The *NEW* Pre-Action Protocol for Construction and Engineering Disputes

Simon Tolson
The Pre-Action Protocol for Construction and Engineering Disputes (the ‘Protocol’), and its not PAP!

Fruits of TeCSA and TECBAR collaboration
If we go back to at least 1994...
• We had the groundbreaking Sir Michael Latham’s industry report ‘Constructing the Team’ in 1994...
• Major concern of our most senior judges and lawmakers, was cutting down cost, faff and ineffectual activity for the user/customer/our clients!
• In his “Access to Justice” report 1995/6, 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 Pre-Action Protocols and this one for Construction and Engineering Disputes was a major milestone in the Woolf reforms.
Wilcox J in *Daejan Investments Limited v The Park West Club Limited* [2003] below

"...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".
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.

2 October 2000 - in force
USP - the pre-action meeting.

• Uniquely from the get-go it provided (unlike the others) for a **pre-action meeting**.

• This idea was not universally welcomed. Insurers disliked the idea that they would have to meet claimants.
FACT: 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!
The protocols (note plural) without a doubt “...have been a success - as post CPR litigation had reduced by 80% in the High Court and 25% in the County Court”

Has anything really changed?
Acuigen study in 2015

Do you think that the Protocol remains up to date with the needs and dynamics of pre litigious processes?

- Total: 82% Yes, 18% No
- Track 2 - Law Firms: 90% Yes, 10% No
- Track 3 - Construction clients: 72% Yes, 28% No

Figure 8 - Does the PAP remain up to date?
(n = 38 respondents, 20 in Track 2, 18 in Track 3)
Much debate within the legal profession about whether the Protocol was effective enough and whether there should be more cases that skip it beyond the express exceptions.
2005

- October 2005 Mr Justice Jackson, then JIC of TCC, set up a working party to consider whether any changes to the Protocol were necessary.
- 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 - came into effect from 6 April 2007.
• April 2009 a Consultation Paper by the Civil Justice Council and the Ministry of Justice
• This invited the review of all Pre-Action Protocols.
• What was Jackson’s working party was re-constituted under Ramsey J as JIC to carry out a further review.
• The working party decided to undertake a further review after the publication of the Final Report by LJJ.
Jackson’s Final Report of the Review of Civil Litigation Costs concluded that the Protocol should be retained as a pre-action process in the TCC for now. He also stated that there was a need for further review. He observed at para 4.16 that:

“the decision whether to retain a pre-action protocol for construction and engineering disputes is finely balanced”.

Jackson LJ recommended ...“after the TCC has moved into the Rolls Building in 2011, the whole question of the protocol should be reviewed”. He suggested that after the move from St Dunstan’s the users of the TCC, both litigants and lawyers, may possibly conclude ... that their pre-action procedures should be aligned with those prevailing in those other jurisdictions [Chancery and Commercial do not have a protocol!]. However, the outcome of that review must be a matter for the TCC judges and practitioners after 2011.
THERE WAS A BIT OF A SPLIT OPINION
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 its Second Interim Report the WP proposed that a questionnaire be sent out to TCC Users and that a final report 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 all responses to the questionnaire were in by October 2011. ...More on the questionnaire in a moment....
April 2012, the Final Report of the WP reviewed the (i) background to the Protocol, (ii) the previous views of the working party and (iii) the results of the questionnaire. It contained recommendations on whether or not to retain the Protocol in its present form.
2012...

- The WP report concluded that the protocol process requires front loading of 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. It felt the point was being missed about what good it brought parties.
• The unanimous view of the TeCSA Committee was that 2011 survey results from the Protocol questionnaire (via SurveyMonkey®) were not a mandate for making the Protocol voluntary or scrapping it.

• TeCSA recorded its support for the Protocol.
The survey data of 172 responses showed that:

- 47% of the respondents said leave it alone and
- only 11% wanted to scrap it.
- 13 respondents said make PAP voluntary. i.e. just over 7% of the sample.
Research and enquiry
In April 2015, Mr Justice Coulson - wearing his Member of the Civil Procedure Rule Committee hat (also Chair of the its Cost Committee) informally indicated an interest in undertaking a further review of the Protocol before any final decisions were taken.
TeCSA determined that to properly inform any review it would be necessary to give the judiciary and Civil Procedure Rule Committee (‘CPRC’), a broader view of the Protocol, one which included the opinion of industry/clients and solicitors to complement those of the Judges and Barristers of the TCC Working Party.
The Survey

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 Acuigen Report

The survey gathered and analysed data from 216 disputes supplemented by 39 in-depth interviews with leading construction companies and construction lawyers. The interviewees had collective experience of 677 disputes that had followed the Protocol within the last three years.
The results of the survey

The results are in...
The results of the survey

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.
Barrier to access to justice?

