Case No: G0LV098

IN THE BRISTOL COUNTY COURT

Date: 17/12/2021

Before :

HIS HONOUR JUDGE AMBROSE

- -

Between :

BRISTOL CITY COUNCIL	**Appellant**
- and -	
MR ABDULLAH SAID & MRS UBAX ABSHIR	**Respondents**

- -

- -

Mr Iain Wightwick (instructed by Bristol City Council Legal Services) for the Appellant
Miss Ellena Pearson (instructed by Emerald Law) for the Respondent

Hearing dates: 10 December 2021

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Judgment Approved by the court for handing down (subject to editorial corrections)

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His Honour Judge Ambrose:

1 This case concerns an appeal against an order for pre-action disclosure in a potential housing disrepair claim. The appeal came before me on 10 December 2021. This is my reserved judgment.

Factual and procedural background

2 Mr Said and Mrs Abshir ("the Tenants") are secure tenants of Bristol City Council ("the Council") at Flat 8, Charleton House, Great Ann Street, Bristol BS2 0DS.

3 At some point prior to 21 May 2020, the Tenants instructed solicitors based in Liverpool, Emerald Law, under a conditional fee agreement.

4 On 21 May 2020, Stacey Coyne of the Tenants' solicitors sent a letter of claim to the Council under the Pre-Action Protocol for Housing Disrepair cases (the "PAP", now replaced by the Pre-Action Protocol for Housing Conditions Claims (England)). I note there is a second identical letter of claim in the bundle, dated 15 June 2020. It is not clear how the second letter came to be generated. In the letter of 19 May 2020, amongst other matters, Ms Coyne itemised a number of complaints and sought to agree the instruction of a single joint expert. She also sought disclosure of a number of documents: "*All relevant records or documents including:- copy of Tenancy Agreement including Tenancy Conditions; any asbestos survey carried out in respect of the property; documents or computerised records relating to notice given, disrepair reported, inspection reports or repair works to the property; void inspection reports; any other documents in the Tenancy File*." The scope of the documents requested extended beyond those itemised in the PAP.

5 As to what was enclosed with the letter of claim, Stacey Coyne's statement asserts that authorities from both her clients were enclosed. However the email from the Council's solicitor Shreema Parmar to Stacey Coyne on 19 June 2020 makes it clear that only an authority from Mr Said was enclosed. The appeal before me proceeded on the basis that only one authority was in fact provided and since that is consistent with the contemporaneous evidence, I accept it as accurate. Although this was pointed out to Ms Coyne on 19 June 2020, there is no evidence that an authority from Mrs Abshir was thereafter sent to the Council.

6 The Council's response to the letter of claim dated 19 June 2020 referred the Tenants' solicitors to paragraphs 4.1 and 4.2 of the PAP. In short, the Council's position was that there was a two stage internal complaints procedure which was a recognised and effective means of obtaining an independent examination of a dispute between tenants and the Council and the Tenants should use that in the first instance. The letter of claim was treated as initiating the first stage of that process. If that two stage process failed to resolve matters, there was recourse to the Housing Ombudsman. These were all free of charge and should be pursued prior to the involvement of lawyers. The Council considered its landlord and tenant relationship with the Tenants had not broken down and it intended to continue to correspond with them to carry out any necessary repairs. So far as the Tenants'

solicitors' disclosure request was concerned, the Council stated: "*As you will be aware your clients are entitled to obtain their housing and or repairs file via a subject access request under the GDPR and Data Protection Act 2018. A subject access request can be made on-line by completing a web form. www.bristol.gov.uk/dprequest. Legal involvement in the request for a housing/repairs file is unnecessary and costly for both parties. Importantly, a subject access request is free of charge. In this regard, I would also refer you to Hussain v Medical Defence Union & Anor [2020] EWHC 15 (QB).*" The letter went on to reiterate the availability of free processes and request that Emerald Law refrain from further involvement in the case.

7 The Tenants' solicitor responded by letter dated 8 July 2020, expressing herself to be "astounded by the contents" of the Council's letter, taking issue with its contents and stating that access to the property to carry out repairs would be denied until after they had obtained an expert's report and a schedule of repairs had been agreed.

