CONSTRUCTION BRIEFING

November 2016

BLAKE MORGAN

New Pre-Action Protocol for Construction and Engineering Disputes launched

The Second Edition of the Pre-Action Protocol for Construction and Engineering Disputes comes into force on 9 November 2016.

The first edition of the Pre-Action Protocol came into force on 2 October 2000. As stated in Daejan Investments Limited v The Park West Club Limited [2003] EWHC 2872 (TCC), the Protocol was intended to provide ***"the framework for a sensible discussion, or the chance for a sensible discussion so that the option is available to a party to avoid the need for litigation***."

A 2015 Acuigen Report commissioned by the Technology and Construction Solicitors' Association (TeCSA) suggests that the Protocol was achieving these objectives: of the 677 surveyed disputes that had been subject to the Protocol, 277 (or 41%) had settled without the need for formal legal proceedings.

However, the Protocol was not without its critics. The Second Interim Report of the Technology and Construction Court (TCC) Working Party in 2011 concluded that the Protocol process requires the front-loading of costs, making the overall cost of litigation higher. Concerns were also expressed, by the judiciary and others, about the inappropriate use of the Protocol as a tactical device. In Higginson Securities (Developments) Limited v Kenneth Hodson [2012] EWHC 1052 (TCC), Mr Justice Akenhead emphasised that the Protocol "***must not be used as a weapon or tactic"*** and noted that "[b]***oth parties must seek to co-operate during its implementation..it is important that the parties proceed reasonably expeditiously, do not drag the process out and keep the costs of the exercise to a reasonable minimum***".

The revised Protocol contains several key changes intended to address these criticisms, with greater emphasis on proportionality and a reduction in the costs of the process. A new and interesting feature is the introduction of a Protocol Referee Procedure, which can be instigated in circumstances where a dispute arises in relation to any alleged non-compliance with the Protocol. A further key change is that the Court is only likely to impose costs sanctions in "***exceptional circumstances***", such as where there has been a "***flagrant or very significant disregard"*** for the terms of the Protocol.

The expressed aim of the Technology and Construction Bar Association (TECBAR) and TeCSA (as joint authors of the new edition of the Protocol) is that the revisions will avoid the front-loading of costs at the Protocol stage and lead to more disputes being resolved before proceedings are issued.

A copy of the new Protocol is attached to this Briefing and a summary of the key changes is set out below.

Key changes

1. The parties can agree to opt out of the Protocol process: a Claimant is not required to comply with the Protocol before issuing proceedings if all parties to the proposed proceedings agree in writing (paragraph 2.2).

2. Regarding the exchange of information at Protocol stage, focus has shifted and "***full***" information is no longer required. Instead the Protocol requires the exchange of "***sufficient information***" broadly to enable the parties to:

    a. "***understand each other's position and make informed decisions about settlement and how to proceed***"; and
    b. "***make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of an appropriate form of ADR***" (paragraph 3).

3. The Court is only likely to impose cost sanctions for breach of the Protocol in "***exceptional circumstances***", such as ***"a flagrant or very significant disregard***" for the terms of the Protocol (paragraph 4).

4. In "***many cases, including those of modest value***" the letter of claim and response should be "***simple***" and parties should ensure costs are kept to a modest level. This is wider than the previous drafting which only expressly required this approach to be adopted "***in lower value claims"*** (paragraph 5).

5. The Protocol's "***general aim***" section has been amended, as follows:

   a. parties only need to make the outline of their case known;
   b. parties should usually meet formally on at least one occasion;
   c. "***defining and agreeing the issues***" between the parties and "***exploring possible ways by which the claim may be resolved***" are no longer express aims of any pre-action meeting; and
   d. parties should be put in a position where they may settle cases "***early, fairly and inexpensively***" (paragraph 6).

6. The requirements of the Letter of Claim have been modified as follows:

   a. the Claimant is required to provide a brief (as opposed to "***clear***") summary of the claim;
   b. the Claimant is required to provide a summary of the relief claimed, with a proportionate level of breakdown;
   c. where a Defendant has previously rejected the Claimant's claim, the Claimant is no longer required to set out why it was wrongfully rejected; and
   d. the Claimant must confirm whether or not it wants the Protocol Referee Procedure to apply (paragraph 7).

