



'New' revised Pre-Action Protocol for construction and engineering disputes

2 November 2016 at Super Court, 7 Rolls Building, Fetter Lane, Court 26¹

Good evening my Lords, Ladies and Gentlemen.

Welcome to this launch event for the **new Pre-Action Protocol for Construction and Engineering Disputes** (the "Protocol"). Both TeCSA and TECBAR sponsor this event and we are delighted it can take place so fittingly in this *Super Court*.

A bit of background on the Protocol ... it has been something of a ride. If we go back to at least 1994 there was a crying need to develop expeditious and efficacious means of resolving disputes in the construction industry (yes I know adjudication came along!). On the wider stage a major concern of our most senior judges and lawmakers was cutting down cost and faff re ineffectual activity for the user/customer/our clients. The likes of Sir Michael Latham in his groundbreaking industry report "Constructing the Team" made this all pretty stark to us.

A series of pre-action protocols was set up in England and Wales from 1999 as part of the Woolf Reforms. Lord Woolf became convinced that such codes of practice for pre-action conduct were needed for the most common types of dispute litigated. In his report "Access to Justice", Lord Woolf said that the protocols were intended to build and increase the benefits of early but well-informed settlements, which genuinely satisfy both parties to a dispute. The purpose of such protocols was:²

- to focus the attention of litigants on the desirability of resolving disputes without litigation;
- to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or
- to make an appropriate offer (of a kind which can have cost consequences if litigation ensues); and
- if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.

Lord Woolf's reforms were ambitious since he was committed to converting the then legendary confrontational construction industry into an amicable and consensual sector where litigation should be avoided wherever possible. The Pre-Action Protocol for Construction and Engineering Disputes was a major milestone in this reform.

At the invitation of the Vice-Chancellor, the first draft of the Protocol was prepared by the Technology and Construction Solicitors' Association in the spring of 2000.³ The Protocol formally "arrived" on 2 October 2000.

This audience will all know the bare bones of the existing protocol and I will not repeat them here. Alexander Nissen QC will be highlighting the key changes coming along in a moment.

Uniquely amongst the protocols, however, it provided for a pre-action meeting. This idea was not universally welcomed. Insurers in particular disliked the idea that they would have to meet claimants. It is a reality that the mere process of getting the parties and their lawyers into a room and getting them to talk about likely costs and procedures often opens the door to a constructive dialogue that is otherwise absent; a significant number of cases settle on the spot – really!

I think it is noteworthy that until at least the White Book edition of 2012 it was said the protocols (note plural) “...had been a success without a doubt as post CPR litigation had reduced by 80% in the High Court and 25% in the County Court.”⁵ The statistics do not show that this trend has changed much since, with c.500 Claim Forms issued per annum and about 45 trials per year in the London TCC.

There has, however, been much debate within the legal profession for some time about whether the Protocol was effective enough and whether there should be more cases that skip it beyond the express exceptions.

Indeed most of you know the current Protocol carve outs mean it does not apply to a Claimant who:

- is to enforce the decision of an adjudicator;
- is to seek an urgent declaration or injunction in relation to adjudication (whether ongoing or concluded);
- makes a claim for interim injunctive relief;
- seeks summary judgment pursuant to Part 24 of the CPR; or
- makes claim that upon substantially the same issues as have been the subject of a recent adjudication or some other formal alternative dispute resolution procedure; or
- relates to a public procurement dispute.

No real change here under the new Protocol save in one important respect that Alexander Nissen QC will address in a moment.

Timeline

2005

In October 2005 Mr Justice Jackson, the then judge in charge of the TCC, set up a working party to consider whether any changes to the Protocol were necessary in the light of experience of its use. That working party produced an interim report in January 2006 and, following consultation, a final report in June 2006. That report recommended changes to the Protocol, which were substantially adopted by the Rules Committee and came into effect from 6 April 2007.

2009

In April 2009 a Consultation Paper was produced by the Civil Justice Council (CJC) and the Ministry of Justice (MoJ) which invited the review of all pre-action protocols.⁶ As a result, the working party which had reviewed and amended the Protocol in 2006 was reconstituted to carry out a further review. It produced its First Interim Report dated December 2009. At that stage, the working party had seen the Interim Report of the Review of Civil Litigation Costs by Lord Justice Jackson and had decided to undertake a further review after the publication of the Final Report.

In the Final Report of the Review of Civil Litigation Costs, at chapter 35, Lord Justice Jackson concluded that, for the time being, the Protocol should be retained as a pre-action process in the TCC. However, he also stated that there was a need for further review. He observed at paragraph 4.16 of that chapter that “the decision whether to retain a pre-action protocol for construction and engineering disputes is finely balanced”.

