Interim Report of the Working Party on the Pre-Action Protocol for the Construction and Engineering Disputes.

Introduction

1. A working party was set up by Mr Justice Jackson in October 2005 to consider whether any particular changes might be made to the Pre-Action Protocol for the Construction and Engineering Disputes. The working party consisted of Mr Justice Ramsey; His Honour Judge Havery QC; Caroline Cummins (TeCSA representative); Allen Dyer (TECBAR representative) and Philip Morris (Industry representative).

2. The initial task for the working party was to review experience of operating under the existing protocol and, in particular, identify any areas where problems had been encountered. This included a review of existing documents: see Ref [1]. This has led to this Interim Report which is intended to stimulate debate for the purpose of consultation with interested parties. Once that consultation has taken place, the working party together with Mr Justice Jackson will proceed to produce a Final Report which will contain recommendations for action. Some changes might be introduced by means of a change in practice in the TCC Guide. Others may require changes to the underlying protocol or the rules and this would necessarily require reference to the Rules Committee and the senior judiciary. As part of the consultation the working party would particularly like to hear from those with first hand experience of operating the existing protocol and meetings will be arranged for this purpose as part of this consultation process.

Experience of the Pre-Action Protocol

3. At the outset it is necessary to state that, in general, it was thought that the existence of the protocol has 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. There were, however, two particular related areas of concern in relation to the time and the cost of complying with the protocol.

Issues of Timing

4. The time aspect arises from the periods which are stated in the protocol for the procedural steps. At present when the Letter of Claim is served, the protocol provides that there should be an acknowledgement within 14 calendar days of receipt of the letter of claim and that the defendant should raise certain objections within 28 days after receipt of the letter of claim. Those periods do not seem to cause any difficulty. However the protocol then provides that the Letter of Response should be sent 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 4 months)*".

5. Experience has shown that defendants are seeking long periods, often of 4 months and, whilst the claimant might object, there is no sanction or process to encourage the defendant to agree a lesser period. Further prolongation of the timetable can

occur if, as often happens, there is a counterclaim. The protocol currently provides that the claimant shall provide a response to any counterclaim within the equivalent period allowed to the defendant to respond to the letter of claim, that is 28 days or such other period as the parties may reasonably agree (up to a maximum of 4 months).

6. There is then the need to have a pre-action protocol meeting "*as soon as possible 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*." Experience has shown that such meetings are very often difficult to arrange and that two meetings are often necessary, extending the timetable by a number of months.

7. There can therefore be a problem because the pre-action protocol procedure can take twelve months or more to be completed, not taking into account the period taken to prepare the Letter of Claim in the first place. In this context questions arise as to whether the maximum period of 4 months is too long and whether there might be some other mechanism to arrive at a reasonable time.

Cost Issues

8. The question of the cost of complying with the protocol is inevitably related to the time taken to complete the procedure. Part of that cost might be necessary for the litigation but part will be additional cost, particularly for a defendant. Experience has also shown that for the larger or more complex types of dispute, the Letter of Claim may include a number of Expert Reports, documents and even Witness Statements. In addition there may be further expense when the claimant or the defendant will seek disclosure of documents in order to understand the defence or the case being made by the other party.

9. The process can therefore lead to large costs and where there are a number of parties this can lead to costs of hundreds of thousands of pounds and sometimes more. The limited ability for a party, particularly a potential defendant against whom proceedings are not ultimately commenced, to recover such costs can lead to unfairness. This raises the question whether some provision is necessary to deal with the ability of the claimant or the defendant to recover the costs of complying with the protocol in particular circumstances: see Ref [2]. It has been suggested that a limit might be applied to the costs.

Information and Documents

10. Whilst the problems of time and cost are common complaints, there are some other aspects which merit further consideration. First, if a party wishes to have more information on a claim or defence or where a party wishes to obtain disclosure, then the procedure depends on the other party acting reasonably and providing the information or documents. Some concern was expressed at the difficulty and the time and expense of dealing with a party which is acting unreasonably. Whilst a pre-action application for disclosure might be made by

either party, if this does not happen a claimant may commence proceedings and having obtained the information or documents, those proceedings might prove unnecessary if sight of the information or documents allows the parties to settle.

11. In the case of a defendant, unless a pre-action application for disclosure is made, any further information or documents might only be obtained later if the claimant starts proceedings and may never be obtained if the matter does not proceed. Equally, the absence of the information or documents may enable a claimant to force a better settlement than would be the case if the information or documents had been made available. Whilst general experience shows that parties co-operate well in providing the necessary information or documents, there is no process to assist the parties if there is a lack of co-operation or if the issue becomes protracted.