7. The "***general aim***" section of the Protocol now states that experts' reports are generally not expected or required at pre-action stage, but can be helpful in cases where expert evidence is central to the claim.

8. The Defendant's acknowledgment letter is required to confirm whether or not the Defendant wants to adopt the Protocol Referee Procedure (paragraph 8.1).

9. The requirements for the Defendant's Letter of Response have been amended. The Defendant must now provide:

   a. a brief and proportionate summary of the Defendant's response to the claim;
   b. a brief summary of any counterclaim; and
   c. the names of any third parties the Defendant intends to/is considering submitting to a Pre-action Protocol process.

10. The following requirements have been removed from the Letter of Response:

    a. the requirement to set out the Defendant's agreement or disagreement with the facts set out in the Letter of Claim;
    b. the requirement to set out which claims are accepted or rejected by the Defendant and the basis of rejection;
    c. if a claim is accepted in whole or part, the requirement for the Defendant to set out whether the damages, sums or extensions of time claimed are accepted or rejected and the basis of the rejection; and
    d. the requirement for the Defendant to set out whether contributory negligence is alleged.

11. The Letter of Response must be sent within 28 days (paragraph 8.5). This period may be extended by up to 28 days i.e. a maximum of two months from receipt of the Letter of Claim (paragraph 10.1), but no more.

12. Any response to a counterclaim shall contain a brief and proportionate summary of the Claimant's response (paragraph 8.7).

13. The pre-action meeting should now happen within **21 days** of receipt of the Letter of Response (or of the Claimant's response to the counterclaim, if any). The Protocol now provides that the meeting may take the form of an ADR process, such as mediation (paragraph 9).

14. Extensions of time of up to **28 days** in the aggregate can be agreed between the parties in respect of any step of the Protocol (paragraph 10.1).

15. The Protocol process will automatically come to an end after the pre-action meeting or, if no meeting takes place, 14 days after the expiry of the period in which the meeting should have taken place (paragraph 10.2).

16. The Protocol Referee Procedure may be engaged to assist the parties with complying with the Protocol.

The Protocol Referee Procedure

The Protocol Referee Procedure is a new concept added to the Protocol.

Parties must agree to use the Protocol Referee Procedure in order for it to apply. The party seeking to initiate the Procedure must apply to the Chairman of TeCSA for the nomination of a Protocol Referee. The Chairman will then appoint either a senior member of TECBAR or TeCSA who is authorised to act as a Protocol Referee. The application must be made using the application form available from the TeCSA website (www.tecsa.org.uk) and must include the Application Fee of £3,500 plus VAT.

The application shall set out briefly details of the directions sought by the applicant in order to assist the parties in participating in and complying with the Protocol and/or the nature of any non-compliance. The application may comprise no more than 4 sides of A4 pages and should be supported by copies of any other documents upon which the Applicant intends to rely (comprising no more than 1 lever arch folder, single sided copying).

The respondent must provide its response within 5 working days of the Protocol Referee's appointment. If the applicant wishes to reply, it must do so within 2 working days of receiving the response.

The Protocol Referee is required to provide a decision no later than 10 working days after receipt of the notice of appointment. The decision will (i) set out any appropriate directions for the future conduct of the Protocol process; (ii) whether there has been non-compliance with the Protocol. If so, the decision should state if (and to what extent) the non-compliance demonstrated a flagrant or significant disregard for the terms of the Protocol. The decision is binding and must be complied with until the dispute is determined by legal proceedings or by agreement.

All forms required for the Protocol Referee process are available on the TeCSA website (www.tecsa.org.uk). The attached flowchart provides an overview of the procedure.

OUR CONSTRUCTION AND ENGINEERING TEAM

"They are top-drawer. We have been kept informed at all stages and we have been advised of our risks at all stages. Above all, the team created confidence."

"I was very impressed with the quality of the whole team at Blake Morgan."

Chambers UK – A Client's Guide 2017

Our Construction team specialises in the resolution of construction disputes. Our extensive experience means we can find the most efficient and cost-effective means by which to resolve any such dispute, whether by negotiation, litigation, arbitration, adjudication or ADR.

Richard Wade
PARTNER
E: Richard.wade@blakemorgan.co.uk
T: 01865 254244

PRE-ACTION PROTOCOL FOR CONSTRUCTION

AND ENGINEERING DISPUTES, 2ND EDITION

1 Introduction

1.1 This Pre-Action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).

2 Exceptions

2.1 A Claimant shall not be required to comply with this Protocol before commencing proceedings to the extent that the proposed proceedings (i) are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or (iv) relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure.

