

PROFESSIONAL
NEGLIGENCE
PRE-ACTION
PROTOCOL

THIS PROTOCOL
MERGES THE TWO
PROTOCOLS
PREVIOUSLY
PRODUCED BY THE
SOLICITORS
INDEMNITY FUND
(SIF) AND CLAIMS
AGAINST
PROFESSIONALS
(CAP)

A

INTRODUCTION

- A1. This protocol is designed to apply when a Claimant wishes to claim against a professional (other than construction professionals and healthcare providers) as a result of that professional's alleged negligence or equivalent breach of contract or breach of fiduciary duty. Although these claims will be the usual situation in which the protocol will be used, there may be other claims for which the protocol could be appropriate. For a more detailed explanation of the scope of the protocol see **Guidance Note C2**.
- A2. The aim of this protocol is to establish a framework in which there is an early exchange of information so that the claim can be fully investigated and, if possible, resolved without the need for litigation. This includes:
- (a) ensuring that the parties are on an equal footing
 - (b) saving expense
 - (c) dealing with the dispute in ways which are proportionate:
 - (i) to the amount of money involved
 - (ii) to the importance of the case
 - (iii) to the complexity of the issues
 - (iv) to the financial position of each party
 - (d) ensuring that it is dealt with expeditiously and fairly.
- A3. This protocol is not intended to replace other forms of pre-action dispute resolution (such as internal complaints procedures, the Surveyors and Valuers Arbitration Scheme, etc). Where such procedures are available, parties are encouraged to consider whether they should be used. If, however, these other procedures are used and fail to resolve the dispute, the protocol should be used before litigation is started, adapting it where appropriate. See also **Guidance Note C3**.
- A4. The Courts will be able to treat the standards set in this protocol as the normal reasonable approach. If litigation is started, it will be for the court to decide whether sanctions should be imposed as a result of substantial non-compliance with a protocol. Guidance on the courts' likely approach is given in the Protocols Practice Direction. The Court is likely to disregard minor departures from this protocol and so should the parties as between themselves.

- A5. Both in operating the timetable and in requesting and providing information during the protocol period, the parties are expected to act reasonably, in line with the Court's expectations of them. See also **Guidance Note C1.2**.

B

THE PROTOCOL

- B1. **Preliminary Notice** (See also **Guidance Note C3.1**)
- B1.1 As soon as the Claimant decides there is a reasonable chance that he will bring a claim against a professional, the Claimant is encouraged to notify the professional in writing.
- B1.2 This letter should contain the following information:
- (a) the identity of the Claimant and any other parties
 - (b) a brief outline of the Claimant's grievance against the professional
 - (c) if possible, a general indication of the financial value of the potential claim
- B1.3 This letter should be addressed to the professional and should ask the professional to inform his professional indemnity insurers, if any, immediately.
- B1.4 The professional should acknowledge receipt of the Claimant's letter within 21 days of receiving it. Other than this acknowledgement, the protocol places no obligation upon either party to take any further action.
- B2. **Letter of Claim**
- B2.1 As soon as the Claimant decides there are grounds for a claim against the professional, the Claimant should write a detailed Letter of Claim to the professional.
- B2.2 The Letter of Claim will normally be an open letter (as opposed to being 'without prejudice') and should include the following –
- (a) The identity of any other parties involved in the dispute or a related dispute.
 - (b) A clear chronological summary (including key dates) of the facts on which the claim is based. Key documents should be identified, copied and enclosed.
 - (c) The allegations against the professional. What has he done wrong? What has he failed to do?
 - (d) An explanation of how the alleged error has caused the loss claimed.

- (e) An estimate of the financial loss suffered by the Claimant and how it is calculated. Supporting documents should be identified, copied and enclosed. If details of the financial loss cannot be supplied, the Claimant should explain why and should state when he will be in a position to provide the details. This information should be sent to the professional as soon as reasonably possible.

If the Claimant is seeking some form of non-financial redress, this should be made clear.

- (f) Confirmation whether or not an expert has been appointed. If so, providing the identity and discipline of the expert, together with the date upon which the expert was appointed.
- (g) A request that a copy of the Letter of Claim be forwarded immediately to the professional’s insurers, if any.

