



The new Pre-Action Protocol has come into force

November 2016

The Pre-Action Protocol for Construction and Engineering Disputes (“the Protocol”) first came into force some 16 years ago. Following consultation between TeCSA, TECBAR and the judges who deal with construction disputes, a new updated Protocol came into force on 14 November 2016. The revised Protocol introduces some interesting changes, but first it is worth recalling the purpose behind the introduction of the Protocol.

What is the Protocol?

The Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors). There are some exceptions where parties will not be expected to comply with the Protocol before commencing proceedings, for example where there may be an issue with limitation or where the claim is in respect of enforcement of an adjudicator’s decision, or arises out of matters that have recently been the subject of an adjudication.

TeCSA Survey

TeCSA sponsored a major piece of research with Acuigen to evaluate the perceived value of the Protocol which is undoubtedly a major tool to achieve the aims of Lord Justice Jackson presented in the Review of Civil Litigation Costs Final Report. The TeCSA study contained in the Acuigen report published in January 2016 shows that:

- 95% of respondents thought that the Protocol was a valuable pre-action mechanism;
- 87% believed that it is creating access to justice;
- 49% suggested amendments to make the Protocol more effective;
- of very real significance for clients, of the 677 disputes that were subject to the Protocol, 277 disputes, or **41%, settled without the need for formal proceedings;**
- such an outcome was one of the key aims of the Jackson reforms and a key point TeCSA felt was often overlooked by the judiciary in the “ones that got away”.

The purpose of the Protocol

The primary purpose of the Protocol is to “encourage the exchange of early and full information about a prospective legal claim” and thereby increase the chances of the parties avoiding litigation by agreeing a settlement. In cases where litigation cannot be avoided, the Protocol supports the efficient management of proceedings. Interestingly, the TeCSA Survey showed that almost all respondents agreed with the first statement and only half of the respondents agreed that the Protocol supports the efficient management of proceedings.

Enforcing the Protocol

When determining costs the courts will take into account the conduct of the parties, including whether the parties have complied with the Protocol, but minor transgressions will be disregarded. It will only be in exceptional circumstances that the court will impose costs consequences for non-compliance.

For example, in *Sainsbury’s Supermarkets Ltd v Condek Holdings Ltd & Others* [2014] EWHC 2016 (TCC), following a successful strike-out application, one party was awarded its costs on an indemnity basis as no good reason had been shown for the failure to implement the Protocol before issuing the

Claim. Had the claimant done so, the Judge was of the view that it would have obtained all the relevant information it needed to reassess whether proceedings should actually have been brought against that party in the first place. Here, it is thought likely that the Decision would be the same under the new Protocol.

You do not necessarily have to use the Protocol

The most striking change is that parties are not required to comply with the Protocol but only provided they have expressly agreed this in writing.

This decision was in part due to the dissatisfaction expressed by 13% of the respondents to the TeCSA Survey who said that the Protocol was acting as a barrier in more sophisticated disputes, and a similar percentage who also felt that the Protocol should be amended to become a voluntary rather than compulsory process. However, unanimity is required in order to opt out.

A different objective

The objective of the original version of the Protocol was:

"the exchange of early and full information".

The new version has changed this to:

"the exchange of sufficient information to allow the other to understand its position and make informed decisions about settlement and how to proceed".

The TeCSA Survey showed that 13% of the construction firms wanted the Protocol to explore ADR or involve a third party/mediator to help reach settlement. Hence there is a new objective for the Protocol:

"to 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).

Reducing the costs of the Protocol

In the case of *Iliffe and Another v Feltham Construction Ltd and Others* [2015] EWCA Civ 715, Lord Justice Jackson had noted that as long as the Protocol is in place, parties must comply with it. As noted above, when issues of compliance with the Protocol arise, TCC judges look at the substance of the matter rather than the minutiae of the Protocol. Lord Justice Jackson also said that "the court deplores any excessive front loading of costs in order to comply with the protocol".

It is perhaps with this comment in mind that there has been some development regarding the Letter of Claim which is to contain a brief summary of claims and relief (proportionate to the claim). Further, the Protocol expressly provides that expert reports are neither expected nor required, although this will depend on what the claim is about. The Protocol acknowledges that there may be cases where they are central and can help explain the Claimant's position. The requirement for a Claimant whose claim had previously been made and rejected to deal with the grounds for rejection has been removed.