He recommended that “after the TCC has moved into the Rolls Building in 2011, the whole question of the protocol should be reviewed”. He elaborated on this in paragraph 4.17:

“The three jurisdictions in that building will all deal with business disputes. There will be benefit in the TCC taking account of the position in the Commercial Court and Chancery Division, when the different specialist jurisdictions have come together under one roof. The users of the TCC, both litigants and lawyers, may possibly conclude at that stage that their pre-action procedures should be aligned with those prevailing in those other jurisdictions. However, the outcome of that review must be a matter for the TCC judges and practitioners after 2011.”

The findings of Jackson LJ’s report on costs were that the Protocol can waste time and cost. Interestingly, there was a strong split opinion between the solicitors, on the one hand, and TCC judges and barristers, on the other:

- The judges and barristers expressed concern that the Protocol substantially increased the time and cost of proceedings by requiring parties to carry out work in the Protocol phase that would be duplicated after proceedings were issued.
- Solicitors held the view that the Protocol, when followed sensibly, promoted early settlement and led to a saving of costs.

2011

In 2011 the TCC, now under Mr Justice Vivian Ramsey as JIC, reconstituted a working party to review the Protocol in light of Lord Justice Jackson’s review. In its Second Interim Report the working party proposed that a questionnaire should be sent out to TCC users and that a final report should then be produced reviewing the position in the light of that information and the move to the Rolls Building. The move to the Rolls Building took place in October 2011 and the closing date for responses to the questionnaire was also October 2011. More on the questionnaire in a moment.

2012

In April 2012, the Final Report of the TCC Pre-Action Protocol Working Party reviewed the background to the Protocol, the previous views of the working party and the results of the questionnaire. It contained recommendations on whether or not to retain the Protocol in its present form.

The working party report concluded that the current process requires parties in construction disputes effectively to front-load their costs, and therefore the overall cost of litigation is higher, contrary to the objectives of Jackson.

The working party recommended that the Protocol should be retained as part of TCC practice but that it should be made voluntary. TeCSA’s was the dissenting view. TeCSA made known that it was the unanimous view of its Committee that the October 2011 survey results from the 2011 Protocol questionnaire (via SurveyMonkey) were not a mandate for making the Protocol voluntary or for scrapping it. TeCSA recorded its support for the Protocol.

The survey data⁸ showed that 47% of the respondents said that it should be left alone, and only 11% wanted to scrap it. Just a small number of respondents said that PAP should be made voluntary. In fact, analysis of the SurveyMonkey data shows 13 or so of 172 wanted to make the PAP voluntary; that is only just over 7% of the sample.

TeCSA considered that the opinions of claimants, i.e. clients who use the TCC, were under-represented and further funded research was required.

2015

In April 2015, Mr Justice Coulson, wearing his Member of the Civil Procedure Rule Committee hat (Chair of the CPRC Cost Committee at the time), indicated an interest in undertaking a further review of the Protocol before any final decisions were taken. TeCSA certainly considered that in order to properly inform any review it would be necessary and helpful to give the judiciary and Civil Procedure Rule Committee ("CPRC") a broader view of the Protocol, which included the opinions of industry/clients and solicitors to complement those of the Judges and Barristers of the TCC Working Party.

Amid speculation that the Protocol might be abandoned or made voluntary, the TeCSA Committee, which I then chaired, saw it as of paramount importance to obtain the industry's views and do so to inform the debate on the Protocol's effectiveness by a fully independently run study.

With the TeCSA litigation Sub-Committee, I helped lead the research on the Protocol with the assistance of Acuigen, a first-rate market research company. The result of that research became available in January titled: "A Report Evaluating the Perceived Value of the Construction and Engineering Pre-action Protocol" ("the Report").

The Report

This was the most comprehensive survey ever undertaken on the usefulness of the Protocol as a tool to achieve the aims of Jackson. Those surveyed included solicitors, main contractors, specialist subcontractors, consultants and insurers. In other words, those most likely to be involved in operating the Protocol.

The survey gathered and analysed data records from 216 disputes. This data was then supplemented by 39 in-depth telephone interviews with construction lawyers and leading construction companies. Those interviewed had collective experience of 677 disputes that had followed the Protocol over the past three years.

For TeCSA, the three most striking outcomes were:

- 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.

This underlined the value placed on the Protocol by those who are directly involved with disputes in our sector.

