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BRIEFING

THE NEW PRE-ACTION PROTOCOL FOR
CONSTRUCTION AND ENGINEERING
DISPUTES
JANUARY 2017

- PRE-ACTION PROTOCOL REMAINS COMPULSORY BUT PROCEDURE HAS BEEN SCALED BACK
- COSTS CONSEQUENCES WILL BE IMPOSED ONLY FOR FLAGRANT OR SIGNIFICANT DISREGARD OF THE PROTOCOL
- NEW PROTOCOL REFEREE PROCEDURE INTRODUCED



The New Pre-Action Protocol for Constructing and Engineering Disputes (the “New Protocol”) came into force on 14 November 2016. It applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors) save for those proceedings:

- a. for the enforcement of an adjudicator’s decision;
- b. that include a claim for injunctive relief;
- c. that will be the subject of a claim for summary judgment; or
- d. that relate to the same, or substantially the same, issues as have been the subject of a recent adjudication or other alternative dispute resolution (“ADR”) procedure.

As such, the protocol applies to a significant proportion of disputes that, if court proceedings were commenced, would be issued in the Technology and Construction Court (the “TCC”).

Why the New Pre-Action Protocol?

The New Protocol replaces the old Pre-Action Protocol for Construction and Engineering Disputes (the “Old Protocol”). The latter came into force in October 2000 and has been reviewed several times, most recently in 2007, largely to address the concerns of barristers and the judiciary.

Since the 2007 update, the most significant review of the Old Protocol has been that of Jackson LJ, who published his *Final Report on the Review of Civil Litigation Costs* in December 2009. The report recommended that the Protocol should remain but

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that another review should be undertaken following the move of the TCC to the Rolls Building in 2011¹.

Thus, after the move, a TCC working party carried out a review of the Old Protocol and its Final Report was published in April 2012. The report concluded that the Protocol should remain in place, but that it should become voluntary. The primary concern of the working party was that the Protocol required the front loading of litigation costs and so impeded access to justice and could be used by one party to prolong the duration of the dispute resolution process.

However, the TCC working party was at a disadvantage because it was primarily made up of members of the judiciary and barristers. Its members had little experience of the volume of disputes that settled during the pre-action process, because these necessarily never made it as far as the issuing of court proceedings. Therefore, following a survey of the Old Protocol’s users, commissioned by TeCSA and TECBAR², it was decided that the Protocol should remain as a compulsory pre-action process in a revised form, to be drafted in collaboration with TeCSA and TECBAR. The New Protocol is the product of that collaboration.

What has changed?

In order to address the concerns raised by the TCC working party, while reflecting the views of the users of the Old Protocol, the main changes to be incorporated into the New Protocol include:

- allowing parties to agree expressly to not comply with the New Protocol;
- streamlining and reducing the amount of information to be exchanged to avoid the front loading of costs that may be avoided if settlement can be reached;
- shortening timescales for each stage of the pre-action process and reducing the extent that such timescales can be extended to prevent a party from drawing out the pre-action process; and
- introducing the Protocol Referee Procedure (the “PRP”) as a procedure for resolving disputes between the parties in respect of alleged non-compliance with the New Protocol.

Provision	Old Protocol paragraph	New Protocol paragraph	Key change
Exceptions	N/A	2.2	The Claimant is no longer required to comply with the Protocol before commencing proceedings if all parties expressly agree in writing.
Objectives	1.3	3.1.1	Rather than early and full information, as required under the Old Protocol, the parties are required to exchange only “sufficient information about the proposed proceedings to allow the parties to understand each other’s position and make informed decisions about settlement and how to proceed”.
		3.1.2	Rather than enabling early settlement and to support efficient case management where litigation is unavoidable, as required under the Old Protocol, the parties are required to make appropriate attempts to resolve the matter and to consider using an appropriate ADR process in order to do so.

¹ Jackson LJ, *Review of Civil Litigation Costs: Final Report* (December 2009), para. 35.4.16, p351.

² The Technology and Construction Solicitors’ Association (“TeCSA”) and the Technology & Construction Bar Association (“TECBAR”).

Provision	Old Protocol paragraph	New Protocol paragraph	Key change
Compliance	1.4	4.1	Cost consequences for non-compliance with the New Protocol are now likely to be imposed “only in exceptional circumstances, such as flagrant or very significant disregard for the terms of [the New Protocol]”.
Proportionality	1.5	5.1	The principle of proportionality in respect of the contents of the letter of claim and response now applies to any claims including those of a “modest value”. This is in contrast to the Old Protocol, which applied this principle to “lower value” claims, suggesting that these would be claims likely to proceed to the County Court.
Overview of the Protocol: general aim	2	6.1	The general aim of the Protocol has been amended to provide that the parties need only know, consider and accept or reject the <i>outline</i> nature of the other’s case.
Letter of claim	3	7.1	The extent of the letter of claim has been significantly scaled back, so that: <ul style="list-style-type: none"> a. only a brief summary of the claim need be included with a proportional level of breakdown of the aspects of the claim; b. the extent of the brevity of the summary should be proportionate to the claim; c. it is no longer required or expected that expert reports should be provided and, where they are provided, they should be succinct and central to the claim; and d. the Claimant must confirm whether it wishes the PRP to apply (see below).
Defendant’s response	4.1	8.1	The Defendant, in its acknowledgement of receipt of the letter of claim, must now confirm whether it wishes to use the PRP.
	4.3.1	8.5	The Defendant’s response should now contain a <i>brief and proportionate</i> summary of the response and any counterclaim and must identify the names of any third parties the defendant intends to or is considering submitting to a pre-action process.
	4.4	8.7	The time limit for a Claimant to respond to any counterclaim has been shortened from 28 to 21 days and such response should be a <i>brief and proportionate</i> summary.
Pre-action meeting	5.1	9.1	The time limit for the holding of a pre-action meeting has been shortened from 28 to 21 days after the receipt of the Defendant’s response (or if there is a counterclaim, receipt by the Defendant of the response to the counterclaim).
	5.2	9.2	In addition to discussing the main issues in the case and considering the steps to resolve the dispute without litigation the meeting can also now take the form of an ADR process (eg, mediation).
	5.4	N/A	The New Protocol no longer contains a direction that the parties should consider whether some form of ADR may be more appropriate than litigation. This may be as a result of the change to allow the pre-action meeting to take the form of an ADR process.

