IN THE COUNTY COURT AT LIVERPOOL

Case No: J01BI062

35 Vernon Street
Liverpool
L2 2BX

Friday, 24th February 2023

Before:
HIS HONOUR JUDGE WOOD KC

B E T W E E N:

HEYS

and

SWINDON BOROUGH COUNCIL

NO APPEARANCE by or on behalf of the Claimant
MR WIGHTWICK appeared on behalf of the Defendant

JUDGMENT
(Approved)

HH JUDGE WOOD:

1. This is an appeal against the decision of Deputy District Judge Henley made in July of last year, whereby he directed the pre-action disclosure of what is effectively the housing file of the Claimant by the Defendant landlord. I granted permission to appeal on the papers on 11 August of last year, stating that the appeal was arguable both in relation to the substantive challenge and in relation to costs. I also indicated that there was a compelling reason for the appeal to be heard, because of the need for some local guidance. At the time I was not aware that other cases in other County Court jurisdictions have made determinations in similar matters, and that there had been an observation by the Court of Appeal on an application for permission to appeal.

**Background**

2. The Claimant is the tenant of 49 Beaulieu Close, Toothill, in Swindon, which she rents from the local council under an assured tenancy. She has been complaining that the landlord has been in breach of its repairing obligation for approximately two years. It is perhaps somewhat surprising that a matter which has no local connection to Liverpool has been determined in a local court at Birkenhead, but this has become a common practice with local firms providing services on a national basis in relation to housing disrepair. In this case, it is a firm based in Tithebarn Street, known as Next Gen Solicitors.
3. Whatever happens with this appeal and the original application, if ever there was a case justifying transfer to a local court, it is this one. However, in accordance with our local practice, the matter will not be transferred unless and until there is an application. Be that as it may, I can summarise the issues which arise on the appeal fairly briefly. The substance can be distilled from the two statements provided for the original application. Mr Gardiner for the Claimant and Mr Hashiri for the Defendant council.
4. A claim was first notified for disrepair in January of last year by a letter from the Claimant's solicitors, and it alleged defects in respect of a defective roof with a leak in the living room, damp and defective plaster on the living room ceiling and walls, and an active leak on the bedroom ceiling, causing damp and mould. It was indicated that the claim was being brought under the pre-action protocol for housing condition claims, which is the most recent incarnation of the relevant PAP. Included within the letter was a request for disclosure within 20 days of, amongst other things, documents relating to notice of disrepair and maintenance records. There were also other requests, which I do not need to deal with for the purposes of this appeal.
5. It appears to be not in dispute that this letter was a standard protocol letter. However, in response the council, if I might call them that, resisted the request for disclosure, pointing out that the tenant had not availed herself of the council's own complaints and arbitration procedures, including the right to repair scheme, and the housing ombudsman service scheme. This was said to be a breach of the pre-action protocol and there was an invitation provided to the Claimant to make a formal complaint following those procedures, with no agreement to provide any disclosure.
6. The letter of response also invited the Claimant to make a subject access request in relation to her housing file, this being the more important aspect as matters have turned out. The writer of the letter emphasised that there was a two-stage procedure involved in the complaint process, that had simply not been followed.
7. For the purposes of this appeal, it is fair to say that the housing file comprises all the relevant records which were included in the original request for disclosure, and as counsel agrees,

there is no need to distinguish between individual items. It was indicated in the same letter, that is the 14 February letter, that the maintenance department was arranging for a survey, and would require access to the property.

8. This response elicited a further reply from the Claimant's solicitors. It was denied that there had been a failure to follow the PAP, because the Claimant had made multiple complaints already during in-person inspections. There was a further request made for disclosure on the basis that the council had failed to provide the necessary housing file. It was denied that there was any obligation on the Claimant to pursue a subject access request, and the duty remained on the council to provide the documents.