Furthermore, and 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. If you recall, this 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".

Based on the Report's findings, TeCSA's view was that there should be no doubt that the Protocol ought to remain and that it should continue to be a compulsory step for those wishing to pursue a claim through the courts - save in exceptional circumstances. Alexander will tell you more about those.

It is interesting to note that when considering how the Protocol could be amended, approximately 75% of respondents felt that access to and guidance from TCC Judges pre-action would be beneficial. A point I will come back to later regarding the "Protocol Referee".

The research underlined the fact that the Protocol is overwhelmingly valued by those who are directly involved with disputes in the engineering and construction sector.

2016

Having regularly seen the positive results of the Protocol in action, yet also seen the frustration of a Protocol process which can be hijacked by one party with the apparent aim of dragging it out and burning costs, following publication in January of the Acuigen report, TeCSA and TECBAR met in April with Mr Justice Coulson in his Chambers with the aim of working together to see if the Protocol could be improved upon.

His Lordship, having studied the Acuigen report, provided some good strong steers to TeCSA and TECBAR, taking on board many of the results of the survey and retaining the Protocol as a mandatory tool (save where both parties agree it is to be disapplied) for the effective early settlement of disputes in the construction industry.⁹

We believe this collaboration and its fruits have embraced and implemented the necessary procedural changes to support improvements and meet the concerns of those who find themselves in a Protocol process that is being abused.

We recognise that for the Protocol to be truly effective, the parties need to investigate their claims and defences in sufficient detail so that informed commercial decisions can be made about whether to reach a compromise or fight the dispute. Inevitably, this requires front-loading of costs. These should largely be recoverable if the Protocol fails to dispose of the dispute and the matter proceeds to court.

It will be interesting to see how, when the new Protocol goes live on 9 November 2016, the revised process works. No doubt with a follow-up piece of research methinks.

Protocol Referee Procedure ("PRP")

This PRP is all new. At para 7.1.5 of the new Protocol, in the Letter of Claim, one of things the Claimant must do is confirm as to whether or not it wishes the Protocol Referee Procedure to apply as provided in paragraph 11.¹⁰

In the Defendant's Response, the Defendant must state whether or not it wishes the Protocol Referee Procedure to apply.

Whilst 75% of respondents to the Acuigen survey felt that access to and guidance from TCC Judges pre-action would be beneficial, the problem presented was twofold. First, until proceedings are on foot a Judge would not have locus or jurisdiction to superintend the process. Second, the MoJ does not have the funds to create such a niche!

We must all remember that access to the courts is rightly regarded as a matter of constitutional importance. However, such access is not absolute.

Through collaboration and with encouragement from Mr Justice Coulson, TeCSA and TECBAR came up with a "Protocol Referee Procedure". We initially called the role a "lion tamer", before settling on the term "Protocol Referee" ("PR"), which is neither an arbitral nor an adjudical post but one that brings on the ref and enables parties who have agreed to sign up to that procedure to seek directions from the Protocol Referee to assist the parties participating in and complying with the Protocol and/or to assist resolution of any material non-compliance with the Protocol. The PRs are to be appointed alternately by TECBAR and TeCSA, and everything is on the stocks ready to go when the Protocol goes live on 9 November 2016.

Key points about the PR

- The PR shall be entitled to decide on his own substantive jurisdiction and as to the scope of the Decision.
- The PR is not an adjudicator nor an arbitrator. He is appointed pursuant to an agreement between the Parties.
- The PR and any employee or agent of his or her shall not be liable to any party for anything done or not done in the discharge or purported discharge of his functions, whether in negligence or otherwise, unless the act or omission is in bad faith.
- Unless the Parties otherwise agree, the PRP and all matters arising in the course thereof are to be kept confidential by the Protocol Referee and the Parties except insofar as necessary to implement or enforce any decision of the Protocol Referee or as may be required for the purpose of any subsequent proceedings.
- In the event that any Party seeks to challenge or review the Decision of the PR in any subsequent litigation, the Protocol Referee is not "competent or compellable" in evidence speak.

Appointing the PR

If the parties have agreed that the PRP shall apply, a party seeking the appointment of the Protocol Referee ("the **Applicant**") must apply to the Chairman of TeCSA for a nomination using the pro-forma application form (the fee is £3,500 plus VAT) which is found on the TeCSA website ("the **Application**").¹¹

The PR will be appointed by the Chairman of TeCSA and will, alternately, be a senior member of either TeCSA or TECBAR authorised so to act.

The PR will be appointed within 2 working days from receipt of the Application.

