

APPENDIX 2



Pre-Action Protocol for Professional Negligence

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

Contents

| Title | Number |
|---|--------|
| Introduction | |
| Scope of the protocol | 1 |
| Aims of the protocol | 2 |
| Compliance | 3 |
| Limitation | 4 |
| The protocol | |
| The Protocol Preliminary Notice | 5 |
| Letter of Claim | 6 |
| Letter of Acknowledgment | 7 |
| Investigations | 8 |
| Letter of Response and Letter of Settlement | 9 |
| Documents | 10 |
| Experts | 11 |
| Alternative Dispute Resolution | 12 |
| Stocktake | 13 |
| Court proceedings | 14 |

INTRODUCTION

1 Scope of the Protocol

1.1 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.

1.2 'Professional' is deliberately left undefined in the protocol. If it becomes an issue as to whether a respondent to a claim is or is not a professional, parties are reminded of the overriding need to act reasonably (see paragraph 3.3 below). Rather than argue about the definition of 'professional', therefore, the parties are invited to use this Protocol, adapting it where appropriate.

1.3 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 court proceedings have commenced, in which case the parties should comply with the protocol before either party commences court proceedings.

1.4 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.

1.5 If at any time prior to the commencement of court proceedings the claimant decides not to proceed with the claim it should notify the professional as soon as reasonably practicable.

2 Aims of the Protocol

2.1 This Protocol sets out a code of good practice and contains the steps which parties should generally follow before commencing court proceedings in respect of a professional negligence claim.

2.2 The aims of the protocol are to enable parties to prospective claims to:

- (a) understand and properly identify the issues in dispute in the proposed claim and share information and relevant documents;
- (b) make informed decisions as to whether and how to proceed;
- (c) try to settle the dispute without proceedings or reduce the issues in dispute;
- (d) avoid unnecessary expense and keep down the costs of resolving the dispute; and
- (e) support the efficient management of proceedings where court proceedings cannot be avoided.

2.3 This protocol is not intended to replace other forms of pre-action dispute resolution (such as those mentioned in paragraph 12 of this protocol). 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 court proceedings are started, adapting it where appropriate.

3 Compliance

3.1 The courts will treat the standards set out in this protocol as the normal reasonable approach for parties to a professional negligence claim. If court proceedings are started, it will be for the court to decide whether sanctions should be imposed as a result of substantial non-compliance with this protocol. Guidance on the courts' likely approach is given in the Practice Direction – Pre-Action Conduct and Protocols. The court is likely to disregard minor or technical departures from this protocol and so should the parties as between themselves.

3.2 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. Accordingly, in the event that the protocol does not specifically address a problem, the parties should comply with the spirit of the protocol by acting reasonably.

4 Limitation

4.1 The protocol does not alter the statutory time limits for commencing court proceedings. A claimant is required to start proceedings within those time limits. However, the claimant can request and the parties can agree a standstill agreement to extend the period in which a limitation defence will not be pursued. Alternatively, a claimant may commence court proceedings and invite the professional to agree to an immediate stay of the proceedings to enable the protocol procedures to be followed before the case is pursued.



THE PROTOCOL

5 Preliminary Notice

5.1 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.

5.2 This letter (the "Preliminary Notice") 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; and
- (c) if possible, a general indication of the financial value of the potential claim

5.3 The Preliminary Notice should be addressed to the professional and should ask the professional to inform his professional indemnity insurers, if any, immediately.

5.4 The Preliminary Notice should be acknowledged in writing within 21 days of receipt. Where the claimant is unrepresented the acknowledgment should enclose a copy of this protocol.

5.5 If, after 6 months from the date of the Preliminary Notice, the claimant has not sent any further correspondence to the professional regarding the claim, the claimant should notify the professional of its intentions with regard to the claim, i.e. whether the claimant is pursuing the claim, has decided not to pursue it or has yet to reach a decision and, if the latter, when the claimant envisages making a decision.

6 Letter of Claim

6.1 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.

6.2 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) Any reasonable requests which the claimant needs to make for documents relevant to the dispute which are held by the professional.
- (d) The allegations against the professional. What has been done wrong or not been done? What should the professional have done acting correctly?
- (e) An explanation of how the alleged error has caused the loss claimed. This should include details of what happened as a result of the claimant relying upon what the professional did wrong or omitted to do, and what might have happened if the professional had acted correctly.
- (f) 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.
- (g) 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.

(h) A request that a copy of the Letter of Claim be forwarded immediately to the professional's insurers, if any.

6.3 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.

6.4 If the claimant has sent other Letters of Claim (or equivalent) to any other party in relation to the same dispute or a related dispute, those letters should be copied to the professional.

7 Letter of Acknowledgment

7.1 The Letter of Claim should be acknowledged in writing within 21 days of receipt.

7.2 Where the claimant is unrepresented, the Letter of Acknowledgment should enclose a copy of this protocol unless provided previously.

8 Investigations

8.1 If the professional considers that, for any reason, the Letter of Claim does not comply with section 6 above, the professional should as soon as reasonably practicable inform the claimant why and identify the further information which the professional reasonably requires.

8.2 The professional will have three months from the date of the Letter of Acknowledgment to investigate and respond to the Letter of Claim by the provision of a Letter of Response and/or a Letter of Settlement (as to which, see paragraph 9 below).