9. Then there was a further flurry of correspondence, with the threat of an application under CPR 31.16, together with costs. Eventually, that application was issued in the Birkenhead County Court. In pursuing the application, Mr Gardiner asserted that the Defendant had been requested on several occasions to provide the necessary documentation and in failing to do so was in breach of the protocol, the spirit of which was to ensure that these matters could be disposed of early in a cost-effective manner. It was submitted that the requirements of CPR 31.6 were met, and that the disclosure of the file would reveal that the Defendant had received more than adequate notice of the need for repair in accordance with its statutory obligations.

10. It was also suggested that whilst costs would normally be borne by the party making the application, and in the circumstances, because of the Defendant's failures to co-operate, a costs order in favour of the Claimant was appropriate. The Defendant responded with Mr Hashiri's statement, in which he confirmed the stance of the council to deal with these matters without involving solicitors, but following the complaints procedure, and incurring the costs of an independent surveyor was an expensive and unnecessary step. In any event, in relation to the housing file, there was a straightforward, simple procedure which could be followed with a subject access request. It was submitted that the Claimant had failed to comply with the requirements of the protocol, which included avoiding unnecessary litigation. As an example of this, evidence was given following the correspondence that attempts had been made on three occasions to attend at the property for an inspection, but access had been refused.

11. Many of these applications are dealt with on paper, as I indicated in the course of exchange with counsel. However, because the battle lines were already drawn here, this was listed for a short hearing before the District Judge. It is somewhat unfortunate that the Court has only heard from one party in the case, and that the Claimant is not represented, although I have had a chance to read a skeleton argument provided by counsel. I understand that her solicitors have now gone into liquidation, and are no longer active. However, I am satisfied that the duty of candour on the part of the Defendant Appellants counsel, Mr Wightwick, has been fulfilled and that this Court has been made aware of all the material that might be relevant, including the authorities or any other court practices that might be relevant to the issues on the appeal.

**The decision appealed against**

12. I deal first with the decision of Deputy District Judge Henley, which is relatively short. These are his pertinent remarks, really beginning at paragraph two, where he says:

> "At best I understand the arguments on behalf of the respondent, they are that the applicant, instead of invoking whatever rights she may have under the protocol, should instead have used the subject access provisions under the general data protection regulations or the Data Protection Act 2018 as it now is, and that by reason that the applicant is herself in breach of the protocol, because indeed the case put forward on behalf of the respondent seems to be

> that ADR is a precursor to write a letter of claim. Having looked at the protocol, I agree that the layout is perhaps unhelpful to the point of being actively misleading, in that it deals with the alternative dispute resolution before it deals with the letter of claim".

13. He says then, in paragraph three:

> "I think there is a logical fallacy to that argument, simply because the letter of claim is the tenant effectively making a formal complaint, and while there is a dispute between the parties as to whether the Claimant applicant did in fact make complaints through the Defendant's complaints procedure in relation to these matters, should there not be such complaints".

14. He then goes on address the council's argument in paragraph four:

> "It is necessary, it seems to me, as a matter of simple logic, that there must be a claim before there can be alternative dispute resolution. (I use the word "claim" here in a non-technical sense), and that the notification for that must come from a letter of claim, and whether it is a formal notification in accordance with the protocol or an informal notification as to the nature and intent behind the claim. However, a formal letter of claim has been sent and it seems to me that the council's response is misguided in law".

15. The judge deals with the text of CPR 31.16 before concluding, in paragraphs six and seven as follows:

> "It seems to me, particularly bearing in mind some of the comments that the Defendant has made in their witness statement and argument denying that the applicant has in fact co-operated in this matter, disclosure before proceedings is desirable".

16. Then, paragraph seven:

> "Whilst I technically still have a discretion, it seems to me that the basis for exercising that discretion in the applicant's favour has been made out, and I am happy to make an order".

