Fenwick Elliott

ARE YOU READY FOR THE NEW CONSTRUCTION PRE-ACTION PROTOCOL?

Jeremy Glover

April 2007

On 6 April 2007, a revised Pre Action Protocol for Construction & Engineering Disputes comes into force. This new protocol will govern all disputes from that date. Disputes which are currently the subject of the existing protocol will continue to be governed by that protocol.

The main changes are as follows:

(i) The introduction of a new paragraph 1.5 which specifically provides that costs incurred in the Protocol must be proportionate to the complexity of the case and the amount of money which is at stake. Thus by way of example, parties will not be expected to marshal and disclose all supporting details and evidence that may ultimately be required if the case proceeds to litigation.

(ii) By paragraph 4.3.1, whilst still being obliged to issue the Letter of Response within 28 days of receipt of the Letter of Claim, potential defendants can agree an extension of time up to 3 months to issue their Letter of Response.

(iii) Paragraph 5.1 sets a deadline for the pre-action meeting which should now normally be held within 28 days of receipt of the Letter of Response;

(iv) Paragraph 5.5(1) notes that parties will be asked to agree to define the relevant issues to be considered by experts and how such expert evidence will be dealt with;

(v) Paragraph 5.4 makes it clear that no party shall be forced to mediate or participate in any other alternative form of dispute resolution;

(vi) However, all parties should be aware that by paragraph 5.6(v) the Court may require a party who attended a pre-action meeting to disclose whether or not they considered or agreed an alternative means of resolving the dispute.

These amendments are intended reflect the concerns of those using the Protocol which have arisen in practice since its introduction. It was felt that all too often the Protocol process was being manipulated to prolong the dispute between the parties, rather than to try to resolve that dispute in a constructive manner as envisaged by the Protocol. The changes are designed to help combat this.

The changes to the Protocol followed the interim report of a working party set up by Mr Justice Jackson which was tasked with considering whether any particular changes ought to be made to the Protocol. The working party reviewed the experiences of those operating under the existing Protocol and sought to identify any areas where problems had been encountered.

The interim report noted that in general it was felt that the existence of the Protocol had:

> *"benefited the parties to disputes by providing them with an early opportunity to articulate and evaluate the strengths and weaknesses of the claims and defences."*

However, the working party also identified certain areas of concern in particular in relation to the time and costs of complying with the Protocol.

In respect to timing issues, that concern was that potential defendants were seeking long periods to prepare a letter of defence and that whilst a potential claimant might object, there was no real sanction or process to encourage agreement to a lesser period. It was recognised that further delay could be caused by the fact that the organisation of the Pre-Action Protocol meeting often could not commence until after the response to any counterclaim. This would lead the Pre-Action Protocol procedure to taking 12 months or more.

It can be seen that two of the amendments to the Protocol have been introduced to try and deal with this. First, the time within which potential defendants have to respond to the claim has been reduced from four to three months and now a much earlier deadline has been introduced for the holding of the pre-action meeting.

Another area of concern related to costs. Whilst, the revisions do not directly address this issue, clearly by attempting to shorten the Protocol process, costs should be reduced. In addition, the new paragraph 1.5 has made it clear that the concept of proportionality must be considered in relation to the incurring of costs. A particular example given relates to the gathering together and disclosure of documentation, albeit that parties will still be able to make applications for pre-action disclosure in accordance with CPR Part 31.16.

Why is the protocol important?

The Pre-action Protocol for Construction and Engineering Disputes applies to a wide category of disputes, including professional negligence claims against architects, engineers and quantity surveyors. It is of particular importance because a potential claimant must comply with the Protocol before commencing proceedings in the court. Paragraph 1.4 relates to compliance and states that:

> "*The court will look at the effect of non-compliance on the other party when deciding whether to impose sanctions.*"

Non compliance with the Construction and Engineering Pre-action Protocol was considered in the case of *Paul Thomas Construction Limited v Hyland & Anor*. In that case the defendants had employed the claimant as a building contractor. A dispute arose over the quantification of the final account. The defendants offered to submit to a form of adjudication, but the claimant refused unless the defendants paid the entire costs of that process. The claimant then issued proceedings in the High Court, and made unsuccessful applications under CPR Part 24 (summary judgment) and Part 25 (interim payments).

His Honour Judge Wilcox considered whether the claimant was justified in issuing proceedings. He came to the conclusion that they were not, and that they had conducted themselves in an unreasonable manner in breach of the Pre-action Protocol. The Judge further decided that the appropriate sanction was for the claimant to pay the defendants' costs of the action on an indemnity basis. The Judge stated that the conduct of the claimant had been exceedingly heavy handed. He stated:

> *"Culpability here means wholly unreasonable behaviour. That must be measured against the reasonable conduct of reasonable solicitors at the time and must be informed by the current rules and, in particular, paragraph 1.4 of the pre-action protocol. I take the view that it was wholly unnecessary to commence this litigation. . . . It is clear that there could have been and should have been explored alternative dispute resolution. That may include sensible discussions between the parties not necessarily involving a third party. In my judgment, there is in those terms some culpability in this case. In my judgment, indemnity costs are warranted."*

Conclusion

Obviously, until the changes are tested in practise, no-one can say whether these changes will have the desired effect. However as the *Hyland* case demonstrates, the courts will not look kindly on parties who act unreasonably. And of course the rules must be read quite carefully. The new paragraph 5.4 makes it quite clear that a party cannot be forced to

mediate. That is quite right. Practically there would be little point in wasting time and money in preparing for a mediation where one party has no inclination in taking a proper part. However you should not forget that refusing to mediate can carry its own costs sanction and the Protocol notes that the Court can inquire at an early stage whether ADR was considered.

6 April 2007

Jeremy Glover

Fenwick Elliott LLP