# PRE- EMPTIVE REMEDIES FOR THE PRESERVATION OF THE *RES*: AN APPRAISAL OF ENFORCEMENT CHALLENGES

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## ABSTRACT

*Civil procedure rules are usually innovatively introduced to facilitate effective justice delivery within the court system. In this regard, Lagos State introduced the pre-emptive remedy provisions, targeting preservation of the res pending the formal commencement of the suit and prevention of rendering litigations nugatory. This article interrogates the nature, essence, and challenges of pre-emptive remedies. In the end, it provides workable recommendations addressing the otherwise overwhelming challenges bedevilling the operation of pre-emptive remedies in the civil litigation system of Lagos State.*

**Keywords**: *Civil Procedure and Practice, Enforcement Challenges, Lagos State, Pre-emptive Remedies, Preservation, Res.*

## INTRODUCTION

In recent times, there have been a lot of plausible innovations happening in the administration of justice in Nigeria, especially as it relates to courts' civil procedures and practice. In this regard, it has long been a fact that Lagos State has always been the champion of procedural reforms in the justice delivery sector in Nigeria. This is particularly so when it comes to making court rules that reflect global trends through positive changes in civil procedures. In this vein, Lagos State, in 2012, first introduced Pre-action protocol Requirements as a core component of the High Court Civil Procedure Rules of the State.[1] The objective behind the introduction of the Pre-action protocol was to ensure that parties explore the possibility of amicable settlement before filing a suit in court and that where litigation becomes inevitable, the necessary parties must have exchanged information that would enable each party to understand the other party's case and, therefore, appropriately streamline the areas in dispute by sieving the grain from the chaff. In effect, it aims at ensuring that where litigation is avoidable, it should be avoided. However, as laudable as Pre-action protocol goals appear to be, litigants and counsel within the Lagos State jurisdiction soon discovered that its general application as a pre-condition to the initiation of all suits could work injustice in certain situations. A recurrent example involved matters of urgency where giving the other party notice of the intention to sue would negatively impact the *res* by putting it at the risk of being dissipated, destroyed, altered, sold or utilised (as the case may be) by any of the parties in such a detrimental manner which would render litigation pointless.

In a bid to cure this mischief, the Lagos State, once again, in its usual innovative way, introduced Pre-emptive Remedy[2] provisions through Practice Direction No. 2 to the High Court of Lagos State

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1. Or 3, rl 2(1) (e), the Preamble to the Lagos High Court (Civil Procedure) Rules, 2012 as well as or 3, rl 2(1) (e) of the same 2012 Rules which made Pre-action protocol Form O1 one of the documents that must accompany a writ or summons. In effect, it made compliance with Pre-action protocol a mandatory pre-condition to the institution of a suit.
2. Except otherwise stated, reference to "pre-emptive remedy" in this article is as used in the High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 Pre-action protocol.

(Civil Procedure) Rules, 2019.[3] In the context of the Lagos State High Court Practice Direction No. 2, pre-emptive remedies are judicial tools used to ensure the continuing existence of the *res* while the action is yet to be instituted or pending compliance with Pre-action protocol. In other words, they aim to preserve the res pending compliance with Pre-action protocol requirements/formal commencement of the suit through any of the established modes of commencing a suit. As appropriate as the preceding may seem, it is of essence to point out that the provisions relating to the application, grant and practice of pre-emptive remedies as set out in the Practice Direction are not without hitches and flaws. It suffices to say that the use and application of the pre-emptive remedy have generated challenges for both the Bar and the Bench. This article aims to discuss the nature, essence, challenges of pre-emptive remedies and give recommendations to limit the almost overwhelming challenges bedevilling the operation of pre-emptive remedies in civil litigation within Lagos State.

## THE ESSENCE OF PRE-EMPTIVE REMEDIES WHILE COMPLYING WITH PRE-ACTION PROTOCOL: PRESERVATION OF THE *RES*

The ultimate goal of pre-emptive remedies, just like any other injunctive reliefs, is the preservation of the *res*.[4] It is elementary that for litigation to serve its ultimate purpose, the *res* must continue to exist until the final determination/resolution of the subject dispute. The absence of *res* implies a waste of the precious judicial time of the court. In the absence of res, the court would give an empty verdict and the successful party would have nothing to enjoy at the end of litigation. In other words, where the res no longer exists at the time judgment is given, the judgment is rendered nugatory. The need to prevent dissipation of the *res* in lawsuits has gained approval from writers,[5] judges[6] and lawyers over the years. Thus, the use of legal apparatus like pre-emptive remedies[7] and injunctive reliefs are indispensable.

The importance of *res* cannot be over-emphasised as it is a donor of courts' jurisdiction. In the case of *National Insurance Commission v First Continental Insurance Co. Ltd.*, the Court of Appeal, while describing *res* and its importance, held thus:

> The res, of course, is what is being litigated upon, it is the subject matter of the action of which both parties seek to preserve for itself, it is what the courts have a duty to preserve its existence in order to give judgment of the court an effect…[8]

3. High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 Pre-action protocol.
4. *Res,* according to Babalola's Dictionary, means '(1) a thing, affair, matter and circumstances; (2) the subject matter of the litigation; (3) the prop or fulcrum of the litigation; (4) the pivot of which the cause of action is founded upon but not the same as the cause of action. *Oyefeso v Omogbehin*'. Olumide Babalola, *Babalola's Law Dictionary of Judicially Defined Words and Phrases* (Noetico Repertum Inc 2018) 330.
5. Abimbola Akeredolu & Chinedum Umeche, *Litigation and Dispute Resolution* (6th edn, Global Legal Group Ltd 2017) 231-232 acknowledge that the court would grant interim injunction to preserve the res.
6. *United Spinners Ltd. v C.B. Ltd* [2001] 14 NWLR (Pt 732) 195, 214 [B]. Wali, JSC held thus: 'The primary duty of all courts (both trial and appellate) is to preserve the *res* (subject matter of litigation) so that at the end of the exercise, whatever decision is reached is not rendered nugatory.' See also *Kigo v Holman* [1980] 5-7 SC 49[30]-[35].
7. 'Pre-emptive remedies' was defined in the 2019 Practice Direction to mean injunctive reliefs seeking to restrain an act.
8. [2007] 2 NWLR (Pt. 1019) 610, 628[G]–[H].

The foregoing postulation further underscores the importance of preserving *res*. A preservative order is pre-emptory in nature and content,[9] and this, in itself, brings to fore the essence of pre-emptive remedy.

**Understanding Pre-action Protocol**

As noted in the introductory part of this article, the pre-emptive remedy provision applicable to civil litigation in Lagos State is a child of necessity birthed by practical application of the Pre-action protocol requirement of the Lagos High Court Civil Procedure Rules. Therefore, it becomes practically impossible to discuss pre-emptive remedies as it applies to Lagos High Court civil litigation without delving into Pre-action protocol.