8 Further correspondence followed in which the parties restated their positions. Then on 21 July 2020 the Tenants' solicitors issued an application in the Liverpool County Court seeking an order for pre-action disclosure.

9 On 30 July 2020, Deputy District Judge Henley considered and granted the application on paper without notice to the parties, ordering disclosure of the documents listed in the PAP (as opposed to those requested in the Tenants' application). When notified that the order had been made, the Council applied to set it aside and to have the case transferred to Bristol.

10 On 26 August 2020 the Council's solicitor sent to the Tenants' solicitor a copy of the application to set aside and a supporting witness statement in which she reiterated the Council's position on disclosure, as previously articulated in the response to the letter of claim.

11 On 9 September 2020 the Tenant's solicitor emailed the Council's solicitor saying "*we do not agree the Claimant should have to make a subject access request as our clients are entitled to be provided with disclosure under Paragraph 6.2(a) of the Housing Conditions Protocol (England). Nevertheless, please consider this a subject access request under Art 15/S45 for all data concerning our client and the information set out in S45(2).*"

12 On 15 September 2020 the Council's solicitor responded by email saying that the email of 9 September 2020 is not considered a subject access request and reiterating what was said in the letter of response, namely that a request can be made online and providing the link to do so.

13 On 18 September 2020 the Tenants' solicitor emailed the Council's solicitor taking issue with the suggestion that the subject access request had to be made online.

14 On 16 October 2020 the case was transferred to Bristol County Court.

15 On 5 January 2021 Deputy District Judge Humphreys sitting in Bristol County Court heard the application to set aside. He handed down his reserved judgment

on 5 July 2021. In that judgment he set aside the Order of Deputy District Judge Henley, considered the matter afresh and made an order for pre-action disclosure of the documents provided for in the PAP.

16 The Council appealed. On 26 August 2021, His Honour Judge Ralton stayed the appeal until further order, to await the decision of the Court of Appeal in *Hockett v Bristol City Council*. In fact, unknown to His Honour Judge Ralton, the Court of Appeal had refused permission to appeal in *Hockett v Bristol City Council* on 20 August 2021. The reasons given by Bean LJ in refusing permission are relied upon by the Council in this appeal. On 20 September 2021 His Honour Judge Ralton granted permission to appeal in the present case.

<u>The test to be applied when considering an application for Pre-Action Disclosure</u>

17 The relevant part of rule 31.16 of the Civil Procedure Rules 1998, which deals with pre-action disclosure, is as follows:

(3) The court may make an order under this rule only where–
- (a) the respondent is likely to be a party to subsequent proceedings;
- (b) the applicant is also likely to be a party to those proceedings;
- (c) 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) 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 It is common ground that rule 31.16 requires a two-stage approach (see generally the White Book 2021 at 31.16.4). The first stage is to establish whether the jurisdictional thresholds prescribed by heads (a) to (d) in subrule (3) are satisfied. If they are, the court then proceeds as a second stage to consider whether, as a matter of discretion, an order for disclosure should be made. An authoritative exposition of the rule is to be found in the case of *Black v Sumitomo Corporation* [2001] EWCA Civ 1819. Per Rix LJ at paragraph 81: "*In my judgment, for jurisdictional purposes the court is only permitted to consider the granting of pre-action disclosure where there is a real prospect in principle of such an order being fair to the parties if litigation is commenced, or of assisting the parties to avoid litigation or of saving costs in any event. If there is such a real prospect, then the court should go on to consider the question of discretion, which has to be considered on all the facts and not merely in principle but in detail.*"

<u>The judgment of Deputy District Judge Humphreys</u>

19 I have reproduced below the relevant parts of the judgment, summarising where appropriate and retaining the original paragraph numbering.