Multiple Parties

12. The second area concerns the position of multiple parties and, in particular, Part 20 defendants who are added as contingent parties in case a defence fails or are added as additional defendants to a counterclaim. The protocol at present assumes that the dispute is one which is made by a claimant against a defendant. In practice this may not be so and this raises questions as to how co-defendants or Part 20 defendants should be dealt with in terms of giving a defendant the chance to comment on the defence of a co-defendant or a defendant to pass on matters raised by a Part 20 defendant. Whilst the parties may be able to organise the procedure themselves, there is no process to deal with situations where there is no agreement or where agreement becomes a protracted and expensive process.

The Overriding Objective

13. The problems raised above all relate, in some way, to the practical working of the procedure so that it can conform to the general principles enunciated in the overriding objective. That is the principles of ensuring that the parties are on an equal footing; saving expense; dealing with the case in ways which are proportionate and ensuring that it is dealt with expeditiously and fairly. A particular concern is that the Pre-Action Protocol process should not be used oppressively. Whilst the TCC Guide provides helpful guidance, that may not always be enough.

The Involvement of the Court

14. The working party was reluctant for the Court to become automatically involved in the Pre-action Protocol process. One of the major advantages of the process should be that the parties try to appreciate the strengths and weaknesses of their position without the involvement of the Court. However that being said, it was equally thought that access to the Court might be desirable to save costs and prevent delay in relation to the Pre-action Protocol process. Such access would have to be available on the application by one party. The Court would only act so as to facilitate an efficient and cost effective approach to the Pre-action Protocol process.

15. In the past the availability of access to the Court to facilitate the Pre-action Protocol process has been mooted and in at least one case led to an application being made which then enabled the parties to agree a reasonable resolution to the procedural issue before the matter was heard. It would be a matter for further discussion whether the Court had power to act under the overriding objective so that the process could merely be included within the TCC Guide or whether there would need to be a change to the Rules. Whatever procedural route were used, the working party was clear that any access to the Court should be limited and only available when the parties were unable to agree on a reasonable procedure. Such access should be the exception, not the rule; it being thought that experienced solicitors should, generally, be able to resolve procedural matters in a reasonable and sensible way.

Possible Issues for Court Involvement

16. The working party considered that the matters which the Court might be called on to consider would include:

(1) Timetable Issues: These would include the period for the Letter of Response or the response to any counterclaim. In addition, it would deal with cases where there were multiparty disputes and where some parties might need to respond to allegations by co-defendants or adopt allegations by Part 20 defendants. There might also be a need for timetabling of the meeting or meetings necessary as part of the process.

(2) Cost Issues: The precise issues would need further consideration. At a minimum they might include directions as to those parts of the procedure which might involve great expense such as expert evidence, investigation or testing or lengthy requests for information or disclosure. At the other end of the scale, it might be desirable for the Court to become involved by dealing at any early stage with the potential recoverability of costs or even setting a cap on costs. Obviously the more the involvement of the Court, the more likely it would be that such matters would require a change to the Rules.

(3) Disclosure: It was thought that in a number of cases the availability of early disclosure of key documents was likely to assist the process. This might include documents relied on to support a case or defence. In addition, it might include documents which were favourable to the other party's case such as reports on defects or internal documentation.

(4) Expert evidence: Very often the resolution of construction and engineering disputes required expert evidence and in a number of cases the Letter of Claim now enclosed expert reports. In such circumstances, there were a number of possible ways in which the defendant might respond to such reports. For instance, it might be convenient for that expert to be asked written questions;

it might seek expert meetings; it might obtain its own expert report or it might be desirable to have a joint expert appointed, at least for the pre-action stage. The same considerations might apply to expert evidence served in support of the Letter of Response, including any counterclaim.

(5) <u>Abridged Pre-action Protocol process:</u> Whilst the circumstances in which the Pre-action Protocol process is necessary are already described in the Protocol, there are cases where the parties might not agree on the necessity for the process to be carried out. Equally, in some cases there might be no need for Letters of Claim or Responses or for meetings. In addition, there is concern that the process might be used oppressively in some cases and an abridged process might prevent that.

ADR

17. A standard pre-action protocol ADR text has been produced in the following terms:

"***ALTERNATIVE DISPUTE RESOLUTION***

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. Both the Claimant and the Defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarized below are some of the options for resolving disputes without litigation:

- *Discussion and negotiation.*
- *Early neutral evaluation by an independent third party (for example, a lawyer experienced in the field of [INSERT] or an individual experienced in the subject matter of the claim).*
- *Mediation – a form of facilitated negotiation assisted by an independent neutral party.*
- *[INSERT ANY OTHERS APROPRIATE TO A PARTICULAR PROTOCOL]*

The Legal Services Commission has published a booklet on "Alternatives to Court", CLS Direct Information Leaflet 23 *(www.clsdirect.org.uk/legalhelp/leaflet23.jsp), which lists a number of organizations that provide alternative dispute resolution services.*

It is expressly recognized that no party can or should be forced to mediate or enter into any form of ADR."