As the name suggests, pre-action protocols (which appear to have been introduced to the common law jurisdiction when they were established in the United Kingdom in 1998,[10] based on the recommendations in the 1996 Lord Woolf's Access to Justice report) are court-prescribed pre-litigation steps and conducts that the prospective litigants and their counsel must observe prior to instituting a matter in court. In this regard, they involve the exchange of information and documents between parties and/or their counsel to narrow the matters in dispute and explore the possibility of amicably resolving the disputes without the necessity of litigation. Granger and Fealy described Pre-action protocol thus:

> The protocols are, in short, 'codes' of responsible pre-action behaviour, drafted by the profession. Their provisions are designed to encourage a sensible exchange of views and a pooling of information between the parties even before a dispute develops into litigation – all with a view to the promotion of early settlements or at least the minimisation of expense through greater 'focusing' on the real issues.[11]

Order 1, Rule 1(2) of The High Court of Lagos State (Civil Procedure) Rules, 2019[12] simply defined Pre-action protocol as "...steps that parties are required to take before initiating proceedings in court as set out in Form O1 of these rules."[13]

In most climes, elaborate provisions on the Pre-action protocol, particularly as they relate to different heads of claim, do not usually form part of the main body of the Rules of Court. In this regard, the Courts would set out the steps and conducts expected of a potential claimant by issuing practice directions.[14] Under the Lagos State Civil Procedure regime, the Preamble to Practice

9. Tobi, JCA (as he then was) in *Emerah v Chiekwe* [1996] 7 NWLR (Pt. 462) 536, 547[B]-[C].
10. The England and Wales Civil Procedure Rules 1998 (CPR).
11. Ian Granger, Micheal Fealy & Martin Spencer, *The Civil Procedure Rules in Action* (2nd edn, Cavendish Publishing Limited 2009) 6-7.
12. The Interpretation section of the Lagos Rules.
13. Form O1, which is a Form on oath that a Claimant or his legal practitioner is mandated to depose to and file as part of the originating processes that must accompany the writ or summons, mandates the deponent to state that:
    i. he made attempts to settle the matter out of court but that the attempts were unsuccessful;
    ii. he must also give particulars of the attempts made and exhibit the evidence of the attempts made; and
    iii. he, by a written memorandum to the defendant, set out his claims and options for settlement.
14. See, for example, Practice Direction Pre-Action Conduct, 2010 as well as the United Kingdom Practice Direction – Pre-Action Conduct And Protocols (updated 1 October 2020) at <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol> accessed 27 May 2021; the High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019; The Trinidad and Tobago Supreme Court of Judicature Practice direction: Pre-action protocol, 2005 <https://www.ttlawcourts.org/index.php/component/attachments/download/6085> accessed 27 May 2021.

Direction No. 2 sets out the purpose and expectation of the Court regarding the parties to litigation. Paragraph 3 of the Preamble puts it thus:

> Prior to commencement of proceedings, the court will expect parties to have engaged in pre-trial correspondence sufficient to:
>
> a. understand each other's position;
> b. make decisions about how to proceed;
> c. try to settle the issues;
> d. consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
> e. support the efficient management of those proceedings;
> f. reduce the cost of and delay in resolving the dispute.[15]

The above-referenced expectations bring to fore the mandatory nature of compliance with the Pre-action Protocol. The fact that Order 5, Rule 1(2) of the Lagos High Court Rules, 2019, makes Form O1 a mandatory process to be filed with the originating processes further underscores its mandatory nature. This is further reinforced by Order 5, rule 1(3), which states that failure to comply with Order 5, rule 1(2) (which makes Form O1 part of the documents that accompanies a writ) shall nullify the action. In other words, without full compliance with the Pre-action protocol, any action so instituted amounts to a nullity.[16] In this regard, the Pre-Action Protocol as a pre-condition to the institution of an action at the Lagos High Court is similar to the statutorily mandated pre-action notice peculiar to statutory bodies.[17] The Supreme Court, in the case of *Ntiero v. NPA*, described pre-action notice thus:

> A Pre-Action Notice connotes some form of notification or information required by law or imparted by operation of law, contained in an enactment agreements or contracts which requires compliance by the person who is under legal duty to put notice the person to be notified, before the commencement of any legal action against a person.[18]

Furthermore, generally, the Lagos High Court Registry does not accept for filing, any originating processes without having a Pre-action protocol bundle prepared in line with the dictates of Practice Direction No. 2.

## THE SCOPE AND APPLICATION OF A PRE-ACTION PROTOCOL

In view of the objectives of the Pre-action protocol, the aim is to ensure that all litigants observe the protocol in varying degrees. The nature, scope and extent of its application to any particular matter is determined by the head of claim the matter falls as well as certain other peculiarities. It is for this reason that the Courts have made particular protocols tailored to different heads of claims. Be that as it may, there is always a general provision in Practice Directions that covers matters that do not

15. para 3, High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 Pre-action protocol.
16. or 7, rl 1 and or. 5 rl 1(3), High Court of Lagos State (Civil Procedures) Rules 2019.
17. Asset Management Corporation of Nigeria Act 2010 (as amended), s 42(2); s 17 of the Companies and Allied Matters Act, 2020; Federal Inland Revenue Service (Establishment) Act 2007, s 55(3); and Nigerian Port Authority Act 1999, s 92(1).
18. *Ntiero v. N.P.A* [2008] 10 NWLR (Pt. 1094) 129, 146[D]-[E].

fall under any of the specific head of claim.[19] Under the Trinidadian and Tobagonian 2005 Practice Direction on Pre-action protocol, paragraph 4.1. caters for cases with no approved protocol thus:

> In cases not covered by an approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in Part 1.1. (2) (a), (b) and (c) of the CPR to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid litigation.

Commenting on the approved protocol for specific heads of claims, Granger and Fealy, while commenting on the areas covered by the pre-action protocol under the English and Welsh Civil Procedure Rules (CPR), noted thus:

> Pre-action protocols have so far been produced for personal injury claims, for clinical disputes and (on a pilot basis) for road traffic accidents. The personal injury and clinical negligence protocols are printed in Part C and are considered in detail in Chapters 25 and 26 below. Furthermore – and very importantly – paragraph 4.1 of the general practice direction on protocols provides that:
>
> In cases not covered by any approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR 1.1(2) (a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.
>
> The general aim of encouraging reasonable pre-action behaviour is thus effectively extended to actions of all types. (As to the question of pre-action behaviour in the context of costs, see the judgments of the Court of Appeal in *Ford v GKR Construction* [2000] 1 All ER 802 – especially of Lord Woolf at p 810 – and in *London Borough of Brent v Aniedobe* (1999) unreported, 23 November.).[20]

A list of all the protocols in force in England and Wales as of 1 October 2020 is contained in Practice Direction – Pre-Action Conduct and Protocols.[21]

As noted earlier, apart from the general pre-action protocol, the Lagos State High Court, through Practice Direction No. 2, has so far issued protocols for Defamation,[22] Mortgages,[23] Land Matters,[24] Recovery of Debts,[25] and Recovery of Premises.[26]

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19. For Lagos, see General Pre-action protocol at page 3 of Practice direction No. 2. In England and Wales, Practice Direction – Pre-Action Conduct and Protocols applies '…to disputes where no pre-action protocol approved by the Master of the Rolls applies.' See <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct> accessed 27 May 2021.
20. Ian Granger, Micheal Fealy & Martin Spencer, The Civil Procedure Rules in Action (2nd edn, Cavendish Publishing Limited 2009) 6.
21. Practice Direction – Pre-Action Conduct and Protocols <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct> accessed 27 May 2021. For an updated list as at 19 May 2021, see CPR - Pre-action protocols, see https://www.justice.gov.uk/courts/procedure-rules/civil/protocol accessed 27 May 2021.
22. See pages 11 to 13 of Practice Direction No. 2.
23. See pages 14-19 to 13 of Practice Direction No. 2.
24. See page 20 of Practice Direction No. 2.
25. See pages 21 to 24 of Practice Direction No. 2.
26. See pages 25 to 26 of Practice Direction No. 2.