Discussion

29 *Turning to the substantive issue, namely the underlying application for pre-action disclosure, the starting point in relation to the Application is the two-stage test in CPR 31.16 and its relationship with the Protocol. As Mr Wightwick points out, it is a matter of judicial discretion. The question whether or not the City Council must comply with the disclosure requirements of the Protocol (or what it suggests is a protocol-compliant alternative) rather boils down to whether or not the City Council are effectively able to contract out of the Protocol or successfully argue that clause 4.2 of the Protocol "trumps" or ousts any requirement on its part to provide pre-action disclosure to solicitors or other representatives acting on behalf of tenants in accordance with the Protocol prior to meaningful engagement with ADR. I bear in mind that not all tenants may be able easily or at all to access the City Council's online processes, are fully literate or speak English as a first language. There might be force in an argument by Bristol City Council if, following disclosure and the parties being on a level playing field in relation to access to documentation and advice, a Claimant then simply issues proceedings without considering engaging in ADR first pursuant to clause 4 of the Protocol. A Court might be willing to impose a stay in those circumstances.*

In paragraph 30 the Deputy District Judge considered whether the Protocol envisages parties being legally represented.

31 *In my judgment, the mere fact that clause 4(1) of the protocol precedes clause 5 and the Letter of Claim does not thereby imply some chronological requirement that ADR should be used before a Letter of Claim is issued, including a request for standard disclosure. I do not accept Ms Parmar's analysis or Mr Wightwick's submissions in this regard. As I have indicated, without disclosure, I do not see how any tenant, let alone one who has instructed solicitors to represent him, can reasonably be expected to engage without proper prior disclosure in ADR with the City Council, which will have at its disposal all the property documents and resources of its Housing and Legal departments.*

32 *The Order for disclosure complained of by the Council provides for disclosure of the documents provided for in the relevant Protocol. In my judgment, it is not unduly onerous and, as is apparent from Ms Gorick's second statement, largely capable of production. I have in mind the words of Rix LJ that, amongst other things, I have to consider "the nature of the documents requested, the relevance of any protocol or pre-action enquiries, and the opportunity which the complainant has had to make his case without pre-action disclosure (Black v Sumitomo Corporation). I do not see how the Claimants here can make their case or engage in any ADR without pre-action disclosure. Further it places too high a hurdle on the Claimants to require them to utilise the online subject access request procedure of the City Council.*

33 *It is worth noting in passing that the City Council rejected the Stage 1 complaint and also rejected the Claimants' solicitors Subject Access Request on 9*

September 2020 for disclosure of the housing file, stipulating that a request could only be made online by the tenants themselves using a web form.

In paragraph 34 he stated that he bore in mind the overriding objective, which he then set out.

35 *Of primary relevance here is to ensure that the parties are on an equal footing and can participate fully in proceedings, the financial position of each party and the need to deal with the matter fairly.*

Decision

In paragraph 36 he set aside the order of Deputy District Judge Henley and said he would consider the matter afresh.

37 *In relation to the original application for pre-action disclosure, I am satisfied that the threshold tests in CPR 31.16(3) are met. The Council submits that disclosure is not desirable to dispose fairly of anticipated proceedings or to be resolved without proceedings. I do not agree. A Claimant is put in an unenviable and, in my view, potentially unfair position if he/she is unable to obtain legal advice without access to the relevant documents and that requiring a Claimant solely to attempt to access the City Councils documents by way of internet-based subject access requests is an unreasonable and unnecessary hurdle.*

38 *The original Order made by Deputy District Judge Henley was limited to documents provided for by the relevant Protocol, not those requested in the Application, which arguably went beyond the Protocol. I have not heard submissions as to the extent of the documentation sought or whether it should be time limited. I note that one of Mr Wightwick's alternative outcomes was for a "limited order for disclosure". But it is clear that inspection and repairs documents are available, given that they have now largely been disclosed by way of exhibit to Ms Gorick's statement.*

39 *Having regard to the 2-stage test, I am satisfied that: –*
   (a) *the Council is likely to be a party to subsequent proceedings;*
   (b) *the Claimants are also likely to be a party to the above proceedings;*
   (c) *the documents requested in most respects are those that would be provided by way of standard disclosure and are documents expressly set out in the Protocol;*
   (d) *Disclosure before proceedings is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs. Indeed, I cannot see how proceedings can be disposed of fairly or the dispute resolved without disclosure of the documents contemplated by the Protocol.*

40 *Although CPR 31.16 does not state that, to be successful, the anticipated Claimant must have a real prospect of success, it is clear from the authorities that that is one of the factors a Court must bear in mind in considering the exercise of its discretion. But, it is a low bar. Ms Gorick accepts that there have been issues with damp, mould and leaks to the property since 2010. She says*

that, save since issues arising from the pandemic, they were actioned in accordance with the City Council's protocols. Indeed, she talks about "an abundance of repairs". It is not for me to hold a mini-trial as to the merits of any potential claim, whether for specific performance or damages, but on the available evidence, the low threshold of "real prospect of success", is met.