**Appellants case**

17. That is the sum total of the judgment of the Deputy District Judge. The Appellant's argument incorporated into the first two grounds of its appeal are that the judge first of all failed to consider separately the jurisdictional and discretionary aspects of CPR 31.16, and secondly, failed to give adequate consideration as to whether an order was desirable as a matter of both jurisdiction and discretion. Well, obviously, there is an overlap between these two grounds, but the focus has been on 31.16, which is relatively short. I go to the appropriate parts of CPR 31.16, which really run from subrule (3), as follows: "The Court may make an order under this rule only where"… and then (a) is the respondent's role in the proceedings and (b) the applicant's role in the proceedings, and then (c) is where the crux begins:

> "If proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and (d)"…

Here this is the most important part of the rule which I emphasise…:

> " Disclosure before proceedings have started is desirable in order to (i)

dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs".

18. I do not think that I need to deal with any further aspect of that rule for now. In support of this appeal, Mr Bigwood, the Defendant's solicitor, has provided a helpful skeleton argument in which he addresses the legal test which has to be applied when dealing with a pre-action disclosure application. Referring to what is generally accepted as the seminal authority of *Black v Sumitomo Corporation* [2002] 1 WLR 1562, in which Rix LJ indicated a two-stage approach, considering first of all the jurisdictional question as to whether there was a real prospect of any order that was granted was fair to the parties if litigation was commenced, or assisting in avoiding litigation or saving costs, before stepping back and considering the discretion question, which required a detailed analysis and not just a statement of principle.
19. Mr Bigwood in his skeleton referred to other decisions, both in the County Court in Bristol, one of which was considered briefly by the Court of Appeal. For present purposes, I do not address those cases but I will return to them shortly.

**Discussion**

20. In terms of the appeal itself, and the approach which should be taken, this is self-evident. It is a review hearing, because there was a discretionary element involved in the first instance judge's decision. The appellate court should be slow to interfere, but should only do so if the decision involved an obvious error of law or a procedural irregularity, or was manifestly wrong. Simply because this court might have adopted a different approach does not lead to the granting of the appeal and the overturning of the decision. However, one of the matters which I should take into account is the reasoning provided by the Deputy District Judge to arrive at his conclusion.
21. I regret to say that in this case, I really am struggling to understand his approach, with great respect to him. Addressing the jurisdictional question, essentially focussing on the issue of desirability, Deputy District Judge Henley appears to have addressed the question as to whether or not the protocol could be interpreted in such a way as to preclude the ADR route unless and until the claim was made. What he should have done, regardless as to how the protocol should be interpreted, was to consider the questions which qualify desirability, and which are dealt with under subrule 3(d) (i) to (iii), namely, whether disclosure would dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.
22. In paragraph six of his judgment, as I have indicated, he merely states that on the basis of the evidence on the question of co-operation, addressing seemingly only the Defendant's co-operation, disclosure before proceedings is desirable. Therefore, as an appellate court, I really am left wondering it is desirable, or how it would save costs or assist in the resolution of the dispute. Even then, following the template for determining applications of this nature established in the *Black* case, it might have been expected that the learned judge would have weighed up the factors to be taken into account in the exercise of his discretion. A concern remains that the judge did not consider this adequately, or at all, particularly where he refers to technically still having a discretion. This suggests to me that it was not considered an important component part of his approach. Again, the reasoning is inadequate.
23. Accordingly, on my review of the learned District Judge's decision, I have come to the conclusion that it was fundamentally flawed and cannot stand. It cannot form the basis for a proper order in relation to pre-action disclosure, and therefore the matter must be considered

afresh by me in an appellate capacity.

24. In my judgment, this involves a broad consideration, not only of the evidence in this particular case, but the purpose of pre-action disclosure and the protocols which have been established and updated to deal with housing disrepair cases. Running alongside the procedural rules, which are designed to assist and ensure a fair system of disclosure of relevant documents, especially where the parties need to be properly advised before embarking on proceedings, is the legislation incorporated into our law from European law. That is, the legislation dealing with the right to make a subject access request.