8.3 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 and, in any event, as long as possible before the end of the three month period. The professional should explain what is being done to resolve the problem and when the professional expects to be in a position to provide a Letter of Response and/or a Letter of Settlement. The claimant should agree to any reasonable requests for an extension of the three month period.

8.4 The parties should supply promptly, at this stage and throughout, whatever relevant information or documentation is reasonably requested.

8.5 If the professional intends to claim against someone who is not currently a party to the dispute, that third party should be identified to the claimant in writing as soon as possible.



9 Letter of Response and Letter of Settlement

9.1 As soon as the professional has completed his investigations (and in any event within 3 months of the Letter of Acknowledgment unless an extension has been agreed), the professional should send to the claimant:

(a) a Letter of Response, or

(b) a Letter of Settlement; or

(c) both.

9.2 The Letter of Response

9.2.1 The Letter of Response should 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 explain why and 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 when he will be in a position to provide an estimate. The professional's estimate should be sent to the claimant as soon as reasonably possible.

(f) to the extent not already exchanged in the protocol process, key documents should be identified, copied and enclosed.

9.2.2 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 court proceedings, the court may decide, in its discretion, to impose sanctions.

9.3 The Letter of Settlement

9.3.1 Any Letter of Settlement may be an open letter, a without prejudice letter, a without prejudice save as to costs letter or an offer made pursuant to Part 36 of the Civil Procedure Rules and should be sent if the professional intends to make proposals for settlement of all or part of the claim. It should:

(a) set out the professional's views 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 it is already included in a Letter of Response.)

(b) make a settlement proposal or identify any further information which is required before the professional can formulate its proposal.

(c) where additional documents are relied upon, copies should be provided.

9.4 Effect of Letter of Response and/or Letter of Settlement

9.4.1 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 court proceedings.

9.4.2 In any other circumstance, the professional and the claimant should commence negotiations with the aim of resolving the claim within 6 months of the date of the Letter of Acknowledgment (NOT from the date of the Letter of Response).

9.4.3 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 court proceedings.

10 Documents

10.1 This protocol is intended to encourage the early exchange of relevant information, so that issues in dispute can be clarified or resolved. The claimant should provide key documents with the Letter of Claim and (at any time) any other documents reasonably requested by the professional which are relevant to the issues in dispute. The professional should

provide key documents with the Letter of Response, to the extent not provided by the claimant, and (at any time) any other documents reasonably requested by the claimant which are relevant to the issues in dispute.

10.2 Parties are encouraged to cooperate openly in the exchange of relevant information and documentation. However, the protocol should not be used to justify a 'fishing expedition' by either party. No party is obliged under the protocol to disclose any document which a court could not order them to disclose in the pre-action period under CPR 31.16.

10.3 This protocol does not alter the parties' duties to disclose documents under any professional regulation or under general law.

11 Experts

11.1 In professional negligence disputes, separate expert opinions may be needed on:

- (a) breach of duty;
- (b) causation; and/or
- (c) the quantification of the claimant's claim.

11.2 It is recognised that in professional negligence disputes the parties and their advisers will require flexibility in their approach to expert evidence. The parties should co-operate when making decisions on appropriate expert specialisms, whether experts might be instructed jointly and whether any reports obtained pre-action might be shared and should at all times have regard to the duty in CPR 35.1 to restrict expert evidence to that which is reasonably required to resolve the dispute.

11.3 When considering what expert evidence may be required during the protocol period, parties should be aware that any expert reports obtained pre-action will only be permitted in proceedings with the express permission of the court.



12 Alternative Dispute Resolution

12.1 Court proceedings should be a last resort. The parties should consider whether some form of alternative dispute resolution procedure might enable them to settle their dispute without commencing court proceedings, and if so, endeavour to agree which form to adopt.

12.2 Parties may negotiate to settle a dispute or may use a form of ADR including:

- (a) mediation – a third party facilitating a resolution;
- (b) arbitration – a third party deciding the dispute;
- (c) early neutral evaluation – a third party giving an informed opinion on the dispute;
- (d) adjudication – a process by which an independent adjudicator provides the parties with a decision that can resolve the dispute either permanently or on a temporary basis, pending subsequent court determination; and
- (e) Ombudsmen schemes.

(Information on mediation and other forms of ADR is available in the Jackson ADR Handbook (available from Oxford University Press) or at—

- <http://www.civilmediation.justice.gov.uk/>
- http://www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_taking_legal_action_e/alternatives_to_court.htm

12.3 If court proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's refusal to engage or silence in response to an invitation to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional costs.

13 Stocktake

13.1 Where the procedure set out in this protocol has not resolved the dispute between the parties, they should undertake a further review of their respective positions. The parties should consider the state of the papers and the evidence in order to see if proceedings can be avoided and, at the least, narrow the issues between them.

14 Court proceedings

14.1 Unless it is necessary (for example, to obtain protection against the expiry of a relevant limitation period (see paragraph 4 above)) 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 9.4.1 above);
or

(b) the end of the negotiation period (see paragraphs 9.4.2 and 9.4.3 above).

14.2 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.

14.3 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 court proceedings.

14.4 If proceedings are commenced they should be served in accordance with Part 6 of the Civil Procedure Rules."

