No pedantry with pragmatic Protocol

Ian Pease reviews the application and misapplication of the Pre-Action Protocol for Construction and Engineering Disputes

Ian Pease is an associate partner at Davies Arnold Cooper, specialising in construction and engineering law

The Pre-Action Protocol for Construction and Engineering Disputes is there to promote settlements and save costs. It has been in force since 2000 and was revised in April 2007. A brace of recent decisions from the Technology and Construction Court (TCC) has addressed how it operates in practice.

The Protocol operates in conjunction with CPR Part 60, which governs business in the TCC, and the starting point is that failure to comply with the Protocol will lead to a stay of any proceedings until that default is rectified. Of course, in these difficult times, with recession looming, there is always an incentive in cases of dispute to commence court action sooner rather than later. The Protocol process can seem like a needless delay and can, in practice, take several months to complete. However, like runners on their blocks, disputants may lose more than they gain by being too fast off the mark.

The Protocol itself has five main aspects:

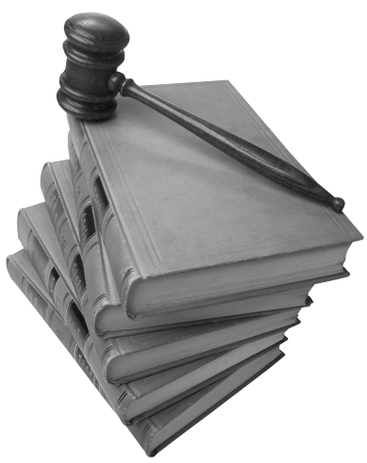
(1) Informing the defendant of the case it has to meet, and allowing it a chance to respond. This is the letter of claim and response procedure, the defendant having 28 days in which to make the response and take any point on jurisdiction.

(2) Thereafter the parties should meet (on a without prejudice basis) to see to what extent agreement is possible and whether they can be helped by any form of ADR.

(3) If after all that they still cannot reach agreement they are enjoined to try to reach agreement on aspects of the litigation (experts and disclosure).

(4) If a claimant is in limitation difficulties then it can commence proceedings without compliance, but must also apply to the court for directions as to the timetable.

(5) However, there are certain situations in which it does not apply: interim injunctions; summary judgment applications; enforcement actions following adjudications; and applications following an ADR.



Orange Personal Communications Services Ltd v Hoare Lea (a firm) [2008]

Both the recent cases are judgments of Akenhead J. In the first, *Orange v Hoare Lea*, Hoare Lea (a Part 20 defendant) applied for a stay of those proceedings until the Protocol had been complied with.

There had been a flood of premises during a fit-out contract. The question was: who was liable? Orange was the claimant and from its pleadings it is clear that the primary case was against the contractor and its sub-contractors. However, to protect itself in the event that it was wrong in this assumption (and the contractors were right that the liability rested with Hoare Lea), and also because limitation was looming, it issued third-party proceedings against its designers, Hoare Lea. The judge remarked:

> Thus it is absolutely clear from this pleading that Orange does not primarily consider that Hoare Lea had anything to do, culpably, with the failure and flood which occurred. The claim by Orange against Hoare Lea is contingent upon the failures [by Hoare Lea] put forward by Kier and/or Haden Young being established.

The particulars of claim against Hoare Lea were served seven months after the (unsuccessful) conclusion of the Protocol process against the contractors. By this time, disclosure had already taken place in the action.

It is evident from his judgment that Akenhead J agreed with the sentiment expressed by Jackson J in *Alfred McAlpine Capital Projects Ltd v SIAC Construction (UK) Ltd* [2006] that, in relation to parties that are brought into an ongoing action, as Hoare Lea was, there is no simple formula or universal answer to the question as to whether the Protocol should apply. Jackson J (in his usual helpful fashion) had set out the factors as follows:

(1) When was it known that the party in question was going to be joined in the action?

(2) What information about the action and the underlying dispute was given to that party before joinder and when?

(3) How large a part does the new party play in the action as a whole?

(4) What stay, if any, could be accommodated in the proceedings against the new party without jeopardising the overall timetable?

(5) Does justice require that the whole timetable should be put back and that a new trial date should be fixed?

(6) Could the new party be compensated in costs for any non-compliance with the Protocol? If so, should the question of costs be addressed immediately or should that question be addressed at the end of the action?

(7) Is there any way (other than a stay) within the parameters of the existing timetable by which the new party could be put in the same position that it would occupy if the Protocol had been followed?

He added:

> More importantly, however, I do not think that the Protocol process would have achieved anything during that period [the pre-Part 20 proceedings period]...

Akenhead J characterised this approach as 'pragmatic' and went on to make his own list of considerations based around the 'overriding objective':

(a) The overriding objective (in CPR Part 1) is concerned with saving expense, proportionality, expedition and fairness; the Court's resources are a factor. This objective whilst concerned with justice justifies a pragmatic approach by the Court to achieve the objective. The overriding objective is recognised even within the Protocol as having a material application.