B2.3 The Letter of Claim is not intended to have the same formal status as a Statement of Case. If, however, the Letter of Claim differs materially from the Statement of Case in subsequent proceedings, the Court may decide, in its discretion, to impose sanctions.

B2.4 If the Claimant has sent other Letters of Claim (or equivalent) to any other party in relation to this dispute or related dispute, those letters should be copied to the professional. (If the Claimant is claiming against someone else to whom this protocol does not apply, please see **Guidance Note C4**.)

B3. **The Letter of Acknowledgment**

B3.1 The professional should acknowledge receipt of the Letter of Claim within 21 days of receiving it.

B4. **Investigations**

B4.1 The professional will have three months from the date of the Letter of Acknowledgment to investigate.

B4.2 If the professional is in difficulty in complying with the three month time period, the problem should be explained to the Claimant as soon as possible. The professional should explain what is being done to resolve the problem and when the professional expects to complete the investigations. The Claimant should agree to any reasonable request for an extension of the three month period.

B4.3 The parties should supply promptly, at this stage and throughout, whatever relevant information or documentation is reasonably requested. (Please see **Guidance Note C5**).

(If the professional intends to claim against someone who is not currently a party to the dispute, please see **Guidance Note C4**.)

B5. **Letter of Response and Letter of Settlement**

B5.1 As soon as the professional has completed his investigations, the professional should send to the Claimant:

- (a) a Letter of Response, or
- (b) a Letter of Settlement;
- or
- (c) both.

The Letters of Response and Settlement can be contained within a single letter.

THE LETTER OF RESPONSE

B5.2 The Letter of Response will normally be an open letter (as opposed to being ‘without prejudice’) and should be a reasoned answer to the Claimant’s allegations:

- (a) if the claim is admitted the professional should say so in clear terms.
- (b) if only part of the claim is admitted the professional should make clear which parts of the claim are admitted and which are denied.
- (c) if the claim is denied in whole or in part, the Letter of Response should include specific comments on the allegations against the professional and, if the Claimant’s version of events is disputed, the professional should provide his version of events.
- (d) if the professional is unable to admit or deny the claim, the professional should identify any further information which is required.
- (e) if the professional disputes the estimate of the Claimant’s financial loss, the Letter of Response should set out the professional’s estimate. If an estimate cannot be provided, the professional should explain why and should state when he will be in a position to provide an estimate. This information should be sent to the Claimant as soon as reasonably possible.
- (f) where additional documents are relied upon, copies should be provided.

B5.3 The Letter of Response is not intended to have the same formal status as a Defence. If, however, the Letter of Response differs materially from the Defence in subsequent proceedings, the Court may decide, in its discretion, to impose sanctions.

THE LETTER OF SETTLEMENT

B5.4 The Letter of Settlement will normally be a without prejudice letter and should be sent if the professional intends to make proposals for settlement. It should:

- (a) set out the professional’s views to date on the claim identifying those issues which the professional believes are likely to remain in dispute and those which are not. (The Letter of Settlement does not need to include this information if the professional has sent a Letter of Response).
- (b) make a settlement proposal or identify any further information which is required before the professional can formulate its proposals.
- (c) where additional documents are relied upon, copies should be provided.

EFFECT OF LETTER OF RESPONSE AND/OR LETTER OF SETTLEMENT

B5.5 If the Letter of Response denies the claim in its entirety and there is no Letter of Settlement, it is open to the Claimant to commence proceedings.

B5.6 In any other circumstance, the professional and the Claimant should commence negotiations with the aim of concluding those negotiations within 6 months of the date of the Letter of Acknowledgment (NOT from the date of the Letter of Response).

B5.7 If the claim cannot be resolved within this period:

- (a) the parties should agree within 14 days of the end of the period whether the period should be extended and, if so, by how long.
- (b) the parties should seek to identify those issues which are still in dispute and those which can be agreed.
- (c) if an extension of time is not agreed it will then be open to the Claimant to commence proceedings.

B6. Alternative Dispute Resolution

B6.1 The parties can agree at any stage to take the dispute (or any part of the dispute) to mediation or some other form of alternative dispute resolution (ADR).