Does the PAP create access to justice?

<table>
<thead>
<tr>
<th>Creating Access</th>
<th>87%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acting as a barrier</td>
<td>13%</td>
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Figure 6 - Is the PAP creating access to justice or is it a barrier?
(n=39 interviews)

When respondents felt that it was being a barrier to justice, they thought that this was because it slows the process, increases costs, or penalises a less well funded party to litigation.
Protocol up to date?

Figure 8 - Does the PAP remain up to date?

(n = 38 respondents, 20 in Track 2, 18 in Track 3)
The results of the survey...

• 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.

• Such outcome 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’
Pre action judicial supervision...

• 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’.
TeCSA and TECBAR met in April this year with Mr Justice Coulson with the aim of working together to see if the protocol could be improved upon.

His Lordship having studied the Acuigen report provided helpful steers to TeCSA and TECBAR taking on board many the results of the survey and retaining the Protocol as a prima facie mandatory tool.
We believe we have got a good solution.

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

Alexander Nissen QC will now tell you more...
A REPORT EVALUATING THE PERCEIVED VALUE OF THE CONSTRUCTION AND ENGINEERING PRE-ACTION PROTOCOL

Research into perceptions of the construction and engineering pre-action protocol

Prepared by Chris Leng, Programme Director, Acuigen Ltd
29 January 2016 Final Report
Pre-Action Protocol for Construction and Engineering Disputes
2nd Edition

Alexander Nissen QC
1.1 Introduction

1.1 This Pre-Action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).
1.2 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.

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.
1.3 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.

3 Objectives

3.1 The objectives of this Protocol are:

3.1.1 to exchange sufficient information about the 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.
1.4 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”.

4 Compliance

1.4 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. 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.
1.5 Proportionality

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.

5 Proportionality

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 many cases, including those of modest value, the letter of claim and the response 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 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.
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 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; [...]
2 General aim – Continued

vi. the parties have met formally on at least one occasion with a view to
   - defining and agreeing the issues between them
   - exploring possible ways by which the claim may be resolved;

vi. 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.

6 General aim – Continued

6.1 6.1.6 the parties have usually met formally on at least one occasion; and

6.1.7 the parties are in a position where they may be able to settle cases early, fairly
     and inexpensively without recourse to litigation; and

6.1.8 proceedings will be conducted efficiently if litigation does become necessary.
3 The Letter of Claim

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; […]

7 The Letter of Claim

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 the Claimant’s full name and address;
7.1.1 the full name and address of each proposed Defendant;
7.1.2 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; […]
3 The Letter of Claim - Continued

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.

7 The Letter of Claim - Continued

7.1 7.1.4 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.
4 The Defendant’s Response - 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.

8 The Defendant’s Response - 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.
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.

8 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.

NO CHANGE
**4.2 Objections to the court’s jurisdiction or the named defendant**

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.

**8 Objections to the Court’s jurisdiction or the named Defendant**

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.

*NO CHANGE*
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 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;

8 The Defendant’s Response

8.5 Within 28 days from the date of receipt of the letter of claim, the Defendant shall send a letter of response to the Claimant which shall contain the following information:

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 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.
4.3 The defendant’s response - Continued

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.

8.6 The Defendant’s Response - Continued

8.6 If no response is received by the Claimant within the period of 28 days, the Claimant shall be entitled to commence proceedings without further compliance with this Protocol.
4.4 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.

8.7 Claimant’s Response to Counterclaim

8.7 The Claimant shall provide a Response to any Counterclaim within 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.
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.

9 Pre-Action Meeting

9.1 Within 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.

9.3 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, and to consider (i) whether, and if so how, the case 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. Alternatively, the meeting can itself take the form of an ADR process such as mediation.
5 Pre-Action Meeting - Continued

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.