41 *In relation to Mr Wightwick's submissions that (1) the costs already incurred are disproportionate and that (2) a Court is entitled to discourage solicitors from pursuing social landlords and should encourage those solicitors to exhaust the internal complaints procedure, whilst I agree with the first of these, I am not sure about the second. That is perhaps a matter more to be addressed to local MPs or to the Rules Committee to consider amendment to the Rules.*

42 *I grant the application and direct that the Council give disclosure of the documents provided for in the Protocol.*

The appeal against the decision of Deputy District Judge Humphreys

20 The Council submits that the Deputy District Judge erred in principle and/or misdirected himself, giving rise to 4 grounds of appeal:

1. *He failed to consider separately the jurisdictional and discretionary aspects of CPR 31.16(3).*
2. *He failed to give any or adequate consideration to whether an order was appropriate as a matter of discretion.*
3. *He dismissed the Appellant's subject access request procedure under the GDPR as an "unreasonable and unnecessary hurdle" and/or misunderstood the nature of the GDPR.*
4. *He treated Bristol's internal complaints procedure at best as a successor rather than a precursor to the instigation of litigation.*

21 In support of its grounds of appeal, the Council has submitted a skeleton argument from Mr Wightwick dated 2 December 2021. He adopted much of the earlier skeleton argument of Mr Rutledge QC dated 9 August 2021, which had been submitted in support of the application for permission to appeal. The Tenants submitted a skeleton argument from Mr Foden dated "30:xvii:20", prepared for the hearing before Deputy District Judge Humphreys on 5 January 2021. Since that skeleton argument necessarily preceded judgment, it did not address the judgment itself or the grounds of appeal. There has been no further written submission on behalf of the Tenants. At the appeal hearing on 10 December 2021, I heard oral submissions from both Mr Wightwick for the Council and Miss Pearson for the Tenants.

22 So far as the approach to be taken on appeal is concerned, it is common ground that where an appeal is against the exercise of a discretion, the function of the appellate court is initially one of review only. It must defer to the judge's exercise of his discretion and must not interfere with it merely because it would have exercised its discretion differently. However if, having reviewed the judge's decision, the appellate court concludes that the judge has erred in principle in his approach, or left out of account something that he should have considered, or taken into account something that he should not have considered, or failed to balance factors fairly in

the scale such that his decision is wholly wrong, then the appellate court can set aside the judge's discretion and exercise its own discretion. (See generally the White Book 2021 at 52.1.14 and 52.21.5; and Blackstone's Civil Practice 2021 at 75.11).

23 I start by considering the first ground of appeal and whether the Deputy District Judge considered the two stages of the test separately. Mr Wightwick submitted that the Deputy District Judge had failed to distinguish the two stages and in paragraph 39 of the judgment, he had treated satisfaction of the threshold test as determinative of the matter. Miss Pearson conceded that it was not clear from his judgment that he had considered the two stages separately, but she submitted that that did not constitute an error in principle. She relied upon the words of Rix LJ in *Black v Sumitomo Corporation* at paragraph 82, where he stated: "*of course, since the questions of principle and of detail can merge into one another, it is not easy to keep the two stages of the process separate. Nor is it perhaps vital to do so, provided however that the court is aware of the need for both stages to be carried out.*" Although not relied upon by Miss Pearson, I observe that in paragraph 82 Rix LJ went on to say that *"[t]he danger, however, is that a court may be misled by the ease with which the jurisdictional threshold can be passed into thinking that it has thereby decided the question of discretion, when in truth it has not. This is a real danger because first, in very many cases if not most cases it will be possible to make a case for achieving one or other of the three purposes, and secondly, each of the three possibilities is in itself inherently desirable*." In *Black*, the judge at first instance had fallen into just such an error and, as Rix LJ said in paragraph 85, "*…the judge never stood back, having dealt with the jurisdictional thresholds, and asked himself whether this was a case where his discretion should be exercised in favour of disclosure*." Miss Pearson submitted that Deputy District Judge Humphreys made clear reference to the two-stage test and so inferentially he must have considered both stages.

