The Pre Action Protocol for Housing Disrepair Cases [May 2004]

by Simon Trigger

INTRODUCTION

1. The Pre Action Protocol for housing disrepair claims came into force on 8th December 2003. This talk is designed to identify a number of important issues within the Protocol and their likely effect in practice. It is however important to consult the actual Protocol when dealing with a potential Disrepair Claim to ensure that it is complied with as fully as possible.

2. The stated objectives of all Protocols are:

    a) To encourage the exchange of early and full information about the prospective legal claim

    b) To enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings

    c) To support the efficient management of proceedings where litigation cannot be avoided.

3. As such in common with other Pre Action Protocols the aim of the Disrepair Protocol is to avoid litigation where possible and to reduce the complexity of any litigation that is unavoidable.

4. The Protocol also encourages parties to avoid Litigation where possible by the means of alternative dispute resolution procedures. This is important to observe. The Courts are increasingly of the view that a failure to attempt Mediation prior to commencing litigation can be viewed as unreasonable conduct that and should can be penalised in Costs. Whether this will also be the case in Disrepair claims where there is often a greater degree of urgency remains to be seen.

THE PROTOCOL: Its Aims and Ambitions

5. The specific aims of the Disrepair Protocol are:

    a) To avoid unnecessary litigation
    b) To promote the speedy and appropriate carrying out of any repairs which are the landlords responsibility.
    c) To ensure that tenants receive any compensation to which they are entitled as speedily as possible
    d) To promote good pre litigation practice
    e) To keep the costs of resolving disputes down.

6. As such it is not a stated aim of the Protocol to protect Landlords from unmeritorious or speculative claims. The Protocol is instead centred upon ensuring speedy and adequate protection for the Tenant. Of course the result of good pre litigation practice is that unmeritorious or speculative claims should be weeded out. However this is not a stated aim or intention of the Protocol.

PROTOCOL: Applicability

7. The Protocol is for Disrepair Claims. For the purposes of the Protocol a disrepair claim is a civil claim arising from the condition of residential premises. It is expressly defined to include related personal injury claims. The protocol, for obvious reasons, is not intended to cover disrepair claims that are brought by way of a counter claim or set off.

8. As such the Protocol is expressly intended to cover claims brought under, but not limited to, section 11 of the LTA 1985, section 4 of the DPA 1972, nuisance, negligence and/or an express term of a tenancy or lease. The Protocol does not extend to claims under the Environmental Protection Act 1990.

9. The Protocol is designed for Fast Track sized claims but it should be followed for Small Track and Multi Track claims as well.

EARLY NOTIFICATION LETTER: Annexe A

10. In all claims notice of the potential claims ought to be given to the Landlord as soon as possible. However in particularly urgent cases an Early Notification Letter can be sent before a formal Letter of Claim is sent. This is a new concept which reflects the potentially urgent nature of a disrepair claim.

11. The Early Notification Letter is not supposed to replace direct reporting of defects to Landlords by existing reporting channels. Instead the Early Notification is appropriate in cases where despite the Landlords knowledge the matter remains unresolved.

12. The Early Notification Letter ought to set out certain prescribed information:

    a) The Tenants name, address of property, tenants address if different, tenants telephone number and details of when access is available.
    b) Details of the defect in the form of a Schedule if appropriate. **Annexe G** of the Protocol sets out a Draft Schedule which can be used for this purpose.
    c) Details of previous notification or details of why the Tenant believes that the Landlord has knowledge of the defect.
    d) The Proposed Expert, if any
    e) Proposed Letter to the Expert (**Annexe C**)
    f) Disclosure of all relevant documents readily available.

13. A request should also be made for disclosure from the Landlord. This request should be for all relevant documents including but not limited to:

    a) Copy of tenancy agreement
    b) Documents or computerised records relating to Notice given, disrepair reports, inspection records or repair works.

14. Finally unless the Tenant is acting in person the Early Notification Letter ought to include authorisation for the release of the information requested.

15. A copy of the Protocol ought also to be sent to the Landlord in all case where it is reasonable to assume they will not have access to a copy (eg they are an individual or a small organisation). Where there is doubt a copy of the Protocol ought to be sent to the Landlord.

LETTER OF CLAIM: Annexe B

16. A Letter of Claim ought to be sent at the "earliest reasonable opportunity". A Letter of Claim should still be sent when an Early Notification Letter has been used. In addition to the information set out in the Early Notification Letter (which must be included if no Early Notification Letter was sent) the Letter of Claim ought to include the following information.

    a) The history of defects including attempts to rectify
    b) Effect of defects on Tenant, including personal injuries.
    c) Details of the identities of all people who plan to make a personal injury claim. This is wider than simply the Tenant of the property. The details of all potential personal injury Claimants ought to be included in the Letter of Claim.
    d) Details of any Special Damages (**Annexe E**)

17. Where a Claim has a Personal Injury element to it the Personal Injury Pre Action Protocol ought to be followed unless the personal injury is such that it does not warrant two separate Protocols.