B6.2 In addition, any party at any stage can refer the dispute (or any part of the dispute) to an ADR agency for mediation or some other form of ADR.

B6.3 When approached by a party or an ADR agency with a proposal that ADR be used, the other party or parties should respond within 14 days stating that:

- (a) they agree to the proposal; or
- (b) they agree that ADR will be or may be appropriate, but they believe it has been suggested prematurely. They should state when they anticipate it would or may become appropriate; or

- (c) they agree that ADR is appropriate, but not the form of ADR proposed (if any). They should state the form of ADR which they believe to be appropriate; or
- (d) they do not accept that any form of ADR is appropriate. They should state their reasons.

This letter should be copied to the other party or parties and can be disclosed to the court on the issue of costs.

B6.4 It is expressly recognised that no party can or should be forced to mediate or enter into any other form of ADR.

B7. Experts

(The following provisions apply where the claim raises an issue of professional expertise whose resolution requires expert evidence).

B7.1 If the Claimant has obtained expert evidence prior to sending the Letter of Claim, the professional will have equal right to obtain expert evidence prior to sending the Letter of Response/Letter of Settlement.

B7.2 If the Claimant has not obtained expert evidence prior to sending the Letter of Claim, the parties are encouraged to appoint a joint expert. If they agree to do so, they should seek to agree the identity of the expert and the terms of the expert's appointment.

B7.3 If agreement about a joint expert cannot be reached, all parties are free to appoint their own experts.

(For further details on experts see **Guidance Note C6**)

B8. Proceedings

B8.1 Unless it is necessary (for example, to obtain protection against the expiry of a relevant limitation period) the Claimant should not start Court proceedings until:

- (a) the Letter of Response denies the claim in its entirety and there is no Letter of Settlement (see paragraph B5.5 above); or
- (b) the end of the negotiation period (see paragraphs B5.6 and B5.7 above); or

(For further discussion of statutory time limits for the commencement of litigation, please see **Guidance Note C7**)

B8.2 Where possible 14 days written notice should be given to the professional before proceedings are started, indicating the court within which the Claimant is intending to commence litigation.

B8.3 Proceedings should be served on the professional, unless the professional's solicitor has notified the Claimant in writing that he is authorised to accept service on behalf of the professional.

C

GUIDANCE NOTES

- C1. **Introduction**
- C1.1 The protocol has been kept simple to promote ease of use and general acceptability. The guidance notes which follow relate particularly to issues on which further guidance may be required.
- C1.2 The Woolf reforms envisage that parties will act reasonably in the pre-action period. Accordingly, in the event that the protocol and the guidelines do not specifically address a problem, the parties should comply with the spirit of the protocol by acting reasonably.
- C2. **Scope of Protocol**
- C2.1 The protocol is specifically designed for claims of negligence against professionals. This will include claims in which the allegation against a professional is that they have breached a contractual term to take reasonable skill and care. The protocol is also appropriate for claims of breach of fiduciary duty against professionals.
- C2.2 The protocol is not intended to apply to claims:
- (a) against Architects, Engineers and Quantity Surveyors – parties should use the Construction and Engineering Disputes (CED) protocol.
 - (b) against Healthcare providers – parties should use the pre-action protocol for the Resolution of Clinical Disputes.
 - (c) concerning defamation – parties should use the pre-action protocol for defamation claims.
- C2.3 ‘Professional’ is deliberately left undefined in the protocol. If it becomes an issue as to whether a defendant is or is not a professional, parties are reminded of the overriding need to act reasonably (see paragraphs A4 and C1.2 above). Rather than argue about the definition of ‘professional’, therefore, the parties are invited to use this protocol, adapting it where appropriate.
- C2.4 The protocol may not be suitable for disputes with professionals concerning intellectual property claims, etc. Until specific protocols are created for those claims, however, parties are invited to use this protocol, adapting it where necessary.

C2.5 Allegations of professional negligence are sometimes made in response to an attempt by the professional to recover outstanding fees. Where possible these allegations should be raised before litigation has commenced, in which case the parties should comply with the protocol before either party commences litigation. If litigation has already commenced it will be a matter for the Court whether sanctions should be imposed against either party. In any event, the parties are encouraged to consider applying to the Court for a stay to allow the protocol to be followed.