24 I agree that Deputy District Judge Humphreys did not address each stage separately in his judgment. However it does not automatically follow that he did not consider each stage in coming to his decision. My task is to consider whether he considered each stage and if he did, whether his decision was wrong.

25 It is clear to me that he did consider the jurisdictional test and he set out his conclusion in paragraph 39 of his judgment. In the course of oral submissions Mr Wightwick submitted that it was not obvious that the court had jurisdiction in this case (this being a reiteration of the submission made in paragraph 28 of his skeleton argument). However it is not a ground of appeal that the jurisdictional test was inadequately considered or was not met (unlike the discretionary aspect of the test which is the subject of the second ground of appeal). This is not surprising. The jurisdictional threshold has been described as being low (*Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at paragraph 27) and whilst there were arguments on both sides in the present case, in my judgement it is not reasonably arguable that Deputy District Judge Humphreys had not considered the jurisdictional test and/or that he was wrong to find it was met.

26 The real issue in this appeal is whether he considered the discretionary aspect of CPR 31.16 and if he did, whether his exercise of discretion was wrong.

27 Mr Wightwick submits that he did not consider it at all, arguing that he treated satisfaction of the threshold test as determinative. Miss Pearson disagrees, arguing that he did consider the discretionary aspect and referring me to a number of passages which, she submits, touch upon it. She referred me to paragraph 31 in which Deputy District Judge Humphreys said that he could not see how any tenant could engage in ADR without prior disclosure; to the final two sentences of paragraph 32, where he reiterated the same point about ADR and then went on to say that requiring them to use the online subject access request "*places too high a hurdle on the Claimants*"; to paragraph 34 where he stated that he bore in mind the overriding objective; and to paragraph 35 where he said that "*of primary relevance here is to ensure that the parties are on an equal footing and can participate fully in proceedings, the financial position of each party and the need to deal with the matter fairly.*"

28 I observe that many of the passages relied upon by Miss Pearson relate to matters that are also relevant to the jurisdictional test and in particular to 31.16(3)(d). If each passage were viewed out of context, it would not be obvious which of the two stages was under consideration. However when viewed in context, the way the judgment is structured means that these passages are all part of the discussion that leads to the decision in paragraph 39. In my judgement the decision in paragraph 39, notwithstanding that it begins with the preamble *"[h]aving regard to the two-stage test*", is a decision on the jurisdictional test. Having come to that decision on the jurisdictional test, the Deputy District Judge did not then stand back and ask himself whether this was a case where his discretion should be exercised in favour of disclosure, as he was required to do (per Rix LJ in *Black v Sumitomo Corporation*, at paragraph 85). In my judgement there was a failure to consider the discretionary aspect of CPR 31.16. As a result, the approach taken was wrong in principle and the decision must be set aside.

29 However if I am wrong about that and the discussion section of the judgment *does* amount to a consideration of not only the jurisdictional test but also the discretionary aspect of CPR 31.16, then in my judgement the Deputy District Judge still fell into error in the way he considered the question of a Subject Access Request. The availability of other means of obtaining the documents sought is an important factor in the exercise of the Court's discretion. In my judgement, Deputy District Judge Humphreys' consideration of the availability of the documents via a Subject Access Request was in error in a number of respects.

a. First, in paragraph 29 he stated: "*I bear in mind that not all tenants may be able easily or at all to access the City Council's online processes, are fully literate or speak English as a first language*." There was no evidence that these observations applied to the present case. There was no evidence from either of the Tenants and no evidence from their solicitor on such matters. In bearing these matters in mind, the Deputy District Judge was taking into account matters that ought not properly to have been taken into account in this case.

b. Second, in paragraph 32 he stated that using the online process was "*too high a hurdle*" and in paragraph 37 he described it as an "*unreasonable and unnecessary hurdle*". However these characterisations are not borne out by the

evidence. The only evidence of the online process is to be found in paragraph 6 of the statement of Shreena Parma dated 13 October 2020 in which she states: "*Further, on the question of the subject access request, I am told that Bristol City Council's data protection team are concerned that they should not face sanctions or proceedings for wrongly sharing or otherwise exposing the data of hundreds of thousands of individuals which Council holds. For this reason it has developed a <u>simple but effective online application scheme</u>, which protects data belonging to individuals by asking them to confirm their identity. For that reason, requests directly from solicitors are not complied with by the team*" (emphasis added). In coming to the characterisations that he did, the Deputy District Judge came to conclusions that were not founded in the evidence.

