

A comparison of the 2007 and 2016 editions of the Pre-action Protocol for Construction and Engineering Disputes¹

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 ~~as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:~~

3.1.1 to ~~encourage the~~ exchange of ~~early and full~~ sufficient information about the ~~prospective legal claim;~~ 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.

~~3.1.2 to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and~~

~~3.1.3 to support the efficient management of proceedings where litigation cannot be avoided.~~

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. ~~If the court has to consider the question of compliance after proceedings have begun~~ It is likely to

¹ Note: purely typographical changes and the relocation of text have not been shown.

~~be only in exceptional circumstances, such as a flagrant or very significant disregard for the terms of this Protocol, that the Court will be concerned with substantial compliance and not minor departures, e.g. failure by impose cost consequences on a short period to provide relevant information. Minor departures will not exempt the 'innocent' party from following the Protocol. The court will look at the effect of for non-compliance on the other party when deciding whether to impose sanctions. For sanctions generally, see paragraph 2 of the Practice Direction Protocols 'Compliance with Protocols' 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 ~~lower value claims (such as those likely to proceed in the county court)~~ many cases, including those of modest value, the letter of claim and the response ~~should~~ 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 ~~does~~ 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 ~~with a view to defining and agreeing the issues between them; and exploring possible ways by which the claim may be resolved;~~ and
- 6.1.7 the parties are in a position where they may be able to settle cases early ~~and~~, 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;

~~7.1.3 a clear summary of the facts on which each claim is based;~~

~~7.1.4 the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;~~

~~7.1.5 the nature of the relief claimed: if damages are claimed, a breakdown showing how the damages have been quantified; if a sum is claimed pursuant to a contract, how it has been calculated; if an extension of time is claimed, the period claimed;~~

~~7.1.6 where a claim has been made previously and rejected by a defendant, and the claimant is able to identify the reason(s) for such rejection, the claimant's grounds of belief as to why the claim was wrongly rejected;~~

7.1.4 ~~7.1.7~~ 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, ~~or such other period as the parties may reasonably agree (up to a maximum of 3 months)~~, the Defendant shall send a letter of response to the Claimant which shall contain the following information:

~~8.5.1 the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;~~

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 which claims are accepted and which are rejected, and if rejected, the basis of the rejection;~~

~~8.5.3 if a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection;~~

~~8.5.4 if contributory negligence is alleged against the claimant, a summary of the facts relied on;~~

~~8.5.5 whether the defendant intends to make a counterclaim, and if so, giving the information which is required to be given in a letter of claim by paragraph 3(iii) to (vi) above;~~

8.5.2 ~~8.5.6~~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 ~~(or such other period as has been agreed between the parties)~~, 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 ~~the equivalent period allowed to the defendant to respond to the letter of claim under paragraph 8.5 above~~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.

Pre-Action Meeting

9.1 Within ~~28-21~~ 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~~ ~~9.3~~~~In some circumstances, it may be necessary to convene more than one meeting.~~ It is not intended by this Protocol to prescribe in detail the manner in which the meetings should be conducted. ~~But~~ However, the Court will normally expect that those attending will include:

9.2.1 ~~9.3.1~~ 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 ~~9.3.2~~ a legal representative of each party (if one has been instructed);

9.2.3 ~~9.3.3~~ where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and

9.2.4 ~~9.3.4~~ 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~~ ~~In respect of each agreed issue or the dispute as a whole, the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.~~

9.3 ~~9.4~~ 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 ~~in respect of each issue~~, and to consider (i) whether, and if so how, the issues 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 CPR 1.1. Alternatively, the meeting can itself take the form of an ADR process such as mediation.

9.4 ~~9.5~~ If the parties are unable to agree on a means of resolving the dispute other than by litigation they should ~~use their best endeavours~~ seek to agree:

9.4.1 ~~9.5.1~~ if there is any area where expert evidence is likely to be required, ~~how the relevant issues are to be defined and~~ 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 ~~9.5.2~~ the extent of disclosure of documents with a view to saving costs; and

9.4.3 ~~9.5.3~~ the conduct of the litigation with the aim of minimising cost and delay.

9.5 ~~9.6~~ Any party who attended any pre-action meeting shall be at liberty and may be required to disclose to the Court:

9.5.1 ~~9.6.1~~ that the meeting took place, when and who attended;

9.5.2 ~~9.6.2~~ the identity of any party who refused to attend, and the grounds for such refusal;

9.5.3 ~~9.6.3~~ if the meeting did not take place, why not; ~~and~~

9.5.4 ~~9.6.4~~ any agreements concluded between the parties; ~~and~~

9.5.5 ~~9.6.5~~ the fact of whether alternative means of resolving the dispute were considered or agreed.

9.6 ~~9.7~~ Except as provided in paragraph ~~9.6~~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 ~~10.1~~ 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.