25. I should say something briefly, but more in passing than otherwise, about the pre-action protocol, because counsel has carefully taken me to a number of provisions of it. It seems to me that it really is unnecessary to consider it in any detail, its status in any detail, in the context of a pre-action disclosure application, particularly addressing the question of whether or not there should have been an engagement in some sort of alternative dispute resolution before a PAD application.

26. I have had my attention drawn to the decision of a local District Judge, very experienced, District Judge Baker, in which the internal complaints procedure and the failure of the tenant to engage with that was considered to be significant. The question of a subject access request did not arise in that case, and although there was some confusion in the present case as to how the judge was approaching the whole issue of ADR and the entitlement to go down the litigation route, including pursuing pre-action disclosure applications, in my judgment it does not require further consideration here despite the thrust of the council's response in the letter dated 14 February 2022. This matter is really all about the SAR, and Mr Wightwick, quite properly I think, has not pursued with any vigour an argument that the application for pre-action disclosure could be precluded, because the tenant did not invoke the internal complaints procedure.

27. It has never been challenged in this case that the same material which the tenant could have obtained in the PAD application was available through a subject access request. That involved an application online, seemingly to protect the data handler from inadvertent disclosure, which could have been made by an agent on behalf of the tenant, a solicitor or some other person assisting her. I will understand why the question of notice of disrepair would be important for any legal advisor, because if repairs were not notified to the landlord, there could be no section 11 claim, or at least one which would sound in damages.

28. In these circumstances, was it reasonable for the council to decline a pre-action disclosure request, and to invite the obtaining of material by an alternative route? In my judgment, the jurisdictional question involves far broader considerations than those which were applied by the judge in this case. For instance, the Court should be asking, not only have the parties co-operated in terms of attempting to make the relevant material available, but is the invited approach of using the SAR route a reasonable one? Is it fair to the tenant, or is she put at a disadvantage if there is a contemplation of proceedings? Would disclosure assist any dispute to be resolved without proceedings, or could that be achieved if the material is made available in some other way? Finally, would early disclosure save costs? This is particularly important in my judgment, because of the costs implications of a PAD. Here the council was required to pay several thousands of pounds to the Claimant's solicitor. There is no doubt that the cost of a subject access request would have been minimal, probably non-existent, just, if a solicitor was involved, maybe half an hour filling in a form.

29. I take into account, particularly in the area of housing disrepair, which is growing, that there are numerous applications of this nature made to the Court. Many are granted on paper, and usually on the basis of an adverse order for costs against the disclosing party, where there has been a declining of the request for the housing file. Many are unopposed. It is not known

how many of these cases end up with resolution of the litigation, either because of early settlement or simply abandonment. That information is not available; however clearly, the profitable activity lies in the PAD itself.

30. However, that should not be a reason for this Court, sitting in an appellate capacity and perhaps giving guidance, to take a robust approach, or to close down any particular route to litigation. Each case has to be determined on its own merits, and there cannot be any one size fits all. Nevertheless, in my judgment, on the facts of this case, I have little difficulty in coming to the conclusion that this pre-action disclosure application was inappropriate. First, on the jurisdictional basis, and considering the desirability question, it is not easy to identify any ground upon which it could be said that a court order without proceedings for the disclosure of the housing file would dispose fairly of those proceedings, would save costs or assist the resolution without any ultimate claim, when there was an obvious and straightforward route to obtaining the housing file. The question of ADR is highlighted in the protocol, and it is clearly the reasoning behind the protocol that the parties are encouraged to avoid costly litigation if at all possible.

31. Although I am not called upon to determine this question, the idea that ADR could not take place unless and until there is a claim is illogical, contrary to the belief of the Deputy District Judge in this case. In any event, a subject access request is, I suppose, a concomitant part of alternative ways of resolving litigation, because it allows the parties to obtain material in a simple and straightforward way, and to make determinations as to the merits of potential litigation. Therefore I have little doubt that none of the features of desirability can be identified on the basis of this application.