9 Pre-Action Meeting - Continued

9.2 It is not intended by this Protocol to prescribe in detail the manner in which the meeting should be conducted. However, the Court will normally expect that those attending will include:

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

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

9.2.4 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.
5 Pre-Action Meeting - Continued

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.

9 Pre-Action Meeting - Continued

- No equivalent provision.
5 Pre-Action Meeting - Continued

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.

9 Pre-Action Meeting - Continued

9.4 If the parties are unable to agree on a means of resolving the dispute other than by litigation they should seek to agree:

9.4.1 if there is any area where expert evidence is likely to be required, 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 the extent of disclosure of documents with a view to saving costs and to the use of the e-disclosure protocol; and

9.4.3 the conduct of the litigation with the aim of minimising cost and delay.
5 Pre-Action Meeting - Continued

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.

9 Pre-Action Meeting - Continued

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

   9.5.1 that the meeting took place, when and who attended;
   9.5.2 the identity of any party who refused to attend, and the grounds for such refusal;
   9.5.3 if the meeting did not take place, why not;
   9.5.4 any agreements concluded between the parties; and
   9.5.5 the fact of whether alternative means of resolving the dispute were considered or agreed.

NO CHANGE
5 Pre-Action Meeting - Continued

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

9 Pre-Action Meeting - Continued

9.6 Except as provided in paragraph 9.5, everything said at a pre-action meeting shall be treated as “without prejudice”.

NO CHANGE
Other Matters

- No equivalent provisions, though see 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…’

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.
Protocol Referee Procedure

- No equivalent provision

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.
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.

12 Limitation of Action

12.1 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.

NO CHANGE
Next  – Pre Action Protocol Referee Procedure…
The *NEW* Pre-Action Protocol for Construction and Engineering Disputes

Protocol Referee Procedure (‘PRP’)

TeCSA

TECBA
You will recall 75% of respondents to the Acuigen survey considered access to and guidance from TCC Judges pre-action would be beneficial.
“...I think that one of the problems is that you cannot enforce it. If someone really does not comply with it there is no leverage. The person that refuses to comply at all can make it less effective because you are not really getting an answer from them. I think that if there were a means to apply to the court to require the other party to respond, that would be helpful.
The problem presented was twofold. First, until proceedings are on foot a judge would not have locus nor jurisdiction to superintend the process. Second, the MoJ does not have the funds to create such a niche!
Protocol Referee Procedure (‘PRP’)

- Through collaboration and with encouragement of Mr Justice Coulson - TeCSA and TECBAR came up with the role of a ‘lion tamer’, before settling on the ‘Protocol Referee’ (‘PR’).
- The role is neither arbitral or adjudical.
- He or she is a determinator and in effect the process brings on the ref and enables parties to comply with the Protocol and/or to assist resolution of any material non-compliance.
This PRP is a new kid on the block

What is her or she?
Well its not this fellow! Very un PC too!
Protocol Referee

Or these characters...
Protocol Referee Procedure ('PRP')

This PRP is a new procedure. It is optional whether it is invoked.
Protocol Referee

But may be one of these characters...

“IF YOU’RE NOT TIRED, YOU’RE NOT DOING IT RIGHT.”
...PR applicants are required to be Queen’s Counsel (or authorised to sit in the TCC as Deputy High Court Judges and Recorders); to practice predominantly in the UK and to have had sufficient experience of the Pre-Action Protocol for Construction and Engineering Disputes (and its predecessor) to be familiar with disputes which arise in relation to the Protocol. ...In the meantime, selections shall be from a temporary panel derived from the list of persons authorised to sit in the TCC as Deputy High Court Judges and Recorders.
...PR applicants are required to be Solicitors who are senior practitioners with significant experience of TCC litigation. At this juncture 12 drawn from the TeCSA Committee.
Protocol Referee - 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 or 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.
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.

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

Everything is on the stocks ready to go on 9 November 2016. See pack.
The Application for a Protocol Referee

TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION

TeCSA APPLICATION FORM FOR APPOINTMENT OF A PRE-ACTION PROTOCOL REFEREE

William Gard
Chairman
Technology and Construction Solicitors Association
6 Burgess Salmon LLP
One Blaise Wharf
Bristol
BS2 1RX

Date: ........................................