The Application can be made **at any time** during the Protocol process but cannot be made once proceedings have been commenced (para 1.5).

Temporarily binding until proceedings commence

The Decision of the PR shall be binding on the Parties and they shall comply with it until the dispute is finally determined by legal proceedings or by agreement between the Parties. In subsequent legal proceedings the Court shall give due weight to the Decision of the Protocol Referee but shall not be bound by it (para 5.5).

Sanctions

The PR can, within his Decision, have jurisdiction to direct that the Respondent reimburses the Applicant with the Application Fee (together with any VAT). In any subsequent proceedings, the Application Fee shall be costs in the case.

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.¹²

Touchstone

The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs.

The PR Undertaking

TeCSA Pre-Action Protocol Referee Undertaking covers important matters on interest and conflicts. In particular, it obliges the putative PR to:

- disclose any conflict of interest in relation to any proposed appointment, including notifying issues that may arise which might have an impact on the appointment;
- disclose any conflicts that are likely to affect any appointment or might reasonably be perceived as likely to do so, now or at any future stage of the dispute resolution process;
- disclose any involvements, interests, relationships or other matters which are likely to affect the PR's independence or impartiality or which might reasonably be perceived as likely to do so. This includes any interests, relationships or other matters which are likely to affect independence or impartiality, or might reasonably be perceived as likely to do so.

It is envisaged that the PR will not be brought onto the field of play often, but when he or she is, then ding the PR bell should be enough in most cases to call order!

Simon Tolson
Fenwick Elliott

Footnotes

1. Christened by *Abramovich v Berezovsky* in 2009.
2. Judge Wilcox outlined the purpose and effect of the Pre-action Protocol in *Daejan Investments Limited v The Park West Club Limited* [2003] EWHC 2872 (TCC) (see in particular paragraphs 9, 14 and 17). Mr Justice Jackson concurred with Judge Wilcox's observations in those paragraphs in *Cundall Johnson & Partners Llp v Whipps Cross University Hospital NHS Trust* [2007] EWHC 2178 (TCC). In particular, Jackson J agreed with Judge Wilcox's observation in paragraph 14 that: "...the Protocol provides 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".
3. My former partner Robert Fenwick Elliott, now of Keating Chambers, then Chairman of TeCSA, was the principal draftsman.
4. Before commencing proceedings, the plaintiff sends a letter identifying why it thinks the defendant should meet the claim; the defendant then sends a letter identifying why it has not met the claim; there is then a meeting between the parties and the lawyers. The purpose of the meeting is to identify the main issues, and to see whether those issues might be resolved without litigation. It does this chiefly by the lawyers identifying the likely cost and time of litigation, and canvassing whether some alternative approach might be more sensible.
5. Volume 1 of the White Book at section C5.
6. In light of the responses and following further consideration, the CJC accepted that trying to create a one-size-fits-all consolidated pre-action protocol could go a long way in undermining the commitment that had gone into creating and promoting these pre-action protocols in the first place. The CJC also recognises that the ultimate objectives of such a pre-action protocol could only be fulfilled if the common denominator of core elements is relevant to all or most of the separate pre-action protocols, and not outweighed by the particular requirements of each pre-action protocol.
7. It should be noted that those two jurisdictions do not have a protocol.
8. Of 172 responses: Developers 1, Contractors 12
9. If you read nothing else in the Report I would urge you to read the comments of those construction clients who were interviewed (at page 18 of the final report). One client thought the Protocol encouraged early consideration of issues: "You can have built-in adversarial views before the case will ever get to court, but quite often the senior people in a company do not get to explore what the arguments are about until they are sitting in the court room wondering why they are there because the matter could have already been dealt with. The [Protocol] offers a reasonable balance because it is serious enough to draw in the senior people in a company provided it is managed properly."

Another considered that it prevented litigation and promoted mediation:

"Rather than rushing off and issuing proceedings, if it works effectively the process makes someone think that they have to try and convince a claimant on the other side of what [their] position is, and equally if I am the defendant I have to understand what difficulties lie in presenting the position. At its best the Protocol process, coupled potentially with mediation, has that benefit."

Our construction industry clients could see its benefits.

10. Protocol Referee Procedure

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.

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

11. See your pack.

12. Given the high level of costs that can be incurred, it is not surprising that debate continues about the recovery of Protocol costs. At the moment a defendant is unlikely to recover costs involved in rebutting a claim that does not go to trial. Resolving pre-action cost issues was favoured by 56% of respondents in the Acugen study.