18. In practice any claim where Expert evidence as to the Personal Injury will be required should follow the Personal Injury Protocol. Conversely where the injury is minor so that all that will be adduced is a GP letter then the Disrepair Protocol alone can be followed. If the Disrepair claim is urgent it may be

appropriate to issue separate claims for the Disrepair and the Personal Injury which can be consolidated at a later date.

LIMITATION

19. It is important to note that the Protocol time limits do not affect Statutory Time Limits. As such if a statutory time limit is about to expire then the Tenant ought to issue the claim in any event unless the Landlord confirms that they will not rely upon Limitation as a defence.

THE LANDLORD: Initial Response

20. The Landlord should normally reply to the First Letter (whether it is an Early Notification Letter or a Letter of Claim) within 20 working days of receipt ("the Initial Response").

21. Working days is defined in the Glossary (4.10) as not including Saturdays, Sundays or Bank Holidays. Receipt is defined as 2 days after the date of the letter (4.5c). The Landlord may make a written request for additional time. In all cases if the matter comes before the Court it will be a question of whether each party has acted reasonably.

22. In the Initial Response the Landlord ought to address the question of whether the proposed Expert and Letter of Instruction are agreed and if not what their proposals are and whether if separate Experts are to be instructed a Joint Inspection of the property is agreed. The Landlord should also include any requested Disclosure in this Initial Response. This Initial Response ought to be sent to the Tenant within 20 working days in all cases.

23. Where the Landlord is not an individual they ought to designate an individual to act as the point of contact for the Tenant. The details of this individual ought to be sent to the Tenant as soon as possible once they become aware of the claim.

24. If the Landlord does not reply to the Early Notification Letter within 20 days then a Letter of Claim ought to be sent by the Tenant.

THE LANDLORD: Detailed Response

25. On receipt of a Letter of Claim, whether or not an Early Notification Letter was sent, the Landlord has 20 working days to respond in detail ("the Detailed Response").

26. It is important to note that this 20 day period runs from any of the date of receipt of the Letter of Claim **or** of receipt of the Single Joint Experts Report **or** of receipt of the Experts Agreed Schedule following a Joint Inspection.

27. In addition to the information provided in the Initial Response (if two Responses are being made by the Landlord) the Landlord ought to include in his Detailed Response:

    a) Whether liability is admitted and if so in respect of which defects. If liability is disputed in whole or in part reasons ought to be given.

    b) Any allegations of lack of notice or difficulties in gaining access

    c) A full Schedule of works, including start/completion dates.

    d) Any offers on compensation

    e) Any offers on costs

28. It should be noted that failure to comply with the above time limits is a breach of the Protocol that can give rise to sanctions.

EXPERTS: General

29. The Protocol sets out some useful reminders for Tenants. It is emphasised that not all claims will require an Expert. Tenants are also reminded that photographs of the alleged Disrepair both before and after remedial works may be useful. Interestingly the Protocol makes express reference to the use of video footage. The lack of video play back facilities at many Courts may make this novel innovation obsolete. However it is to be recommended. Finally details for three professional bodies that can supply lists of Experts for use in litigation are set out in paragraph 4.6(a). This is a useful starting point for obtaining a relevant expert.

EXPERTS: The Procedure

30. If the Landlord does not object within 20 working days to the Expert proposed by the Tenant in the Initial Letter then they should be instructed as a Single Joint Expert. A draft letter of instruction is set out in Annexe C.

31. If the Landlord accepts the proposed Expert but disputes the Letter of Instruction then two letters of instruction may be set to the Expert. A copy of the second letter should be sent to the Tennant.

32. If there is disagreement about which Expert to instruct then there should be a Joint Inspection of the property by the two Experts. If an expert is to attend an inspection on behalf of the Landlord then he ought to notify the Tenant's Expert and the Tenant's solicitor of this fact.

33. When an Expert is instructed they should be instructed to provide a schedule of works, a list of urgent works and an estimate for the cost of repairs. The Expert should also comment upon all items of disrepair that the Landlord ought reasonably to have known of OR that the expert ought reasonably to report on. It is to be hoped that this rather vague definition will become more workable in practice as Experts became more aware of the needs of the Court in Disrepair cases.

