

APPENDIX 4.

Pre-Action Protocol for Construction and Engineering Disputes

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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).



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.



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.



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'.



Proportionality

1.5

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), the letter of claim and the response should 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 not 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.



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
- (viii) proceedings will be conducted efficiently if litigation does become necessary.



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.



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.



Objections to the court's jurisdiction or the named defendant

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.



The defendant's response

4.3

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 3 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.



5 Pre-Action Meeting

5.1

Within 28 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.

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 rule 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. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.

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) 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)

- (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.

5.6

Any party who attended any pre-action meeting shall be at liberty and may be required 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.
- (v) the fact of whether alternative means of resolving the dispute were considered or agreed.

5.7

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



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.