(b) The Court is given very wide powers to manage cases in CPR Part 3 and elsewhere so as to achieve or further the overriding objective.

(c) The Court should avoid the slavish application of individual rules, practice directions or Protocols if such

application undermines the overriding objective.

(d) Anecdotal information about the effectiveness of the Pre-Action Protocol process in the TCC is mixed. It is recognised as being effective both in settling disputes before they even arrive in the Court and narrowing issues but also as being costly on occasion and enabling parties to delay matters without taking matters very much further forward.

(e) Whilst the norm must be that parties to litigation do comply with the Protocol requirements, the Court must ultimately look at non-compliances in a pragmatic and commercially realistic way. Non-compliances can always be compensated by way of costs orders.

With those general factors in mind the judge was minded to dismiss the application for the good pragmatic reason that:

> Hoare Lea already has in its possession Orange's Particulars of Claim and the pleadings in the earlier proceedings which equate to a letter of claim under the Protocol. Hoare Lea's defence will equate to Hoare Lea's Protocol response...

So the letter of claim and response procedure had already taken place, and furthermore:

> It is unlikely that any bilateral discussions between Hoare Lea and Orange would narrow issues significantly because Orange's published primary case is not against Hoare Lea at all... Hoare Lea's involvement in these disputes is to some extent provisional and only arises if the drainage, waterproofing and leak alarm issues turn out to be evidentially relevant.

The Court saw through to the end game, concluding:

> A settlement is much more likely if all the parties participate in the ADR planned for the spring. A timetable can be achieved which will enable this to happen.

Although Hoare Lea had lost, Orange could not feel smug in its victory, for the judge went on to outline its various procedural failures, particularly not bringing its intention of issuing against Hoare Lea to the Court's attention when agreeing and presenting agreed directions. Orange was duly penalised on costs, its own being disallowed and having to pay a third of Hoare Lea's.

The judge was not going to take a technical or nit-picking attitude to the alleged breaches, but instead looked at the substance of the communications and to asked himself how (if at all) the actions had not complied with the object of the whole exercise.

TJ Brent Ltd & anr v Black & Veatch Consulting Ltd [2008]

The second case involved a leak of oil causing damage to the employer's premises and a contribution claim against the defendant consulting engineers by the contractor. The contractor settled against the employer but the engineers complained that, although there had been correspondence as to the nature of the claim by the contractor against them, there had not been a formal letter of claim by the time the settlement took place. This meant that the engineers were not informed about the final claim against them, the contractor's address or the experts upon whose evidence the contractors intended to rely. The issue of proceedings by the contractors appears again to have been driven by the imminent advent of limitation.

With the background of the *Orange v Hoare Lea* case, it is not difficult to guess the attitude of Akenhead J to these arguments. He was not going to take a technical or nit-picking attitude to the alleged breaches, but instead looked at the substance of the communications and asked himself how (if at all) the actions had not complied with the object of the whole exercise. The judge's goal-based philosophy is shown by the following passage that perhaps did not augur well for the success of the application:

> I am extremely disappointed that, in the light of what was clearly an agreement to stay these proceedings [for mediation], the defendant has felt it necessary to pursue this application. It is within its rights technically to do so because it issued the application on 9 May, before the stay came into place, but I had certainly left that directions hearing believing that the parties had embarked on a sensible course to seek to resolve the disputes between them.

The application was dismissed, with the judge remarking:

> ... whilst it was not incumbent upon the Defendant as a matter of practice or procedure to have to raise the issue of the Pre-action Protocol process once the Particulars of Claim were served, the fact that they did not ask or suggest in October 2007 or at any time between then and early May 2008 that a Pre-action Protocol process would assist undermines the stance which they have taken.

In other words, if you think that the Protocol has not been complied with, it is advisable to raise the matter promptly. Further, the judge suspected that it was only being raised for tactical reasons to do with the forthcoming mediation, saying:

> The Court should be slow to allow the rules to be used in those circumstances for one party to obtain a tactical or costs advantage where in substance the principles of the Protocol have been complied with.

Overall, this second case is the more obvious case of a mistaken application, especially as the parties (and the Court) patently had the advantage of seeing the judgment in the *Orange v Hoare Lea* case. It should be a warning to applicants that the courts, whilst upholding the need for the Protocol to be used, will not put up with applications citing minor defaults where the Protocol has been followed in substance. ■

Alfred McAlpine Capital Projects Ltd v SIAC Construction (UK) Ltd [2006] BLR 139

Orange Personal Communications Services Ltd v Hoare Lea (a firm) [2008] All ER (D) 169 (Feb)

TJ Brent Ltd & anr v Black & Veatch Consulting Ltd [2008] All ER (D) 396 (Jun)