Applicant Party(ies):

1. The parties have agreed that the Protocol Referee Procedure shall apply.
2. I/we attach to this Application details of the directions sought by the Applicant in order to assist
   the parties in participating in and complying with the Protocol and/or details of the nature of the
   non-compliance (no more than 4 sides of A4 paper) together with such other documents as
   the Applicant intends to rely upon (no more than 1 lever arch folder, single sided copying).
3. I/we have included the contact details of both the Applicant and the Respondent in relevant
   boxes below.
4. I/we hereby apply to you to nominate a Protocol Referee.
5. I/we agree to meet all the reasonable costs incurred by the person nominated by you if I/we
   are not entitled to make this Application in accordance with the agreement between the
   parties.
6. I/we enclose a cheque for £3,500 (plus VAT) payable to TeCSA in respect of the Application
   Fee for the cost in connection with this Application.
7. I/we understand that the Application Fee shall not exceed the sum of £3,500 plus VAT.

Signed for and on behalf of Applicant Party(ies): ........................................ (Signature(s))

Applicant Party(ies) | Respondent Party(ies)
---------------------|---------------------
| Name:               | Name:               |
| Address:            | Address:            |
|                     |                     |
|                     |                     |
| Tel.:               | Tel.:               |
| Fax:                | Fax:                |
| Email:              | Email:              |

NOTES:

1. TeCSA will make a nomination upon the application of any person using this form.
2. The Applicant must send a copy of the completed Application Form to the Respondent (at the address
   provided) prior to the nomination.
3. The Protocol Referee shall complete a Protocol Referee Declaration (in the form shown at Figure 1
   below) a signed copy of which will be provided to the parties upon a nomination by TeCSA.
4. TeCSA retains absolute discretion to nominate the Referee and TeCSA has no obligation to disclose
   its reasoning or any deliberations made when nominating a Referee.
5. If the validity of the Application is challenged then the person appointed and the parties involved must
   receive the challenge.
6. In making this application the Applicant undertakes to meet the reasonable changes in the person
   nominated by TeCSA pursuant to this application should the application not proceed.
7. Neither TeCSA, nor TECBAR, nor its Chairmen, nor its deputies, nor the Protocol Referee nor any
   employee or agent of any of them shall be liable to any party for anything done or not done in the
   discharge of or pursuant to the discharge of its functions as Chairman, deputies or Protocol Referees (as
   the case may be) whether in negligence or otherwise, unless the act or omission is in bad faith.

FIGURE 1

| 1. | I declare that I am willing and able to act as Pre-Action Protocol Referee and shall |
|    | immediately accept the appointment and sign the Protocol Referee Notice of Appointment |
|    | and Undertaking (published from time to time by TeCSA) if nominated. |
| 2. | I declare that I am aware of no conflict of interest which may reasonably give rise to any |
|    | real or perceived bias. |
| *3.(b) | I declare that I have, within the past three years, been appointed as a protocol referee, an |
|       | adjudicator or arbitrator, or been instructed as solicitor or counsel, on two or more |
|       | occasions by one or more of the parties, or an affiliate of one or more of the parties as |
|       | follows: |
|       | | |
|       | | |

*3.(b) The approximate percentage of any total income for the relevant period that has resulted
from such repeat appointments is:

<table>
<thead>
<tr>
<th>Name:</th>
<th>........................................ (Signature)</th>
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APPLICATION AND FEE MUST ACCOMPANY THIS FORM
Appointment of the Protocol Referee

Applicant Party submits the Application Form for the Appointment of a Protocol Referee ("Application Form") to the Chairman of TeCSA, together with:

- details of the directions sought and/or details of the nature of the non-compliance (on no more than 4 sides of A4 pages);
- such documents as the Applicant intends to rely upon (no more than 1 lever arch folder, single sided copying); and
- a cheque for £3,500 (plus VAT) which is held by TeCSA for fees and expenses as agent for the appointed PAP Referee.

At the same time as submitting the Application Form to TeCSA, the Applicant shall send a copy of the Application Form to the Respondent Party.

On receipt of the Application Form, TeCSA acknowledges receipt of the Application Form (by email) and copies the acknowledgement and Application Form to the Respondent.

TeCSA then emails the next five PAP Referees on the relevant TeCSA or TECBAR list, attaching the Application Form and a blank form of Declaration as to Conflicts, Independence and Impartiality (the "Declaration"), and requests that they confirm if they are available to act and if so to complete and return a signed copy of the Declaration. [PAP Referees will be appointed alternately from the TeCSA and TECBAR lists and invitees selected on a cab rank principle].