Considering the preceding, and as noted by Granger and Fealy,[27] the general impression is that all litigants are mandated to comply with the pre-action protocol before approaching the court. However, this is not always the case, as all the jurisdictions considered have provisions allowing parties to approach the court without first complying with pre-action protocol. This is a marked exception to the general rule regarding compliance with pre-action protocol.

In England and Wales, the draftsmen of the protocols recognise that there may be certain situations when compliance with the protocols may defeat the purpose of instituting an action or where compliance with the protocols is just not suitable or in the interest of justice. In paragraph 2.2. of the Pre-Action Conduct Practice Direction issued in April 2010, it is noted thus:

> 2.2 There are some types of applications where the principles in this Practice Direction clearly cannot or should not apply. These include, but are not limited to, for example –
> (1) applications for an order where the parties have agreed between them the terms of the court order to be sought ('consent orders');
> (2) applications for an order where there is no other party for the applicant to engage with;
> (3) most applications for directions by a trustee or other fiduciary;
> (4) applications where telling the other potential party in advance would defeat the purpose of the application (for example, an application for an order to freeze assets).[28] [Emphasis, mine]

In a similar vein, the English and Welsh Pre-action protocol on Judicial Review specifically considered the difficulty of compliance with the protocols in very urgent matters. The Protocol recognises that demanding compliance will not be appropriate in very urgent cases and, therefore, expects the claimant to file a claim immediately. Paragraph 16 of the Protocol states that:

> This protocol will not be appropriate in very urgent cases. In this sort of case, a claim should be made immediately. Examples are where directions have been set for the claimant's removal from the UK or where there is an urgent need for an interim order to compel a public body to act where it has unlawfully refused to do so, such as where a local housing authority fails to secure interim accommodation for a homeless claimant. A letter before claim, and a claim itself, will not stop the implementation of a disputed decision, though a proposed defendant may agree to take no action until its response letter has been provided. In other cases, the claimant may need to apply to the court for an urgent interim order. Even in very urgent cases, it is good practice to alert the defendant by telephone and to send by email (or fax) to the defendant the draft Claim Form which the claimant intends to issue. A claimant is also normally required to notify a defendant when an interim order is being sought.[29]

27. Ian Granger, Micheal Fealy & Martin Spencer, The Civil Procedure Rules in Action (2nd edn, Cavendish Publishing Limited 2009).
28. See para 2.2., pg 1, UK Practice Direction Pre-Action Conduct <https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/practice_directions/pd_pre-action_conduct.pdf> accessed 27 May 2021.
29. UK Pre-action protocol for Judicial Review <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv> accessed 27 May 2021.

Still on the English and Welsh Pre-action protocols, under the Practice Direction – Pre-Action Conduct and Protocols (which applies to disputes where no pre-action protocol approved by the Master of the Rolls applies), paragraph 13 thereof states that in urgent matters, the Court will not concern itself with whether parties have complied with the Protocol.[30] Similarly, paragraphs 2.1(ii) of the Pre-action protocol for Construction and Engineering Disputes states that a claimant is not required to comply with the Protocol before commencing proceedings to the extent that the proposed proceedings include a claim for injunctive reliefs.[31]

In a similar vein, the English and Welsh courts do not demand compliance with the pre-action protocols before approaching the court whereby reason of complying with the protocols a claimant's claim is at risk of becoming time-barred under any other legislation which imposes a time limit for bringing an action. In such circumstances, the parties will apply for a stay of proceedings while they comply with the applicable protocol.[32]

The Trinidad and Tobago Practice Direction adopts the same approach in catering for situations where compliance with pre-action protocol is unsuitable. Usually, the window to by-pass compliance is open to parties in instances whereby it is impossible or not feasible for parties to comply with pre-action protocol due to statute of limitation or in matters of real urgency. In this regard, the Trinidad and Tobago Practice Direction provides thus:

> Parties will not be expected to observe this direction in urgent claims or where a period of limitation is about to expire and the period between the expiration of the limitation period and the date the claimant instructs an attorney-at-law to act on his behalf in relation to the proposed claim is too short to allow for compliance with this direction, or for other good and sufficient reason there should not be compliance provided that the reasons for non-compliance are set out fully in the claim form or statement of case. However, in the case where the limitation period is about to expire, the claimant's attorney-at-law should give as much notice of the intention to issue proceedings as is practicable, and in appropriate cases the court might be invited to extend the time for service of the claimant's supporting documents, if any, and/or for service of any defence or alternatively, to stay proceedings while the recommended steps are followed.[33]

From the foregoing consideration of the respective positions in England & Wales and Trinidad and Tobago, the courts have simplified the approach applicable to the situation where the claimant is not expected to comply with the Protocol first before filing a claim. Urgent matters are treated differently from statutory limitation matters thus:

30. UK Practice Direction – Pre-Action Conduct and Protocols https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct accessed 27 May 2021.
31. UK Pre-action protocol for Construction and Engineering Disputes 2nd edition <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced> accessed 27 May 2021.
32. See paragraph 17 of Practice Direction – Pre-Action Conduct and Protocols; paragraph 12.1. Pre-action protocol for Construction and Engineering Disputes 2nd edition; paragraph 11, Pre-action protocol for Disease and Illness Claims <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_dis> accessed 27 May 2021; paragraph 10 Pre-action protocol for Housing Conditions Claims (England) <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_hou> accessed 27 May 2021.
33. Para 2.2, Trinidad and Tobago Supreme Court of Judicature Practice Direction: Pre-action protocol, 2005 <https://www.ttlawcourts.org/index.php/component/attachments/download/6085> accessed 27 May 2021.

a. in urgent matters where, for example, injunctive reliefs are required, the claimant approaches the court without the need of subsequently complying with the protocol;
b. in matters where time-bar applies, the claimant files his claim first, then applies for a stay to enable the parties subsequently comply with the applicable protocol.

In all these cases, these jurisdictions have kept it simple by ensuring a claimant with a claim falling within the recognised exceptions does not need to go through any intricate procedural steps to benefit the exemptions.

However, the foregoing is not necessarily the approach under the Lagos State High Court civil litigation regime. Although, as noted earlier, the Lagos State Practice Direction No. 2 has special provisions permitting a claimant to approach the court without first complying with pre-action protocol, it did so by establishing a seemingly *sui generis* procedure under the caption Pre-emptive Remedies.