Provision	Old Protocol paragraph	New Protocol paragraph	Key change
	5.5	9.4	If the parties cannot agree on a resolution of the dispute at the pre-action meeting, then they are no longer required to simply use best endeavours to agree evidential and procedural matters, but must now <u>seek</u> to agree the same. They no longer have to agree how the relevant issues are to be defined at this stage, but do have to agree whether they will use the e-disclosure protocol. ³
Other matters	N/A	10.1	The New Protocol allows the parties to agree to extend any step in the pre-action process, but any such extension must not exceed 28 days. The Old Protocol allowed parties to agree an extension of time for the filing of the Defendant's response up to a maximum of three months. As such, this revision gives the parties the opportunity to extend all steps in the process but limits the length of any such extension.
		10.2	The New Protocol now provides that the pre-action process will automatically conclude at the completion of the pre-action meeting or, should no meeting take place, 14 days after the expiry of the deadline by which the meeting should have been held.
Protocol Referee Procedure	N/A	11	Finally, the New Protocol introduces the PRP. The PRP is designed to assist the parties in complying with the New Protocol and will be published and maintained jointly by TeCSA and TECBAR. The details of the PRP are set out below.

“FUNDAMENTAL TO THE PRP IS THAT IT IS A CONSENSUAL PROCESS.”

The New Protocol Referee Procedure

The aim of the PRP is to allow some form of recourse for a party that believes that the other party is not complying with the requirements of the Protocol. The referee can give directions as to future conduct of the pre-action process and determine whether there has been non-compliance with the Protocol.

Fundamental to the PRP is that it is a consensual process. Given that it is a procedure that will take place before formal proceedings have been commenced, it is not a process that could be undertaken by the judiciary. As such, referees will be nominated and appointed by TeCSA and TECBAR will maintain lists of referees.

The Protocol Referee Procedure is, in summary, as follows:

- If the parties agree that the PRP applies, they must apply to the TeCSA Chairman and pay the relevant application fee (at the time of writing the fee is currently set at £3,500 plus VAT).
- The application can be made at any time during the pre-action process but cannot be made once court proceedings have commenced.
- The application form should set out details of the directions sought and the nature of non-compliance with any supporting documents and a copy should be sent to the responding party.

³ The e-disclosure protocol was drafted jointly by TeCSA, TECBAR and the Society of Construction Law. It has been adopted by the TCC and should be used to record the result of discussions between the parties in respect of using e-disclosure as required by CPR 31.5(5) and PD31B. TCC judges will generally direct that the e-disclosure protocol should be adopted unless an alternative way of dealing with e-disclosure has been agreed. A copy of the e-disclosure protocol can be found at: <http://www.tecsa.org.uk/e-disclosure>.

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- The TeCSA Chairman will seek to appoint a referee within two working days of the application. TeCSA will acknowledge receipt of the application form and email the next five referees on the relevant TeCSA or TECBAR list.
 - TeCSA will then decide on the nomination and issue it to the parties copying the same to the referee. Such decision is at the TeCSA Chairman's sole discretion.
 - The responding party has to provide a response to the application, accompanied by supporting documents.
 - The applicant is then entitled to submit a reply to the response.
 - The referee should reach a decision no later than 10 working days after receipt of the notice of appointment, but the parties can agree to extend this period.
 - The decision should set out any appropriate directions for future conduct and whether there has been any non-compliance with the Protocol.
 - This decision is binding on the parties until the dispute's determination. In later legal proceedings the court should give due weight to the decision, but it is not bound by it.
 - The referee has jurisdiction to direct that the responding party reimburses the applicant for the application fee.

A step in the right direction?

The Old Protocol was criticised for being open to abuse by parties that sought to draw out the dispute resolution process, for front loading litigation costs, including encouraging the exchange of lengthy and expensive expert reports and for being compulsory even in disputes where it might not be strictly appropriate.

By streamlining and shortening the pre-action process and limiting the extent to which the timescales may be extended, the opportunity for one party to draw out the dispute is curtailed. In limiting the level of detail of information that should be exchanged, discouraging the use of in-depth expert reports and refocussing the overall aim of the pre-action process towards resolving the dispute without the need to commence court proceedings the New Protocol should help to limit the cost to the parties of complying with the pre-action process. Finally, while the New Protocol remains compulsory, the parties can expressly agree to dispense with it if they believe it will be of no assistance and thus a waste of time. In theory then, the New Protocol appears to resolve the significant problems that were found with the Old Protocol and should continue to head off court proceedings in a significant proportion of disputes, while being less open to abuse.

Whether the PRP will be a success is less clear. At the very least it will be a significant stick with which to threaten a party that fails to comply with the Protocol. However, it remains at its heart a consensual process. It seems unlikely that a party that intends to frustrate the pre-action process by not complying with the Protocol would agree to submit to the PRP. As such, it remains to be seen the extent to which parties will actually use the procedure. No doubt TeCSA will monitor uptake closely and report back in due course. If the PRP is a success, then we may perhaps see a similar procedure incorporated into other pre-action protocols in the future.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with the authors below or your regular contact at Watson Farley & Williams.



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