18. It has been agreed that the working party should give consideration as to whether this or something similar could be included in the Pre-Action Protocol for the Construction and Engineering Disputes. Paragraph 5.4 of the Pre-Action Protocol already includes the substance of the first sentence of the standard ADR Text.

19. As to the second sentence, at present, apart from the matters which paragraph 5.6 states that a party can disclose, everything said at a pre-action meeting is treated as being "without prejudice": see paragraph 5.7. As a result, "*evidence that alternative means of resolving their dispute were considered*" is not covered. Such evidence could be added as an item in paragraph 5.6. It is common for the parties to refer to ADR in the Letter of Claim or Letter of Response and evidence would be available if that were done.

20. Some concern was expressed as to whether it was either necessary or desirable for such evidence to be required in the context of the Pre-Action Protocol for the Construction and Engineering Disputes. In particular, the fact that a meeting is required means that discussion and negotiation is likely to take place but it is undesirable that evidence should be given as to this. That is why the meeting is treated as "without prejudice".

21. As to the third sentence, experience of ADR in Construction and Engineering Disputes (and other disputes) has shown that ADR should be allowed to be a continuing process rather than a single pre-action stage. Of course, if pre-action ADR resolves the matter then litigation is avoided and this is a desirable aim. However, settlement is often pursued in parallel and the possibility of Early Neutral Evaluation or the recently proposed Court Settlement Procedure in the TCC acknowledges this. Equally, it is thought that the fact that a defendant is actively seeking settlement should not prevent a claimant from commencing proceedings and it is assumed that the reference in the third sentence is to settlement being actively explored "*by both or all relevant parties*".

22. As to the fourth sentence, it is not thought that any addition is necessary to the Pre-Action Protocol for the Construction and Engineering Disputes, given the terms of paragraph 1.4 and its reference to paragraph 2 of the Practice Direction.

23. As to the following paragraphs of the standard ADR text, in the context of Construction and Engineering Disputes it is not thought that reference to different forms of ADR is necessary given the diversity of the means of ADR available and the general awareness of such processes within the construction industry.

24. Finally, the last paragraph of the standard ADR text is, it seems, intended to preclude Human Rights arguments and it is for consideration whether such a provision is necessary depending on the extent to which the standard text is adopted.

Commentary on the Pre-Action Protocol

25. In the light of the comments in this Interim Report, the working party has set out below the terms of the Pre-Action Protocol for the Construction and Engineering Disputes with a brief commentary on the provisions.

26. The working party emphasises that the matters raised in this Interim Report are intended to stimulate debate as part of the consultation process. Whether those or other matters are to be adopted as part of the Pre-action Protocol process will depend on the views expressed during the consultation and ultimately whether they are thought to represent desirable changes to the TCC Guide or the Rules.

Consultation

27. The working party would therefore appreciate any comments on the suggestions contained in this Interim Report and any further suggestions. In addition, the working party would benefit from hearing views of practitioners with experiences, good or bad, of the operation of the Pre-Action Protocol for the Construction and Engineering Disputes or any other Pre-Action Protocol.

16 January 2006

Related References

[1] Note prepared by Caroline Cummins for the TeCSA Seminar on 23 September 2003 (available at www.tecsa.org.uk)

[2] Decision of HHJ Peter Coulson QC in *McGlinn v. Waltham Contractors* [2005] EWHC 1419 (TCC)

Pre-Action Protocol for the Construction and Engineering Disputes

1 Introduction

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

It is noted that this does not expressly include IT disputes but it is not known whether this is in fact a problem. Equally an initial view that the reference to professional negligence might cause problems of overlap with the Professional Negligence Pre-Action Protocol had not been thought to have materialised.

Exceptions

1.2 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.

The defined exceptions are not known to have caused any difficulties and it is thought that "formal alternative dispute resolution procedure" would cover most procedures in standard forms of contract. The possible involvement of the Court has been mentioned in the Interim Report.

Objectives

1.3 The objectives of this Protocol are as set out in the Practice Direction relating to Civil Procedure Pre-Action Protocols, namely:

- (i) to encourage the exchange of early and full information about the prospective legal claim;
- (ii) to enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings; and
- (iii) to support the efficient management of proceedings where litigation cannot be avoided.

The reference to the Practice Direction is important and it was thought that users are not always aware of the provisions of the Practice Direction.