## PRE-EMPTIVE REMEDIES PROVISION UNDER PRACTICE DIRECTION NO. 2

The Pre-emptive Remedies provisions, which form part of Practice Direction No. 2, are, without a doubt, special provisions for many reasons. They are specifically made to cater for special circumstances stated therein. It provides thus:

1. Where in the interest of justice or to prevent irreparable damage or serious mischief, there is a need for pre-emptive remedies to be ordered by the court, the affected party must file either the memorandum of claim with its accompanying documents and the memorandum for settlement, in the case of a Respondent, together with an ex parte originating application for pre-emptive remedy sought supported by an affidavit and a written address in the registry.
2. After the remedy is either granted or refused by the court, the Judge is to order the parties to continue with full compliance of the Protocol.
3. Where an order of injunction is granted ex-parte and parties are unable to settle before the order abates, the Judge may extend it lifespan until compliance with the Protocol is complete.[34]

From the foregoing, it is clear that an intending claimant can only invoke the pre-emptive remedies provision where the court needs to order pre-emptive remedies because:

a. the interest of justice permits; or
b. there is a need to prevent irreparable damage or serious mischief.

In this situation, rather than initiating the action by way of any of the conventional originating processes, that is, writ of summons, originating summons, originating motion or petition, the Practice Direction permits a deserving applicant to come to court by way of an *ex-parte* originating application. In this regard, the applicant, usually the claimant, files the following documents:

34. See Page 07 of Practice Direction No. 2.

a. memorandum of claim with its accompanying documents;
b. memorandum for settlement;
c. an *ex-parte* originating application praying for the pre-emptive remedy sought;
d. affidavit in support of the ex-parte originating application; and
e. written address.

Upon the Court's grant or refusal of the pre-emptive remedy sought vide the *ex-parte* originating application, the Judge shall then order the parties to continue with full compliance with the Pre-action protocol. Eventually, upon full compliance with the pre-action protocol, the claimant shall then file the writ of summons (or any other applicable originating process) and other accompanying documents.

It must be noted that this is a novelty. It is the only situation under the Lagos State High Court Civil Procedure rules where a suit can be initiated by way of *Ex-parte* originating application (without filing a writ of summons or originating summons or originating motion or petition).

It is also the only means of approaching the Court under the High Court of Lagos State (Civil Procedure) Rules in a manner that by-passes Pre-action protocol. It is an invention of the draftsmen of the Practice Direction No. 2 and only peculiar to Lagos State High Court for the time being.

In terms of the mode of commencement, that is, by way of an application seeking the preservation of the *res*, it may be argued that the concept is not entirely novel. This argument draws force from the procedure adopted in initiating matters under the Asset Management Corporation of Nigeria (AMCON) Practice Direction, 2013.[35] By paragraph 4.1. of the AMCON Practice Direction, 2013, the claimant can file any application before filing his claim form. Of a greater force is the provision of section 50(1) of Asset Management Corporation of Nigeria Act 2010 (as amended), which provide thus:

> Where the Corporation has reasonable cause to believe that a debtor or debtor company has funds in any account with any eligible financial institution, it may apply to the court, before, or at the time if filing of action for debt recovery or other like action or at any time after the filing of action and before or after the service of the originating process by which such action is commenced on the debtor or debtor company by motion ex parte for an interlocutory order freezing the debtor or the debtor company's account. [Emphasis, mine]

The effect of this is that the claimant in an AMCON matter may approach the court through an *ex parte* application. Although both Practice Direction No. 2 and the AMCON Act permit the applicant to approach the court ex parte before filing his claim, by way of nomenclature, Practice Direction No. 2 specifically calls the ex parte process to be filed "*ex parte originating application*". At the same time, the AMCON Act uses the conventional term "*motion ex parte*" even though it may be filed before filing an action. This immediately brings to fore the basis of comparison between the conventional motion *ex parte* and *ex parte* originating application under Lagos State High Court Practice Direction No. 2. It is interesting to note that the similarities and dissimilarities between the conventional motion *ex parte* and *ex parte* originating application under Lagos State High Court Practice Direction No. 2 abound.



35. Asset Management Corporation of Nigeria (Special Debt Recovery Practice Direction).

## JUXTAPOSING MOTION *EX-PARTE* FOR INJUNCTION WITH *EX-PARTE* ORIGINATING APPLICATION UNDER THE PRACTICE DIRECTION NO. 2.

Generally, the word *ex-parte* suggests that only a party is involved and that it is to the exclusion of the other party who might or might not be affected by the outcome of the proceedings. The 11th edition of Black's Law Dictionary defines the word '*ex parte*' as something:

> ...done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest; of, relating to, or involving court action taken or received by one party without notice to the other, usu. For temporary or emergency relief..."[36]

Usually, an *ex-parte* application is by way of a motion. It may be used for several purposes, as Achike, JCA (as he then was) explained in the case of *7Up Bottling Co. v Abiola & Sons Ltd.*, some of which may not directly affect the interest of the other party to the suit.[37] However, it is important to immediately note that the motion *ex-parte* that is the subject of interest in the instant juxtaposition is a motion ex-parte for injunctive relief.

A motion *ex-parte* in this context is usually defined in contradiction to a motion on notice and conventionally prays for an interim order pending the time the court hears the other party.[38] As Nnaemeka-Agu JSC noted in *Kotoye v CBN*:

> By their very nature injunctions granted on ex-parte applications can only be properly interim in nature. They are made, without notice to the other side, to keep matters in status quo to a named date, usually not more than a few days, or until the Respondent can be put on notice. The rationale of an order made on such an application is that delay to be caused by proceeding in the ordinary way by putting the other side on notice would or might cause such an irretrievable or serious mischief. Such injunctions are for cases of real urgency. The emphasis is on 'real'.[39]

A broad consideration of the nature and purpose of the grant of a motion *ex-parte*, as Nnaemeka-Agu, JSC succinctly put above, establishes that it shares a very similar agenda to that of Pre-emptive remedies' *ex-parte* originating application. A motion *ex-parte* for an injunction, just as with the *ex-parte* originating application under Practice Direction No. 2, may seek a preservative order or pre-emptive remedies. In both cases, the primary concern is usually to preserve the *res* or restrain the other party from doing an act or mandate him to do an act. The interpretation of pre-emptive remedies in Practice Direction No. 2 further gives credence to the similarity between a motion *ex-parte* and the *ex-parte* originating application. The Practice Direction interprets pre-emptive remedies to "*include injunctive reliefs seeking to restrain an act....*"

36. Bryan A Garner, *Black's Law Dictionary* (11th edn, West Publishing Co 2019) 772.
37. *Seven-Up Bottling Co. v Abiola & Sons Ltd* [1989] 4 NWLR (Pt. 114) 229, 237[F]. An example quite common is a motion ex-parte for substituted service where it has been difficult or impossible to effect personal service on a defendant.
38. *Kotoye v CBN* [1989] 1 NWLR (Pt. 98) 419, 440[D]-[E].
39. Id.