EXPERTS: Status of a Single Joint Expert

34. The effect and status of a Single Joint Expert is likely to be the same as in the Personal Injury sphere. If a Single Joint Expert has been instructed a party is not precluded from seeking to obtain their own Expert evidence at a later stage in the proceedings. However it is likely that the party seeking to instruct a new Expert will have to show a substantial (as opposed to fanciful) reason for wishing to instruct their own Expert.

35. In the Personal Injury sphere the Courts do now expect a party seeking to move away from a Joint Expert to follow a clear procedure. The first step is to ask questions of the Joint Expert. It is hoped that these questions will often resolve the issue. If questions do not resolve the issue then if the party can show that there is a substantial objection to the Joint Experts evidence they may be permitted to adduce their own Expert evidence.

36. For further guidance on this issue please see Daniels v Walker [2000] 1 WLR 1382 and Cosgrove v Pattison The Times February 13th 2001

EXPERTS: Time Limits

37. Where there is a Joint Inspection or a Single Joint Expert the property ought to be inspected within 20 working days of the Initial Response. In urgent cases Experts may be instructed within a shorter time frame.

38. A Single Joint Expert should provide a copy of their report within 10 days of the Inspection.

39. Where there has been a Joint Inspection the Experts must produce a schedule of works detailing the areas of agreement and disagreement with reasons for the disagreement within 10 days of the Inspection.

40. This time frame is likely to place Experts under considerable time pressure and should be watched with care.

EXPERT: Costs

41. Where there is a Single Joint Expert the costs ought to be paid equally between the parties. Where there is a Joint Inspection each party will bear its own costs in full.

42. The Experts terms of payment ought to be agreed at the outset. This should include the matter of subsequent questions to the Expert.

COSTS: Annexe F

43. If the claim is settled without litigation “on terms which justify bringing it” the Landlord ought to pay to the Tenant his reasonable costs OR out of pocket expenses. A draft statement of costs is set out at Annexe F.

44. There is no definition of “which justify bringing it” and it will be interesting to see whether this is an area that leads to dispute. It is also of note that where a claim did not justify bringing it there appears to be no adverse costs consequences for the Tenant. Therefore the Landlord appears to have no redress for unmeritorious or speculative claims that lead to an Expert being instructed and costs being incurred but no litigation. This appears to be in line with the Focus of the Protocol as set out in its Aims.

SANCTIONS: Failure to Comply

45. The Protocol is clear. Unreasonable failure to comply with the Protocol permits the Court to order parties to pay costs OR be the subject of other sanction. This is comparable to the other published Protocols.

46. In practice the Courts have given the Protocol a high status. A failure to follow the Protocol will almost invariably require a sound justification. A failure to

be able to explain such a failure often leads to an adverse costs order. Examples of costs orders frequently made for failure to comply with the relevant Protocol are Indemnity Costs orders or the disallowing of costs on issues that may have been resolved by adherence to the Protocol.

47. It is important to bear in mind however that the Court does have the full range of sanctions open to it for failure to comply with the Protocol. Examples of other sanctions that have been made are the disallowing of Expert Evidence obtained other than by the Protocol, disallowing Special Damages claims and in the most serious cases Striking out of the Claim/Defence raised.

48. As such the practitioner who deals with a Disrepair Case would be well advised to follow the Protocol as carefully and accurately as possible in all cases. This is so even where the case appears to be straightforward and/or likely to be uncontested.

PROTOCOL: Conclusion

49. It is to be hoped that the Pre Action Protocol simply enshrines what was in reality occurring in Disrepair Claims. It is to be hoped that the full implementation of the Protocol will lead to a swifter and more open response from Landlords when faced with a potential claim. It is also to be hoped that the Protocol will ensure that the real issues in dispute between the parties will be identified and addressed at as early an opportunity as possible. In the Personal Injury sphere the Pre Action Protocol has seemingly led to far more cases settling without litigation and to far earlier resolutions to disputes.

50. There is however one area where future complications seem likely. If a claim has settled without litigation the Tennant is entitled to his costs if the settlement was on terms that “justified bringing the claim”. It is likely that these words will lead to disputes. It may well be that Landlords will argue that even in cases where repairs were carried out the claim was not justified as it could have been remedied without recourse to the Protocol.

51. As such those acting for Tenants would be well advised to ensure that in any settlement, including those prior to issue, the liability for costs incurred is addressed. Where the costs are not addressed it is likely to lead to satellite litigation over the meaning of “justified in bringing the claim”. This is to my mind an area where the Courts should in due course set out general guidance to assist practitioners.

52. The Courts will no doubt provide guidance in the future on the Protocol as it is worked through in practice by ever more innovative lawyers. As such the case reports should in the future be watched with care for decisions on the Protocol.

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