2.2 A Claimant shall not be required to comply with this Protocol before commencing proceedings if all the parties to the proposed proceedings expressly so agree in writing.

3 Objectives

3.1 The objectives of this Protocol are:

3.1.1 to exchange sufficient information about the proposed proceedings broadly to allow the parties to understand each other's position and make informed decisions about settlement and how to proceed;

3.1.2 to make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of an appropriate form of ADR in order to do so.

4 Compliance

4.1 If proceedings are commenced, the Court will be able to treat the standards set in this Protocol as the normal reasonable and proportionate approach to pre-action conduct. It is likely to be only in exceptional circumstances, such as a flagrant or very significant disregard for the terms of this Protocol, that the Court will impose cost consequences on a party for non-compliance with this Protocol.

5 Proportionality

5.1 The overriding objective (CPR rule 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In many cases, including those of modest value, the letter of claim and the response can be simple and the costs of both sides should be kept to a modest level. In all cases, the costs incurred at the Protocol stage should be proportionate to the complexity

of the case and the amount of money which is at stake. The Protocol is not intended to impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation.

6 Overview of the Protocol

General aim

6.1 The general aim of this Protocol is to ensure that before Court proceedings commence:

6.1.1 the Claimant and the Defendant have provided sufficient information for each party to know the outline nature of the other's case;

6.1.2 each party has had an opportunity to consider the outline of the other's case, and to accept or reject all or any part of the outline case made against him at the earliest possible stage;

6.1.3 there is more pre-action contact between the parties;

6.1.4 better and earlier exchange of information occurs;

6.1.5 there is better pre-action investigation by the parties;

6.1.6 the parties have usually met formally on at least one occasion; and

6.1.7 the parties are in a position where they may be able to settle cases early, fairly and inexpensively without recourse to litigation; and

6.1.8 proceedings will be conducted efficiently if litigation does become necessary.

7 The Letter of Claim

7.1 Prior to commencing proceedings, the Claimant or his solicitor shall send to each proposed Defendant (if appropriate to his registered address) a copy of a letter of claim which shall contain the following information:

7.1.1 the Claimant's full name and address;

7.1.2 the full name and address of each proposed Defendant;

7.1.3 a brief summary of the claim or claims including (a) a list of principal contractual or statutory provisions relied on (b) a summary of the relief claimed including, where applicable, the monetary value of any claim or claims with a proportionate level of breakdown. The extent of the brief summary should be proportionate to the claim. Generally, it is not expected or required that expert reports should be provided but, in cases where they are succinct and central to the claim, they can form a helpful way of explaining the Claimant's position;

7.1.4 the names of any experts already instructed by the Claimant on whose evidence he intends to rely identifying the issues to which that evidence will be directed; and

7.1.5 the Claimant's confirmation as to whether or not it wishes the Protocol Referee Procedure to apply as provided at paragraph 11 below.

8 The Defendant's Response

The Defendant's acknowledgment

8.1 Within 14 calendar days of receipt of the letter of claim, the Defendant should acknowledge its receipt in writing and may give the name and address of his insurer (if any) and shall also confirm whether or not it wishes the Protocol Referee Procedure as provided at paragraph 11 below to apply. If there has been no acknowledgment by or on behalf of the Defendant within 14 days, the Claimant will be entitled to commence proceedings without further compliance with this Protocol.

Objections to the Court's jurisdiction or the named Defendant

8.2 If the Defendant intends to take any objection to all or any part of the Claimant's claim on the grounds that (i) the Court lacks jurisdiction, (ii) the matter should be referred to arbitration, or (iii) the Defendant named in the letter of claim is the wrong Defendant, that objection should be raised by the Defendant within 28 days after receipt of the Letter of Claim. The letter of objection shall specify the parts of the claim to which the objection relates, setting out the grounds relied on, and, where appropriate, shall identify the correct Defendant (if known). Any failure to take such objection shall not prejudice the Defendant's rights to do so in any subsequent proceedings, but the Court may take such failure into account when considering the question of costs.