As noted above, despite the apparent similarities between the conventional motion *ex-parte* for an injunction and the *ex-parte* originating application, the dissimilarities are quite noticeable. They range from the period/times they can be filed, the prayers sought, the lifespan, the scope to accompanying documents.

*Lifespan*: by the provisions of Order 43, Rule 3(3) and (4) of the High Court of Lagos State (Civil Procedure) Rules,[40] an order of Interim injunction made pursuant to a motion ex-parte abates after 7 days and can be further extended for another 7 days only from the date the extension is granted.[41] Speaking on the lifespan of an injunctive order made on a motion *ex-parte*, the Court of Appeal in *Skye Bank Plc. v Haruna & Ors*, put it thus:

> …ex parte orders are by their very nature not intended or meant to last forever, but to have a short life span, usually for 7 or 14 days depending on the rules of court unless renewed….[42]

With regard to the pre-emptive remedies *ex-parte* originating application, although it is also designed to have a short lifespan, the Practice Direction does not prescribe a definite lifespan for the pre-emptive orders made pursuant to the *ex-parte* originating application. Be that as it may, an order so made may last for a reasonably longer period than that of a motion *ex-parte* order, depending on how long it will take the parties to fully comply with pre-action protocol and eventually file a claim in court.[43]

*Accompanying Documents:* the civil procedure rules, a motion *ex-parte* is supported by an affidavit and accompanied by a written address.[44] Order 43, Rule 3(2) of the Lagos Rules also forbids an application for an injunction to be made *ex-parte* except a motion on notice was filed along with the motion ex-parte. In effect, a motion on notice for an injunction must be filed along with the motion *ex-parte* before the court can entertain the motion *ex-parte*. This is particularly so in view of the fact that the injunctive order made on the motion *ex-parte* is granted pending the determination of the motion on notice for the injunction.

With respect to the *ex-parte* originating application, Practice direction No. 2 stipulates that the *ex-parte* originating application is to be filed with:

a. an accompanying affidavit;
b. a written address; and
c. the Memorandum of claim.

In the case of the Respondent, who also seeks pre-emptive remedies under the Practice Direction No. 2, he is mandated to file along with the *ex-parte* originating application:

40. High Court of the Lagos State (Civil Procedure) Rules 2019.
41. By Order 26, Rule 10 of Under the Federal High Court (Civil Procedure) Rules, 2019, an order made on a motion ex-parte has a different lifespan. It cannot last for more than a period of 14 days after the party affected has filed an application to discharge or vary it or for another 14 days after the application to discharge or vary it has been argued.
42. [2014] LPELR-41078(CA).
43. Practice Direction No. 2 gives the judge the power to extend the lifespan of an order for Pre-emptive remedies until full compliance with the Protocol (i.e., Pre-action protocol). See Practice Direction of the High Court of Lagos State No.2 of 2019 page 07.
44. or 43, rls 1 & 2 of the High Court of Lagos State (Civil Procedure) Rules 2019.

a. an accompanying affidavit;
b. a written address; and
c. memorandum of settlement.[45]

It must be noted that unlike the motion *ex-parte*, which must have a motion on notice filed along with it, the *ex-parte* originating application, by its very nature, does not demand the filing of a motion on notice along with it. As shall be further discussed anon, the fact that no motion on notice is filed along with the ex-parte originating application has been a constant source of trouble for both the Bench and the Bar.

***Time to Apply:*** it is established that a motion *ex-parte* is filed after the claim has been filed (not before).[46] However, the *ex-parte* originating application under Practice direction No. 2 can only be filed before the claimant files his claim. It is a purpose-specific originating application that cannot be filed after the claim has been filed because it served the purpose of preserving a state of affairs before the claim is filed. Therefore, once the claim is filed, the *ex-parte* originating application cannot be filed again and no court can grant the pre-emptive remedies under the Practice Direction No. 2 again.

Despite the identified marked differences between the motion *ex-parte* and *ex-parte* originating application, some of the challenges faced in the filing, hearing and grant of the pre-emptive remedies, *ex-parte* originating application still stem from the fact that some judges and counsel still place it on the same pedestal with the injunctive motion *ex-parte*.

## CHALLENGES BEDEVILING THE ENFORCEMENT OF THE PROVISIONS OF THE PRACTICE DIRECTION ON PRE-ACTION PROTOCOL VIS-À-VIS PRE-EMPTIVE REMEDIES

As noted in the introductory section of this article, when the Lagos State High Court (Civil Procedure) Rules, 2012 (2012 Lagos Rules) introduced pre-action protocol into the civil litigation regime in Lagos State, it did so through a general application of the pre-action protocol to all matters in a manner that emphasised the innovative approach more than its practical application. Basically, paragraph 2(2)(e) of the Preamble to the 2012 Lagos Rules introduced pre-action protocol as an active case management tool that the claimant and his counsel are required to comply with to achieve the overriding objective of the Rules. Apart from stating the meaning of pre-action protocol in Order 1, Rule 2(3) of the 2012 Lagos Rules,[47] the only other significant mentions are in Order 3, Rule 2(1) and Rule 8(2)(d)[48] and Form O1.[49] Beside the Preamble and Form O1 to the 2012 Lagos Rules, there was no Practice Direction on pre-action protocol setting out a timeline for exchanging pre-action protocol correspondence or the compliance period generally. No matter the nature of the claim or the urgent nature of the preservative orders required, every claimant was expected to comply with the pre-action protocol before approaching the court. The authors of The Blue Book

45. Practice Direction of the High Court of Lagos State no 2 of 2019, page 07.
46. As pointed out earlier in this article, the only known exception is under section 50 of the AMCON Act and the AMCON Practice Direction, 2013 where the claimant is permitted to file a motion ex-parte before filing his claim.
47. It simply interpreted pre-action protocol to mean the steps that parties are required to take before issuing proceedings in court as set out in Form O1 to the Rules.
48. Both of which made it mandatory to file pre-action protocol Form O1 along with the writ of summons or originating summons.
49. It is a Statement of Compliance with Pre-action Protocol.

2013 - Practical Approach to the High Court of Lagos State (Civil Procedure) Rules, 2012 identified the issues involved therein thus:

> As noted earlier, by virtue of Order 3, Rule 2(1) (e) and Order 3, Rule 8(2)(d), compliance with pre-action protocol is a pre-condition to filing a writ of summons or originating summons under the Rules. This may turn out to defeat the very essence of litigation in matters where exigency of time requires immediate intervention by the court. An appropriate example is when injunctive reliefs are urgently required to protect the *res* from clear and present danger of destruction. In this situation, compliance with pre-action protocol may sound the death knell on the *res* that one seeks to protect. In other words, it may be said that pre-action protocol under the Rules has buried *qua timet* and any other emergency. Another issue of interest is where the action will become statute-barred if not immediately instituted, or an order freezing the defendant's assets is immediately required to avoid an opportunity for the defendant to move same out of jurisdiction surreptitiously. In these instances, the urgency involved renders complying with pre-action protocol requirement unwise."[50] The only saving grace for the claimants and their counsel was that they could issue the written memorandum today and file their claim the next day due to the absence of a pre-action protocol compliance timeline. It was that ludicrous and not thought through.[51]

The foregoing, therefore, created the need for reform and necessitated the issuance of Practice Direction No. 2. Clearly, issuing specific protocols of different heads of claim, including specific timelines for exchange of correspondence and pre-action protocol compliance, generally was necessary and, therefore, accommodated in Practice Direction No. 2. Furthermore, as it has been severally noted above, based on the need to ensure that the pre-action protocol timelines do not stifle matters of urgency which the court would need to deal with pending compliance with the pre-action protocol,[52] the draftsmen of Practice Direction No. 2 decided to innovate by introducing the Pre-emptive Remedies provision. Before the court can order pre-emptive remedies, i.e., before filing a claim, the applicant must establish that it is in the interest of justice for the court to make the order, or there is a serious need to prevent irreparable damage or serious mischief.

