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The construction & energy law specialists

Pre-action protocol: Room for improvement?

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The TCC pre-action protocol is due for review – but do solicitors working in construction law think it needs major change? Dominic Helps and Simon Tolson of TeCSA decided to find out.

The introduction of the pre-action protocol was one of the central features of the Woolf Reforms of the late 1990's designed to clean up the litigation system and promote access to civil justice in the future. The protocol was intended to operate as a final filter designed to prevent parties from becoming sucked into the expensive litigation process without having explored alternative ways of resolving their differences. Lord Woolf was firmly of the view that helping parties to avoid costly court battles was clearly in their interests and, by saving valuable court time and other resources, would also promote access to justice.

Not everyone agreed that the pre-action protocol (PAP) process enhanced access to justice. For some, it was an unwelcome interference by the system which resulted in unnecessary front-end loading of costs.

The Technology and Construction Solicitors Association (TeCSA) was heavily involved in drafting the original version of the PAP that applies in the Technology and Construction Court (TCC PAP) in 2000 and with the review in 2007 and 2011. It has frequently monitored the mood of its members, all experienced construction specialists, in conferences and surveys. What we have consistently found is that, although our members would welcome improvement in some areas, the overwhelming view is that the PAP has a high success rate in promoting settlement.

Perhaps it should come as no surprise that, of the various parts of the legal community, it is the solicitors who feel most strongly about preserving the PAP in its existing mandatory form. That is because it is solicitors who handle cases through the PAP stage and therefore see how often it can lead to a direct settlement or at least to further discussions between the parties. For the main part, barristers and the judiciary will only experience the PAP process where it has failed to achieve its objective, frequently as a result of abuse by one of the parties.

The Civil Procedure Rules Committee is currently reviewing the operation of the PAP through all its divisions and the only one that remains to be scrutinised is the TCC version. Rumours have been circulating that the days of the TCC PAP at least in a mandatory form, may be numbered. At TeCSA we felt that such a course would not correspond with what we understood to be the view of both our members and our construction industry clients.

We decided that the most constructive thing we could do in the circumstances was to engage a leading independent market research company to carry out an extensive survey that would tell us whether our reading of the situation was accurate and which would provide valuable evidence to assist the TCC judges with their review of the operation of the TCC PAP.

The first element of the survey project, which was carried out over a period of approximately six months, involved collecting relevant information concerning the use of the TCC PAP over the last three years from law firms specialising in construction. Twenty such law firms participated in this process, providing detailed information covering a total of 216 construction disputes involving the use of the TCC PAP. The market research company then conducted extensive interviews with

experienced litigators from 21 law firms. In parallel, and arguably the most important part of the process, the market research company carried out interviews with a total of 18 construction industry companies comprising general contractors, specialists, consultants and client organisations to understand the industry's perception of the process.

The results of the survey have now been published in the shape of a report that can be accessed from the TeCSA website (www.tecsa.org.uk/news). They exceeded our expectations. No less than 95% of the respondents thought that the TCC PAP was a valuable pre-action mechanism. 87% feel that it is creating access to justice. Although 84% of respondents felt that the protocol remains up to date with the needs and dynamics of pre-action litigation processes, interestingly 49% were in favour of some form of modification.

The report contains plenty of ideas about possible modifications to the TCC PAP and unsurprisingly there is no general consensus on what they should be. It may be worth looking into producing a more informal and abbreviated version for really small disputes for which the existing PAP might be considered disproportionate.

Finally, we really hope that the judiciary will give serious consideration to finding an appropriate mechanism for policing the PAP process to deal with the problem of deliberate abuse.

Our overall reading of the report, however, is that there is a consensus that the PAP process should remain mandatory. We believe that is crucial to its continued success.

Dominic Helps is a consultant for construction specialist law firm Corbett & Co. Simon Tolson is senior partner in Fenwick Elliott. They are writing here in their capacity as members of the Technology and Construction Solicitors' Association (TeCSA) committee, of which Simon is the immediate past chairman.

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