

PRE-ACTION PROTOCOL FOR CONSTRUCTION AND ENGINEERING DISPUTES

On 2 October 2000, a pre-action protocol came into force regulating the way in which construction and engineering disputes are dealt with prior to commencement of legal proceedings. It affects all those involved in construction and engineering disputes, including professional negligence claims.

Following the overhaul of the civil justice system in light of the Woolf reforms on 26 April 1999, the parties to prospective litigation have been required to act reasonably and to take all necessary steps to ensure that there is a flow of information and dialogue between the parties with a view to promoting early settlement of cases so as to avoid the time and expense of litigation. Specific protocols were envisaged for particular types of dispute. So far, there have been protocols for personal injury and clinical negligence cases. This is the first protocol of any sort for commercial disputes. It is likely therefore that not only will it affect construction and engineering disputes but it will in the short term at least represent best practice and set the standard for dealing with all commercial disputes prior to litigation.

The protocol sets out a four stage procedure:

- a detailed letter of claim is sent by the proposed claimant
- within 14 days of receipt the proposed defendant must acknowledge receipt of the letter
- within 28 days of receipt of the claim letter a detailed response must be given
- as soon as possible after the response is given the parties are to meet to discuss the case on a "without prejudice" basis.

The protocol requires that the letter of claim must set out the name and address of the proposed claimant, the full name and address of each proposed defendant, a summary of the facts on which the claim is based and identify the contract terms which are relied upon. Where damages are claimed a breakdown must be provided

showing exactly how they are calculated and if an extension of time is claimed the period claimed must be specified. If a claim has been made previously and rejected then the claim must explain why the rejection was wrong. Where experts are instructed they must be identified and the issues they are to address must also be stated.

The defendant's response letter must give similar details of any counterclaim which it proposes to bring and set out fully all facts and matters relied upon in defence of the proposed claim. If the jurisdiction of the court is to be contested (for example by seeking a reference to arbitration) then the point must be taken in the defendant's response. If the defendant is insured the insurer must be identified. The response is to be given within 28 days of receipt of the letter of claim, although the period can be extended by the consent of the parties by up to 4 months.

The pre-action meeting is to take place on a "without prejudice" basis. Its purpose is to identify common ground and matters in dispute and to consider ways in which the disputed matters might be resolved without litigation or if litigation is to follow how the matter might best be dealt with, for example whether or not any form alternative dispute resolution ("ADR") might be suitable and what expert evidence.

Non-compliance with the protocol will not debar a party from pursuing either a claim or defence through the courts. However, it is likely that the court will penalise non-compliance with the protocol by ordering the non-compliant party to pay either all or part of the costs of the action. There is no obligation to follow the protocol where the claim: is for enforcement of an adjudicator's award; is one where the claimant proposes to apply for summary judgment; is for interim injunctive relief; or is one where adjudication or ADR on substantially the same issues has taken place.

The new protocol has immediate impact upon those involved in construction and engineering disputes. However, it does have a wider impact upon commercial litigation cases generally as it is likely to serve as a model of good practice for the resolution of all commercial disputes until such time as specific protocols are put into place in particular practice areas.

It is important therefore that early advice is taken at the time a claim is contemplated. It is essential

that the claim letter is correctly formulated and drafted. Similarly, where a claim letter is received it is important that early advice is taken to ensure that the response is served in time and that the meeting takes place.

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This information is necessarily brief and not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.

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