Despite the good intentions of the draftsmen, the pre-emptive remedies process in Practice Direction No. 2 appears to be a challenged process. In practice, the major challenge that the application of the Pre-emptive remedies provisions of Practice Direction No. 2 has posed stems from the fact that it originates an action without a claim being filed and enables the applicant to initiate an *ex-parte* process without filing a corresponding motion on notice. Some judges and many legal practitioners appear not to be on the same page with the draftsmen of the pre-emptive remedies' provisions of Practice Direction No. 2.

50. Muiz Banire, Ajibola Basiru and Kunle Adegoke, *The Blue Book: - Practical Approach to the High Court of Lagos State (Civil Procedure) Rules, 2012* (3rd edn, Ecowatch Publications (Nig.) Ltd 2013) 38-39.
51. For further reading on Pre-action protocol application under the 2012 Lagos Rules, see The Blue Book (n 50).
52. Particularly those identified in the quote in the preceding paragraph from The Blue Book 2013.

## THE ATTITUDE OF THE JUDICIARY TO THE GRANT OF PRE-EMPTIVE REMEDIES

In the context of this section of the article, the Judiciary includes the support staff of the courts and the Registry generally. Practice has shown that some judges, with due respect, appear not to have a good understanding of the pre-emptive remedies procedure as stated in Practice Direction No. 2. Generally, judges have been admonished to be cautious in granting *ex-parte* orders.[53] As noted Tobi, JCA (as he then was) noted in *NAA v Orjiako*, the reluctance to grant *ex-parte* orders is usually based on the likelihood to breach fair hearing and, together with it, the *audi alterem partem* rule.[54] In hearing an *ex-parte* originating application under Practice Direction No. 2, some judges lean too much on these admonitions regarding *ex-parte* order and simply order the applicant to put the other party on notice. In effect, even though Practice Direction No. 2 neither provides for nor envisage the filing of a motion on notice, the judges, rather than considering the *ex-parte* originating application on the strength of the materials placed before them, simply order the applicant to put the defendant/respondent on notice by filing and serving a motion on notice. This hesitation was apparent in the ruling of Honorable Justice I. O. Harrison (High Court of Lagos State) delivered in the unreported case of *Chief Jamiu Oloruntoyin v Chief Biliaminu Abisogun & 6 Ors.*[55] (delivered on 12 December 2019), on an *ex-parte* originating application for pre-emptive remedies brought under Practice Direction No. 2. In a manner that exhibited an apparent misunderstanding of the nature and essence of pre-emptive remedies procedure under Practice Direction No. 2, His Lordship held thus:

> That it's not the policy of this Court to hear ex-parte motions of this nature as it will want to hear the other side and determine the issues holistically on its merits

With due respect, in the context of the pre-emptive remedy's provisions of Practice Direction No. 2, this is an aberration. All that is required of a judge hearing the *ex-parte* originating application is to grant or refuse the pre-emptive remedies reliefs sought based on the materials placed before the court, particularly considering the threat to the *res*. Although similar in many ways to the conventional *ex-parte* motion, it is not the same class and ought to attract a different consideration. It is also important to add that once the other side is put on notice, the application before the court ceases to be an *ex-parte* application, with the likely consequential effect of perishing the *res*.

In a similar vein, it has been observed that some judges, upon granting the reliefs sought in the *ex-parte* originating application, treat the order as if its lifespan is the same as that of the Order 43 motion *ex-parte* order. In the ruling of Honorable Justice Idowu Alakija on 28 July 2020 in the case of *Suit No. LD/3954GCM/2020: Prince Ademola Oniru & Anor v Attorney General of Lagos State & 3 Ors,* the learned Judge stated thus:

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53. See Oguntade, JCA (as he then was) in *Ilori v Benson* [2000] 9 NWLR (Pt. 673) 570, 581[B]-[C] where His Lordship noted that opined the grant of ex parte orders require the highest degree of caution and circumspection and that it must be sparingly used and only to prevent a prospective but irreversible injury. See also *Egbuchulam v Onyemeh* [1993] 1 NWLR (Pt. 272) 732, 740-74[B]; *N. A. A. v. Orjiako* [1998] 6 NWLR (Pt. 553) 265, 281[D]-[E].
54. [1998] 6 NWLR (Pt. 553) 265, 281[D]-[E].
55. *Suit No.: LA/3698GCM/2019* (High Court of Lagos State, 12 December 2019, Hon. Justice IO Harrison).

> Leave is granted to the Applicant for an interim injunction restraining the 1st and 2nd Defendants or their respective agents, privies from acting on or engaging in acts capable of causing breakdown/breach of public order and peace in or around Oniru Beach pending the Court's Order compliance full Pre-action protocol[56]

The Court further ordered that:

> This Order being interim in nature shall be for a period of 7 days commencing from today 28 July 2020 and shall lapse at expiration of 7 days.

From the foregoing extract, it is clear that the court agreed with the entitlement of the applicant to the grant of pre-emptive remedies in compliance with the Practice Direction No. 2 but went further to give an order in the nature of an interim injunctive relief under Order 43, Rule 3(3) of High Court of Lagos State (Civil Procedure) Rules, 2019, which specifically stipulates that 'An order of injunction made upon an application *ex-parte* shall abate after 7 days.'

Our Judges must appreciate the fact that the *ex-parte* originating application is not regulated by the provisions of Order 43 of the High Court of Lagos State (Civil Procedure) Rules, 2019 so as to impose the duration stipulated therein on the pre-emptive Order; it is *sui generis* and regulated by the special provisions in the Pre-emptive Remedies section of Practice Direction No. 2.