Compliance

1.4 If proceedings are commenced, the court will be able to treat the standards set in this Protocol as the normal reasonable approach to pre-action conduct. If the court has to consider the question of compliance after proceedings have begun, it will be concerned with substantial compliance and not minor departures, e.g. failure by 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 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".

The fact that the TCC guide requires details of the steps taken during the Pre-Action Protocol process to be provided at the first case management conference was thought to provide an effective way in which the TCC reviews compliance. It was thought that any party should currently raise any concerns with compliance at that stage.

2 Overview of the Protocol

General Aim

2 The general aim of this Protocol is to ensure that before court proceedings commence:

(i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
(ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
(iii) there is more pre-action contact between the parties;
(iv) better and earlier exchange of information occurs;
(v) there is better pre-action investigation by the parties;
(vi) the parties have 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;
(vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and
(vii) proceedings will be conducted efficiently if litigation does become necessary.

It was thought that this general aim is usually achieved through the current Pre-Action Protocol.

3 The Letter of Claim

3 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:

(i) the claimant's full name and address;
(ii) the full name and address of each proposed defendant;
(iii) a clear summary of the facts on which each claim is based;
(iv) the basis on which each claim is made, identifying the principal contractual terms and statutory provisions relied on;

(v) 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;

(vi) 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;

(vii) 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.

Concern was expressed that large amounts of documentation had been included with some Letters of Claim. The working party considered whether some addition should be made either defining or limiting the documents which might be served with the Letter of Claim. It was thought that parties were generally adopting a sensible approach to the amount and type of documentation and that any elaboration on this question was more likely to cause problems.

4 The Defendant's Response

The defendant's acknowledgment

4.1 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). 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.

4.2 Objections to the court's jurisdiction or the named defendant

4.2.1 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.

4.2.2 Where such notice of objection is given, the defendant is not required to send a letter of response in accordance with paragraph 4.3.1 in relation to the claim or those parts of it to which the objection relates (as the case may be).

4.2.3 If at any stage before the claimant commences proceedings, the defendant withdraws his objection, then paragraph 4.3 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.

4.3 The defendant's response

4.3.1 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 4 months), the defendant shall send a letter of response to the claimant which shall contain the following information:

- (i) the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement;
- (ii) which claims are accepted and which are rejected, and if rejected, the basis of the rejection;
- (iii) 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;
- (iv) if contributory negligence is alleged against the claimant, a summary of the facts relied on;
- (v) 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;
- (vi) 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;

4.3.2 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 counter claim

4.4 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 4.3.1 above.

Issues arising from the timing of the Letter of Response and a response to any counterclaim, including whether 4 months is too long as a maximum period, have been mentioned in the Interim Report. A similar comment applies in respect of enclosures to that set out for the Letter of Claim.

5 Pre-Action Meeting

5.1 As soon as possible 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.

5.2 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 Part 1.1 of the Civil Procedure Rules.

5.3 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 the court will normally expect that those attending will include:

(i) 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;
(ii) a legal representative of each party (if one has been instructed);
(iii) where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and
(iv) 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.

5.4 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.

Reference has been made above to the standard pre-action protocol ADR text. If that text were to be adopted then this would be a convenient place.

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

(i) whether, if there is any area where expert evidence is likely to be required, a joint expert may be appointed, and if so, who that should be; and (so far as is practicable)
(ii) the extent of disclosure of documents with a view to saving costs; and
(iii) the conduct of the litigation with the aim of minimising cost and delay.

This could be an area where access to the Court might assist in resolving any problems in agreeing a reasonable and sensible approach on these issues.
It is thought that sub-paragraph (i) might be expanded so as to consider other questions of the form of expert evidence and not just the use of a joint expert.

5.6 Any party who attended any pre-action meeting shall be at liberty to disclose to the court:

(i) that the meeting took place, when and who attended;
(ii) the identity of any party who refused to attend, and the grounds for such refusal;
(iii) if the meeting did not take place, why not; and
(iv) any agreements concluded between the parties.

In the context of the standard pre-action protocol ADR text, consideration might be given to adding, as a sub-paragraph, the possibility of disclosing the fact of whether alternative means of resolving the dispute were considered.

5.7 Except as provided in paragraph 5.6, everything said at a pre-action meeting shall be treated as "without prejudice".

The views on the timing of such meetings have been set out in the Interim Report. One question which was raised in discussion was whether it was appropriate for a third-party neutral to be involved either in the first or any second meeting so as to endeavour to achieve more common ground either on substantive issues or on procedural matters. There was a view that the meetings can sometimes be unstructured and unproductive. At present the working party considers that this should be a matter for the parties and no specific recommendation for a change to the Protocol has been made. This will, though, be kept under review.

6 Limitation of Action

6 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.

It was not thought that this provision had caused any particular difficulties.