TeCSA then considers the responses and signed Declarations from the potential PAP Referees and makes a decision as to the nomination. [Referees will be selected from those PAP invitees responding with signed Declarations, within the time prescribed, in the Chairman’s absolute discretion].

On receipt of the Nomination, the nominee PAP Referee immediately issues his/her Notice of Appointment and Undertaking to the parties (thus giving written notice to the parties of his/her acceptance of the Appointment).
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.

The fee is £3,500 plus VAT and the form is to be found on the TeCSA website ("the Application").

Application: No more than 4 sides of A4 pages together with no more than 1 lever arch folder of materials.
Appointment of the Protocol Referee...

Applicant must give details of the directions sought in order to assist the parties in participating in and complying with the Protocol; and/or nature of the non-compliance.

The nature of the non-compliance Application: No more than 4 sides of A4 pages together with no more than 1 lever arch folder of materials.
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.
It will avoid the need for parties to trouble the Court with such disputes in all but the most extreme cases. Weight shall be attached to the Protocol Referee's decision, if it ever comes to be reviewed.
5. **THE DECISION**

5.1 The Protocol Referee shall reach a decision no later than 10 working days after receipt of the Notice of Appointment setting out:

5.1.1 Any appropriate directions for future conduct of the Protocol process; and/or

5.1.2 Whether there has been non-compliance with the Protocol and, if so, whether the non-compliance demonstrated a flagrant or significant disregard for the terms of the Protocol and, if so, to what extent

("the Decision").

5.2 The Decision shall be in writing.

5.3 The Protocol Referee shall provide brief reasons for the Decision.

5.4 The Parties may agree to extend the period within which the Protocol Referee may reach the Decision.

5.5 The Decision 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.
Sanctions

- The PR can, within his Decision direct how any breach or material misdemeanour should be addressed, he or she has jurisdiction to also 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.
The PR Undertaking - obligation to:

Disclose any conflict of interest in relation to any proposed appointment and notify 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.

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.
The PR Undertaking - obligation to:

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION
www.tecsa.org.uk

Pre-Action Protocol Referee Notice of Appointment and Undertaking

Applicant Party(ies):

Respondent Party(ies):

I acknowledge that I have been nominated by the Chairman of TeCSA as Pre-Action Protocol Referee for the purposes of assisting the above parties in participating and complying with the Protocol. I hereby accept that appointment.

I shall:

1. Conduct the Protocol Reference Procedure in accordance with, and subject to, the Protocol Reference Procedure and the TCC Pre-Action Protocol (as applicable), and
2. Ensure that I or my firm maintain the necessary and appropriate professional indemnity insurance cover for my services.

I accept that my fees shall not exceed £3,500 plus VAT (if applicable) and shall be held for me by TeCSA acting as my agent. I shall not require any advance payment of or security for my fees.

I recognise I have a duty to uphold the appropriate professional and personal standards appropriate to enable the Chairman from time to time to have confidence in making appointments.

I recognise that membership of the TeCSA or TECBAR List of Pre-Action Protocol Referees does not guarantee a quota of (or any) appointments.

I recognise that I am not an adjudicator or an arbitrator under the Protocol and that I am appointed pursuant to agreement between the parties.

In signing and returning this document I confirm my ongoing commitment to all of these matters without the need to make further declarations other than when requested specifically by TeCSA or TECBAR to do so.

Signed: ..............................................................

Date: ..............................................................
The nomination:

TeCSA

TECHNOLOGY AND CONSTRUCTION SOLICITORS ASSOCIATION
www.tecsa.org.uk

NOMINATION OF A PRE-ACTION PROTOCOL REFEREE BY THE CHAIRMAN OF TeCSA

To:
Address:

FAQ:
Tel:
Email:

I acknowledge receipt of your application dated [ ] for the nomination of a Protocol Referee and I hereby nominate:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
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Tel:
Fax:
Email:

I also enclose a signed copy of the Protocol Referee's Declaration as to Conflicts, Independence and Impartiality.

Copy to: The Protocol Referee and to

Name(s) and address(es) of other Party(ies):

FAQ:
Tel:
Email:

Dated this [ ]

William Gard
Chairman
TeCSA
Any questions?

...Thank you