32. When considering the discretionary question, there are other matters that should be taken into account. First is the fact that the Defendant could not be said to have been un-cooperative in taking this stance. Perhaps some Local Authorities, some landlords, some social landlords might not have taken the approach; but here they chose to, they chose to invite the tenant to go down the route of the SAR. In my judgment, the suggestion of an alternative route to disclosure of the relevant material is a reasonable one. It seems to me that the online system was an efficient and proportionate way of dealing with the obtaining of the file.

33. Second, the tenant remained represented by solicitors who could have assisted her, and perhaps should have assisted her, in getting the necessary material to enable them to advise her properly. There is no suggestion that they would have abandoned her in such circumstances. Of course, it is less profitable, but the whole rationale behind the protocol is to encourage cost saving, rather than costs building.

34. Third, and although this remains controversial, there is some suggestion that the tenant, following the application for disclosure, had been un-cooperative herself in not allowing an inspection. I do not make any ruling on that, because I appreciate that in the skeleton argument provided by counsel the evidential basis was disputed. However the Court might have had a clearer of the extent of any dispute and might have been assisted, of course, if there had been an inspection with the full extent of the disrepair that has been implicated.

35. As I have indicated, I have been referred to previous County Court decisions, and in particular the case of [*Sayed & Ashbir v Bristol City Council*] in Bristol County Court, in which Judge Ambrose dealt with an almost identical situation relating to an appeal against the decision for pre-action disclosure by a District Judge. In that case, it would appear that a far more detailed and elaborate reasoning was provided by the District Judge at first instance, because much of it is extracted in Judge Ambrose's judgment itself. He allowed the appeal, seemingly on both the jurisdictional and discretionary questions. His decision chimed with that of Judge Ralton in an earlier case, which was the subject of a second appeal to the Court of Appeal, in which Bean LJ declined to grant permission.

36. Although neither County Court cases are authoritative or binding this Court, it is open to me to reject or accept the reasoning if I so choose, I do find the conclusion of Judge Ambrose to be persuasive. It seems to me that his reference to the observations of Bean LJ is entirely apposite, and I propose to do exactly the same in this judgment, including my judgment remarks, because those comments encapsulate not only the rationale of the pre-action protocol, but also a common-sense approach to applications of this nature. Bean LJ said this:

> "I agree with Judge Ralton that the critical question in this case is whether a tenant in Local Authority housing should make a subject access request under data protection legislation before applying to a court for pre-action disclosure. I also agree with Judge Ralton that the Deputy District Judge was right to refuse to make an order of pre-action disclosure. Pre-action disclosure is always a discretionary remedy. To make an order when the tenant has not used the council's complaints procedure, has not made a subject access request and has apparently refused to allow inspection of the premises goes against both the letter and the spirit of the relevant pre-action protocol, and the policy of the courts to encourage parties to treat litigation as a last resort. I can see no plausible explanation for the course being adopted on behalf of the Claimant other than to increase the income of its solicitors. I am wholly unimpressed by the elaborate argument to the effect that the answer to a subject access request may consist of information rather than copies of documents. If the council's answer to the subject access request turns out to be evasive, or to conceal the contents of relevant documents in its position, then the case for a renewed application for pre-action disclosure might well be strengthened".

37. Those were Bean LJ's comments, and in fact those comments accord with Mr Wightwick's observations derived from the Court of Appeal authorities to which he referred, that there has been established a reticence that should be adopted by the courts when dealing with these cases. In other words, the default position should not be that the application is granted. The burden is upon the Claimant seeking the order, or the potential Claimant, and the order should only be granted on compelling grounds. I am satisfied that those compelling grounds are not established here for the reasons given.

**End of Judgment**

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This transcript has been approved by the judge.