C3. **Inter-action with other pre-action methods of dispute resolution**

C3.1 There are a growing number of methods by which disputes can be resolved without the need for litigation, eg internal complaints procedures, the Surveyors and Valuers Arbitration Scheme, and so on. The Preliminary Notice procedure of the protocol (see paragraph B1) is designed to enable both parties to take stock at an early stage and to decide before work starts on preparing a Letter of Claim whether the grievance should be referred to one of these other dispute resolution procedures. (For the avoidance of doubt, however, there is no obligation on either party under the protocol to take any action at this stage other than giving the acknowledgment provided for in paragraph B1.4).

C3.2 Accordingly, parties are free to use (and are encouraged to use) any of the available pre-action procedures in an attempt to resolve their dispute. If appropriate, the parties can agree to suspend the protocol timetable whilst the other method of dispute resolution is used.

C3.3 If these methods fail to resolve the dispute, however, the protocol should be used before litigation is commenced. Because there has already been an attempt to resolve the dispute, it may be appropriate to adjust the protocol's requirements. In particular, unless the parties agree otherwise, there is unlikely to be any benefit in duplicating a stage which has in effect already been undertaken. However, if the protocol adds anything to the earlier method of dispute resolution, it should be used, adapting it where appropriate. Once again, the parties are expected to act reasonably.

C4. **Multi-Party Disputes**

C4.1 Paragraph B2.2 (a) of the protocol requires a Claimant to identify any other parties involved in the dispute or a related dispute. This is intended to ensure that all relevant parties are identified as soon as possible.

C4.2 If the dispute involves more than two parties, there are a number of potential problems. It is possible that different protocols will apply to different defendants. It is possible that defendants will claim against each other. It is possible that other parties will be drawn into the dispute. It is possible that the protocol timetable against one party will not be synchronised with the protocol timetable against a different party. How will these problems be resolved?

- C4.3 As stated in paragraph C1.2 above, the parties are expected to act reasonably. What is ‘reasonable’ will, of course, depend upon the specific facts of each case. Accordingly, it would be inappropriate for the protocol to set down generalised rules. Whenever a problem arises, the parties are encouraged to discuss how it can be overcome. In doing so, parties are reminded of the protocol’s aims which include the aim to resolve the dispute without the need for litigation (paragraph A2 above).
- C5. **Investigations**
- C5.1 Paragraph B4.3 is intended to encourage the early exchange of relevant information, so that issues in the dispute can be clarified or resolved. It should not be used as a ‘fishing expedition’ by either party. No party is obliged under paragraph B4.3 to disclose any document which a Court could not order them to disclose in the pre-action period.
- C5.2 This protocol does not alter the parties’ duties to disclose documents under any professional regulation or under general law.
- C6. **Experts**
- C6.1 Expert evidence is not always needed, although the use and role of experts in professional negligence claims is often crucial. However, the way in which expert evidence is used in, say, an insurance brokers’ negligence case, is not necessarily the same as in, say, an accountants’ case. Similarly, the approach to be adopted in a £10,000 case does not necessarily compare with the approach in a £10 million case. The protocol therefore is designed to be flexible and does not dictate a standard approach. On the contrary it envisages that the parties will bear the responsibility for agreeing how best to use experts.
- C6.2 If a joint expert is used, therefore, the parties are left to decide issues such as: the payment of the expert, whether joint or separate instructions are used, how and to whom the expert is to report, how questions may be addressed to the expert and how the expert should respond, whether an agreed statement of facts is required, and so on.
- C6.3 If separate experts are used, the parties are left to decide issues such as: whether the expert’s reports should be exchanged, whether there should be an expert’s meeting, and so on.
- C6.4 Even if a joint expert is appointed, it is possible that parties will still want to instruct their own experts. The protocol does not prohibit this.
- C7. **Proceedings**
- C7.1 This protocol does not alter the statutory time limits for starting Court proceedings. A Claimant is required to start proceedings within those time limits.
- C7.2 If proceedings are for any reason started before the parties have followed the procedures in this protocol, the parties are encouraged to agree to apply to the court for a stay whilst the protocol is followed.