It is, however, essential to note that the judges that fall into the category described above do not constitute the majority of the Bench. This is so because several judges have delivered laudable and notable rulings on pre-emptive remedies in identical circumstances. In the earlier cited case of *Chief Jamiu Oloruntoyin v Chief Biliaminu Abisogun & 6 Ors.*, the Respondent therein filed a Notice of Preliminary Objection challenging the competence of the *ex-parte* originating application without first filing a writ of summons. In a ruling delivered on 27 February 2020 in Suit No.: LA/3698GCM/2019: *Chief Jamiu Oloruntoyin v. Chief Biliaminu Abisogun & 6 Ors.*, His Lordship, Honourable Justice S. A. Onigbanjo, dutifully explained the jurisprudential underpinning of the *ex-parte* originating application thus:

> For the avoidance of doubt, the 1st Preamble to the General Pre-action protocol in the said Practice Direction states as follows "Pre-action protocols explains the conduct and sets out the steps required of parties prior to the commencement of proceedings to which the High Court of Lagos State (Civil Procedure) Rules apply. They are issued by the Chief Judge of Lagos State and a form an integral part of the High Court of Lagos State (Civil Procedure) Rules.
>
> The 2nd Preamble states that "this Pre-action protocol applies to all actions instituted at the High Court of Lagos State etc. To me, therefore, since the Honourable Chief Judge of Lagos State is statutorily and constitutionally empowered to make rules for regulating the practice and procedure of the High Court of Lagos State by section 274 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) then it must follow from the foregoing provisions of the said Practice Direction No. 2 of 2019 relied



56. Unreported ruling of the High Court of Lagos State delivered on 28 July 2020 by Hon. Justice Idowu Alakija in Suit No. LD/3954GCM/2020: *Prince Ademola Oniru & Anor v Attorney General of Lagos State & 3 Ors.*

> upon by the applicant in instituting this suit an integral part of the High Court of Lagos State Civil Procedure Rules relating to forms of commencement of the action in this court. The institution of this suit by way of Ex-Parte Application with accompanying processes in compliance with the Pre-Emptive Remedies provisions of the said Practice Direction cannot be faulted... The forgoing being the case, I am consequently satisfied from the reliefs prayed for in the originating Ex-Parte application being basically injunctive reliefs as well as with the accompanying processes filed by the claimant in court on 9/12/19 that this suit was properly instituted in accordance with the provisions of Order 5 of the High Court Lagos Civil Procedure Rules, 2019.[57]

The jurisprudence on pre-emptive remedies under Practice Direction No. 2 is still in its embryonic stage. Therefore, there appears to be no Court of Appeal or Supreme Court decision on it yet. While the appellate courts' opinions on pre-emptive remedies are awaited, the challenges associated with it continue to put its suitability in issue.

## CHALLENGES FACING THE PRE-EMPTIVE REMEDIES PROCEDURE

Due to its novel nature, the pre-emptive remedies procedure has been plagued with several challenges. Some of these challenges have been identified in the preceding paragraphs of this article, and some others are identified hereunder.

### Lack of Proper Awareness

Practice and experience have shown that the administrative staff of courts are not fully abreast of the provisions of the 2019 Practice Direction No. 2 on pre-emptive remedies. On more than one occasion (from the writer's experience), the Lagos State High Court Registry refused to accept the *ex-parte* originating application for filing on the ground that no originating process (writ of summons or originating summons) was filed along with it. It would usually take special effort on the part of the counsel involved and, if mother luck comes to his aid, the intervention of a senior court official willing to be properly guided, before the *ex-parte* originating application would be accepted for filing at the registry.

The attitude of the Registry in those situations clearly suggests that the Lagos State judiciary did not properly educate its officials (particularly the ones charged with filing of processes in court) on the pre-emptive remedies *ex-parte* originating application procedure as laid out in Practice Direction No. 2. Every officer in the Registry of the court, particularly those charged with the screening of processes brought for filing, ought to possess, at least, a working understanding of the practice direction. However, the Registry's lack of understanding appears understandable given the fact noted earlier that even some judges equally misconstrue it, too. It only speaks to the level of unpreparedness of the Lagos State Judiciary with regard to the pre-emptive remedy's procedure in practice. It also displays the imperativeness of continuous capacity building for the staff.

## *EX-PARTE* ORIGINATING APPLICATION AS A TOOL OF APPROACHING THE COURT

As noted while discussing the lack of awareness challenge, the propriety of approaching the court without filing a claim remains a challenge faced in the practice relating to the use of *ex-parte* originating applications. Apart from the Registry's lack of awareness, legal practitioners have had to

57. Unreported ruling of the High Court of Lagos State delivered on 12 December 2019. by Hon. Justice SA Onigbanjo in Suit No.: LA/3698GCM/2019).

question its propriety.[58] It is, in fact, not unnatural for the procedure to raise an eyebrow and also understandable that some judges have exhibited reluctance to go with the flow. It may also explain why some judges simply treat the *ex-parte* originating application as if it were a motion *ex-parte* for an injunction.

**The Concept of Full Compliance**

Paragraph 2 of the pre-emptive remedies provisions in the Practice Direction stipulates:

> After the remedy is either granted or refused by the court, the Judge is to order the parties to continue with full compliance of the Protocol.

This is an area that has presented a challenge to the court and litigants. A simple application of this provision dictates that litigants are not expected to by-pass compliance with pre-action protocol despite the invocation of the pre-emptive remedies provisions of Practice Direction No. 2. On this contrary, compliance is only suspending pending the determination of the *ex-parte* originating application. Practice has shown that due to a lack of proper appreciation and understanding of the procedure, and the fact that rather than just granting or refusing the pre-emptive remedies reliefs in the application, some judges command that the other party be put on notice and, through that medium, find themselves enmeshed in the substantive suit when the claim has not been filed. Due to this, the entire process becomes muddled up and, at that stage, the whole essence of directing full compliance with the applicable pre-action protocol becomes unappealing. In the case of *Mrs. Osakpemwen Dorcas Ogbeide v Attorney General of Lagos State & 3 Ors,*[59] while the applicant's counsel was waiting for the judge to direct full compliance, the judge hinted (albeit off-record) that counsel ought to have filed his writ of summons and statement of claim. In that particular case, on the court's direction, the other parties had been put on notice and several contentious processes had been exchanged. It was, therefore, unreasonable to still expect full compliance in that situation.

The simple way to avoid this and ensure that full compliance is followed after the *ex-parte* originating application is granted or refused is for the judge to ensure both the Bench and Bar-keep faith with the pre-emptive remedy's provisions of the Practice Direction No. 2. When the *ex-parte* originating application comes before a judge, all that is required is for the Judge to determine the application based on the materials before the court. The judge does not need to direct that the other party be put on notice. If the judge believes that the application should not be granted, it should be refused rather than directing that the other party be put on notice. Thereafter, in strict adherence to the provisions of paragraph 2 of the pre-emptive remedy's provisions of the Practice Direction No. 2, the judge shall then *order the parties to continue with full compliance of the applicable Protocol.*

**Legal Practitioners and Couching the Reliefs**

As if the confusion in the judicial arm is insufficient, lawyers equally compound issues in the ways and manner they couch their relief in this regard. Since the introduction of the Pre-action protocol in the 2012 rules, many legal practitioners have displayed an inadequate understanding of the adherence to, application of, and compliance with the Pre-action protocol. This is particularly so regarding pre-emptive remedies. With respect to the practice and procedure relating to the pre-emptive remedy's provisions in Practice direction No. 2, the prominent identifiable issue legal

58. See, for example, Suit No.: LA/3698GCM/2019: *Chief Jamiu Oloruntoyin v Chief Biliaminu Abisogun & 6 Ors.* (above) 27.
59. Unreported Case of High Court of Lagos State in *Suit No. ID/3434GCM/2019.*

practitioners face concerns the proper way to couch the relief sought in the *ex-parte* originating application. In this regard, it is not in issue that the pre-emptive remedies granted pursuant to the Practice Direction No. 2 *ex-parte* originating application are interim in nature, i.e., granted on a preliminary basis pending a particular time or intervening event.[60] As Nwodo, JCA rightly noted in *Animashaun v. Bakare*, 'An interim order should be granted until a named date or named event.'[61] (Emphasis, mine)

However, the issue legal practitioners face is how to properly couch the pre-emptive remedies sought in a manner that meets the intendment of the Pre-emptive remedy's provisions of Practice Direction No. 2. It is an established position of the law that the court will not grant a relief or prayer not sought.[62] Therefore, where the court finds that the reliefs sought are couched in a manner that they carry a different intendment than that in Pre-emptive remedies provisions of Practice Direction No. 2, the application may fail on this ground alone.