8.3 Where such notice of objection is given, the Defendant is not required to send a letter of response in accordance with paragraph 8.5 in relation to the claim or those parts of it to which the objection relates (as the case may be).

8.4 If at any stage before the Claimant commences proceedings, the Defendant withdraws his objection, then paragraph 8.5 and the remaining part of this Protocol will apply to the claim or those parts of it to which the objection related as if the letter of claim had been received on the date on which notice of withdrawal of the objection had been given.

The Defendant's Response

8.5 Within 28 days from the date of receipt of the letter of claim, the Defendant shall send a letter of response to the Claimant which shall contain the following information:

8.5.1 A brief and proportionate summary of the Defendant's response to the claim or claims and, if the Defendant intends to make a Counterclaim, a brief summary of the Counterclaim containing the matters set out in paragraph 7.1.3 above;

8.5.2 the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed;

8.5.3 the names of any third parties the Defendant intends to/is considering submitting to a Pre-action Protocol process.

8.6 If no response is received by the Claimant within the period of 28 days, the Claimant shall be entitled to commence proceedings without further compliance with this Protocol.

Claimant's Response to Counterclaim

8.7 The Claimant shall provide a Response to any Counterclaim within 21 days of the Defendant's Letter of Response. The Response shall contain a brief and proportionate summary of the Claimant's Response to the Counterclaim.

9 Pre-Action Meeting

9.1 Within 21 days after receipt by the Claimant of the Defendant's letter of response, or (if the Claimant intends to respond to the Counterclaim) after receipt by the Defendant of the Claimant's letter of response to the Counterclaim, the parties should normally meet.

9.2 It is not intended by this Protocol to prescribe in detail the manner in which the meeting should be conducted. However, the Court will normally expect that those attending will include:

9.2.1 where the party is an individual, that individual, and where the party is a corporate body, a representative of that body who has authority to settle or recommend settlement of the dispute;

9.2.2 a legal representative of each party (if one has been instructed);

9.2.3 where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and

9.2.4 where a claim is made or defended on behalf of some other party (such as, for example, a claim made by a main contractor pursuant to a contractual obligation to pass on subcontractor claims), the party on whose behalf the claim is made or defended and/or his legal representatives.

9.3 Generally, the aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement, and to consider (i) whether, and if so how, the case might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective as defined in rule 1.1 of the Civil Procedure Rules. Alternatively, the meeting can itself take the form of an ADR process such as mediation.

9.4 If the parties are unable to agree on a means of resolving the dispute other than by litigation they should seek to agree:

9.4.1 if there is any area where expert evidence is likely to be required, how expert evidence is to be dealt with including whether a joint expert might be appointed, and if so, who that should be; and (so far as is practicable);

9.4.2 the extent of disclosure of documents with a view to saving costs and to the use of the e-disclosure protocol; and

9.4.3 the conduct of the litigation with the aim of minimising cost and delay.

9.5 Any party who attended any pre-action meeting shall be at liberty and may be required to disclose to the Court:

9.5.1 that the meeting took place, when and who attended;

9.5.2 the identity of any party who refused to attend, and the grounds for such refusal;

9.5.3 if the meeting did not take place, why not;

9.5.4 any agreements concluded between the parties; and

9.5.5 the fact of whether alternative means of resolving the dispute were considered or agreed.

9.6 Except as provided in paragraph 9.5, everything said at a pre-action meeting shall be treated as "without prejudice".

10 Other Matters

10.1 The parties may agree longer periods of time for compliance with any of the steps described above save that no extension in respect of any step shall exceed 28 days in the aggregate.

10.2 The Protocol process will be concluded at the completion of the pre-action meeting or, if no meeting takes place, 14 days after the expiry of the period in which the meeting should otherwise have taken place.

11 Protocol Referee Procedure

11.1 For the purposes of assisting the parties in participating in and complying with the Protocol, the parties may agree to engage in the current version of the Protocol Referee Procedure.

11.2 The Protocol Referee Procedure shall be published from time to time jointly by TeCSA and TECBAR on their respective websites.

12 Limitation of Action

12.1 If by reason of complying with any part of this protocol a Claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the Claimant may commence proceedings without complying with this Protocol. In such circumstances, a Claimant who commences proceedings without complying with all, or any part, of this Protocol must apply to the Court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the Court to issue proceedings. The Court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this Protocol.

TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

www.tecsa.org.uk