The requirements of the Letter of Response have also been changed in the same way so that only a brief and proportionate summary of the response to the claim and a brief summary of any counterclaim are required.

The Protocol Referee: a brand new feature

TeCSA and TECBAR have introduced a completely new feature called Protocol Referee Procedure ("PRP").

The prime purpose of the Protocol Referee ("PR") role is to help the parties to comply with the Protocol and/or to assist resolution of any dispute about whether there has been material non-compliance with the Protocol. Importantly, the PR is neither an adjudicator nor an arbitrator and he/she is appointed pursuant to an agreement between the parties.

This particular feature appears to have been introduced as 74% of respondents to the TeCSA Survey considered that access to and guidance from TCC judges pre-action would be beneficial. Such a high percentage clearly indicated that the parties needed some guidance and direction from the judiciary. The problem presented by this was twofold. First, until proceedings are on foot a judge would not have locus or jurisdiction to superintend the process. Second, the Ministry of Justice (MoJ) would not have the funds to create such a niche. Through collaboration and with the encouragement of Mr Justice Coulson, TeCSA and TECBAR came up with the role of a "lion tamer"¹, before settling on the PR, with senior members of TECBAR or TeCSA taking the place of judges.

Some respondents recognised that any additional guidance could introduce some extra costs and delay. This is why the fee to involve the PR is capped at a modest £3,500 plus VAT. With regard to potential delays in invoking the PRP, the procedure is intended to be quick, so this should not be an issue:

- The Chairman of TeCSA shall nominate a PR, with the object of securing the appointment no later than 2 working days from receipt of the Application.
- Once a PR has been appointed, the Respondent shall submit the Response to the Application no later than 5 working days from the date of the Notice of Appointment.
- If a Response is received by the Applicant and PR within 5 working days, the Applicant shall be entitled to submit the Reply no later than 2 working days from receipt of the Response.
- The PR shall reach a decision no later than 10 working days after receipt of the Notice of Appointment. In total the procedure amounts to 19 working days, unless extended.

Conclusion

The key provisions of the revised Protocol are as follows:

- Now **only an outline of the claimant's case need be given, and likewise for the defendant's reply**. Adding to the previous aims, which were to settle disputes fairly and early, there is now an additional aim to settle disputes inexpensively (*paragraph 6*).
- The objective of the Protocol has changed from the exchange of early and full information, to the exchange of: *"...sufficient information to allow the other to understand its position and make informed decisions about settlement and how to proceed [emphasis added]."*
- Parties **can agree to dispense with the need to follow the Protocol (paragraph 2)**.
- The requirements for a Letter of Claim and a Letter of Response have been amended so as to encourage brevity. **A Letter of Claim should now contain a brief summary, which should be proportionate to the claim** and likewise for the letter of response.
- Expert reports are no longer required nor expected.
- The timeframes for compliance have been shortened. Parties should normally meet 21 days (rather than 28 days) after the letter of response. The maximum time for EOTs is 28 days.
- A meeting or an ADR process such as mediation can take place (*paragraph 9.3*).

- There is a new provision for the Protocol action to be **concluded automatically at the completion of the pre-action meeting**, or 14 days after expiry of the period within which the meeting should have taken place (*paragraph 10*).
- Only in exceptional circumstances, such as flagrant or very significant disregard of the Protocol, will the court impose costs consequences for non-compliance (*paragraph 4*).
- Finally, **a new protocol referee procedure has been introduced**. The referees will not be judges, but will be drawn from senior members of the Bar and solicitors experienced in construction and engineering disputes who will be appointed by TECBAR and TeCSA, and the procedure will be administered by TeCSA.

The new upgraded version of the Protocol is intended to encourage an early and full exchange of information about the prospective claim, and thereby increase the chances of avoiding litigation. It also comes with the moral advantage of addressing the concerns of the TeCSA Survey and so it will be interesting to see the extent to which parties choose to adopt the PRP.

Footnotes

1. A comment made by Alexander Nissen QC at the launch of the revised Protocol on 2 November 2016

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