It is not uncommon for practitioners to couch the relief in the *ex-parte* originating application in a manner that makes the intervening/terminal event of the order sought, the hearing of a motion on notice as if it were an Order 43 Motion *Ex-parte*.[63] A consideration of the pre-emptive remedy's provisions of Practice Direction No. 2 establishes that couching the relief in a manner that makes the intervening/terminal event the determination of a motion on notice is wrong and may cause a failure of the application. At times, the reliefs are couched in a manner to abide by the determination of the suit that is even still at the embryonic stage. These are the various confusions that have made the application and operation of the pre-emptive remedy minimally effective.

From the provisions of paragraphs 2 and 3 of the pre-emptive remedy's provisions of Practice Direction No. 2, the proper way to couch the reliefs in the *ex-parte* originating application become manifest. The paragraphs mentioned above 2 and 3 provide thus:

> 2. After the remedy is either granted or refused by the court, *the Judge is to order the parties to continue with full compliance of the protocol.*
> 3. Where an order of injunction is granted ex parte *and parties are unable to settle before the order abates, the judge may extend its life span until compliance with the Protocol is complete.* (Emphasis, mine)

Although the draftsmen of Practice Direction No. 2 failed to clearly state the intervening event pending which the pre-emptive remedies are to be made, looking at paragraph 2 quoted above, it is reasonable to conclude that the intervening event envisaged by the draftsmen is in full compliance with the applicable pre-action protocol. This is particularly so in view of the fact that the aim is to prevent irreparable damage or mischief pending full compliance with the pre-action protocol. Based on the foregoing, the proper way to couch the injunctive relief in the ex-parte originating motion is:*'an order...pending full compliance with the applicable pre-action protocol'.*

60. See Black's Law Dictionary (n 36) 972 for the meaning of 'interim' and page 1545 for the meaning of 'interim relief'.
61. [2010] 16 NWLR (Pt. 1220) 513, 537[A].
62. See *Akinrimisi v Maersk* [2013] 10 NWLR (Pt. 1361) 73, 85[E] per Muntaka Coomassie J.S.C.
63. See or 43, High Court of Lagos State (Civil Procedure) Rules 2019.

Any prayer which falls short of the foregoing cannot be deemed to have been properly couched. It suffices to say the Practice Direction has limited the scope of prayers that could be sought by applicants seeking pre-emptive remedies.

**Proper Order to Make**

As noted above, the pre-emptive remedies ought to be granted pending full compliance with the applicable protocol. However, in making the order, the judge may make the order with a named date as the return date. Where this occurs, it is deemed to be in conformity with paragraph 3 of the pre-emptive remedy's provisions of Practice Direction No. 2. This enables the applicant in favour of whom the pre-emptive remedies are granted to report to the court on the named date on the status of the compliance with the applicable protocol. In this regard, where the court finds that there is still room for amicable resolution among parties, paragraph 3 allows the Judge to extend the lifespan of the order rather than allowing it to abate. In this regard, the pre-emptive remedies must always have an initial lifespan (the return date) that fully accommodates the timeframe set out of in the Practice Direction for the relevant protocol. It is only at this point that the Judge may consider extending the life span of the order.

## CONCLUSION

It is fair to say that the challenges associated with the implementation of the pre-emptive remedies provisions of Practice Direction No. 2 transcend mere teething problems. Based on experience from its practical application so far, as lofty as it is in the department of filling the vacuum of urgent matters within the context of pre-action protocol compliance, it would appear that the pre-emptive remedies provisions were rushed into, without proper enlightenment of the stakeholders on its procedural application. Ordinarily, due to its novelty, it is not a procedure that should be left in the realm of learning on the job.

There is also the question of whether it is actually required when the simpler route of making pre-action protocol inapplicable to urgent matters could simply be adopted. As shown in the body of this article, this is the approach adopted in the jurisdiction where the Lagos State High Court borrowed the pre-action protocol concept.[64] In this regard, it may not be out of place to reconsider its suitability vis-à-vis the approach adopted by other jurisdictions to accommodate urgent matters within the context of pre-action protocol. In urgent matters and matters subject to a time bar, England & Wales and Trinidad and Tobago adopted a simplified approach of allowing the claimant to file his claim without first complying with the pre-action protocol. Where desirable, the court may then stay proceedings while parties comply with the applicable protocol. This approach, without a doubt, would raise minor dust than the pre-emptive remedies provisions of Practice Direction No. 2 has brought with it.

This article has given an overview of pre-emptive remedies under the practice direction in the Lagos State High Court Practice Direction No. 2, particularly regarding pre-action protocol. Having considered the good, bad and the ugly of the concepts examined in this article and the reference to judicial and statutory authorities, the following are recommended:



64. See ns 37, 38, 39, 40, 41, 42 and 43 above.

a. the Judiciary should ensure that all stakeholders are properly trained on the pre-emptive remedy's procedure. It ought to put in place facility to train, update and equip the administrative staff of the Judiciary with the relevant knowledge, experience and skills needed to appreciate the nature of Pre-emptive remedies pending the full compliance with the Pre-action protocol; pre-emptive remedies should be included in subsequent amendment to the High Court of Lagos State (Civil Procedure) Rules, as this will broaden the scope of injunctive reliefs under the rules of court;
b. timelines should be stipulated for the determination of full compliance with the pre-action protocol. Although it may appear inconsequential, it will be a step towards the right direction if the drafters consider inserting a timeline within which full compliance with the practice protocol should be effected since one of the ultimate aims of the Practice Direction is to avoid tardiness in the prosecution of matters;
c. relevant praecipe forms should be provided in the Practice Direction to further serve as a guide to all stakeholders in the Judiciary; and
d. in the alternative, the whole concept of pre-emptive remedies as a way of accommodating urgent matters within the pre-action protocol enforcement can be jettisoned. In this regard:

    i. the Lagos State High Court may adopt the tested simplified approach of allowing the claimant to file his claim without first complying with the pre-action protocol;
    ii. where desirable, the court may then stay proceedings while parties comply with the applicable protocol;

This may be taken a notch higher by ensuring that originating processes that seek to bypass compliance with the pre-action protocol are screened to determine the presence or otherwise of the urgency or other extenuating circumstances before accepting them for filing.