

## **Pre-Action Protocols**

### What are Pre-Action Protocols?

Pre-Action Protocols were introduced as part of a raft of measures resulting from the Civil Justice Reforms of 1999. The aim of the Civil Justice Reforms was to reduce the costs and delays associated with litigation. The role of pre-action protocols is to provide guidance to disputing parties as to how they should conduct themselves. There are two protocols that apply to the vast majority of professional indemnity disputes, namely:

1. The Construction and Engineering Pre-Action Protocol (“CEP”), effective from October 2000;
2. The Professional Negligence Pre-Action Protocol (“PNP”), effective from July 2001.

The CEP applies to disputes involving construction professionals such as architects, engineers and quantity surveyors, as well as contractors. The PNP applies to disputes involving all other professionals.

### How do they work?

Both protocols encourage the parties to adopt a “cards on the table” approach, by disclosing sufficient information to allow the other party (or parties) to the dispute to understand their position. In this way, it is hoped that many disputes will be resolved without the need to commence legal proceedings at all. Even if this is not the case, the areas of dispute should be narrowed down to key issues, which will enable any subsequent litigation to be conducted effectively.

The two protocols differ in some respects in the procedures that are utilised to achieve the above aim.

### How do the protocols fit in with other dispute resolution procedures?

There are a number of different options available for resolving disputes involving professionals, including mediation, arbitration and adjudication. This is expressly recognised in the PNP, and the disputing parties are encouraged to utilise whatever method or combination of methods are best suited to comply with the objectives of the Civil Justice Reforms. The CEP recognises that the protocol is not intended to apply where proceedings are contemplated in order to enforce an adjudicator's award under the Housing Grants, Construction and Regeneration Act 1996.

### Do the protocols simply amount to a charter to complain?

Unfortunately, the number of spurious complaints against professionals shows no sign of abating. However, this trend was noticeable before the protocols were introduced, and there does not appear to be any evidence to suggest that the number of spurious complaints has increased since their introduction. In fact, the use of pre-action protocols may assist the position of professionals, in that:

1. Potential claimants may be discouraged by the amount of information that is required to complete a Letter of Claim;
2. Spurious claims can perhaps be identified at an earlier stage.

### What are the penalties for non-compliance?

Both protocols emphasise that it is a matter for the Courts to decide what sanctions, if any, should be imposed on parties who fail to comply with some or all of the provisions of the relevant protocol. The PNP states that the Courts are unlikely to penalise minor or purely technical breaches of the protocol, and it encourages the disputing parties to do likewise.

### Conclusion

Both protocols were given a warm reception by solicitors, judges, professionals and the media when they were introduced, and they do appear to have been effective in helping to reduce the number of disputes that litigate. However, the suspicion remains that some parties comply with the relevant protocol through fear of being subjected to sanctions by the Court if the dispute does litigate, rather than choose to comply with those parts of the protocol when they perceive that it is in their interests to do so, whilst ignoring other parts that are perceived to be less beneficial.