may in due course be reporting to the court and that they should therefore consider themselves bound by the guidance for expert witnesses and should be reminded of their duty to the court in providing independent evidence.

8.6 Where the parties propose to instruct a joint expert, there is a duty on both parties to disclose whether they have already consulted that expert about the assets in issue.

8.7 If the parties agree to instruct separate expert the parties should be encouraged to agree in advance that the reports will be disclosed.

8.8 In any event, no actuaries are to be instructed without leave of the court.

SUMMARY

9.1 The aim of all pre-application proceedings must be to assist the parties to resolve their differences speedily and fairly or at least narrow the issues and should that not be possible, to assist the court to do so.

K. H. TOUGH
Her Majesty's Greffier