c. Third, he failed to consider the fact that the Subject Access Request procedure would yield the same documentation as was sought by way of pre-action disclosure, at no cost to the Tenants.

d. Fourth, in paragraph 33 he noted in passing that the Council had rejected the Tenants' solicitors' Subject Access Request made on 9 September 2020. Without more, such a rejection would strengthen the Tenants' application and the manner in which it was noted indicates that that was the view of the Deputy District Judge. In fact, on closer analysis, the position is not so straightforward. The Council's solicitor had pointed out the availability of the documentation via a Subject Access Request as early as the emailed letter of response, within which she had provided a link to the online portal. At the same time the Council's solicitor also sent an email pointing out to the Tenants' solicitors that only an authority from Mr Said had been provided, and not from Mrs Abshir. The Tenants' solicitors' response was to declare themselves astounded by the Council's stance and they proceeded to issue the pre-action disclosure application. On 9 September 2020, after an order for pre-action disclosure had been made on the papers and after the Council had applied to set it aside, the Tenants' solicitor emailed the Council's solicitor saying *"[w]e do not agree the Claimant should have to make a subject access request as our clients are entitled to be provided with disclosure under Paragraph 6.2(a) of the Housing Conditions Protocol (England). Nevertheless, please consider this a subject access request under Art 15/S45 for all data concerning our client and the information set out in S45(2)."* There are three aspects of that request that do not appear to have been considered by Deputy District Judge Humphreys: (i) the request ignored the online process that the Council had in place for dealing with such requests and of which the Tenants' solicitors had notice; (ii) it was made without prior provision of a form of authority from Mrs Abshir; and (iii) the scope of the data sought went far beyond anything that could ever have been considered necessary for the purposes of a housing disrepair case ("all data concerning our client and the information set out in s45(2)"). The failure to consider these factors led, in my judgement, to an erroneous assessment of the evidential significance of the Council's rejection of the request.

30 Accordingly, if I am wrong in my conclusion that the discretionary aspect of 31.16 was not considered, and if it *was* considered in the discussion and decision sections of the judgment, then matters that should have been taken into account were not,

and matters that should not have been taken into account were. The result was an exercise of discretion that was wrong in principle and must be set aside.

The exercise of discretion by the appellate court

31 The Tenants are in dispute with the Council over repairs to their property. There is no direct evidence before the Court from either of the Tenants, but their letter of claim asserts a number of disrepairs which it is said have been previously reported to the Council and no action has been taken. The Council has placed evidence before the Court from Ms Gorick, a Responsive Repairs Supervisor employed by the Council. She describes a number of reported disrepairs over the years of the tenancy and the steps taken by the Council to address them. She gives evidence of the Council being actively involved in carrying out repairs at the property, including during 2018/19/20. I am not in a position to evaluate the strengths and weakness of these respective positions, but I proceed for present purposes only, on the basis that the low threshold of "real prospect of success" is met.

32 The Tenants have instructed solicitors who have sent a letter of claim and issued a pre-action disclosure application.

33 I take into account that the PAP provides that the letter of claim should request disclosure from the landlord (paragraph 5.3) and the landlord's response should include copies of all relevant records or documents requested by the tenant (paragraph 6.2). I take into account the fact that the Council did not provide the requested documentation in response to the letter of claim.

34 I accept the proposition that disclosure of the tenancy file to the Tenants is desirable in order to dispose fairly of the anticipated proceedings and that the jurisdictional test under CPR 31.16 is met.

35 However, it does not automatically follow from this that the Court should exercise its discretion and make an order for pre-action disclosure.

36 I take into account the fact that the PAP states that the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation (paragraph 4.1) and that specific ADR options for council tenants are suggested at paragraph 4.2, including the council's own complaints procedure and the Housing Ombudsman.

37 In this case the Council has an internal complaints procedure for tenants who are dissatisfied with matters relating to their housing. It has two stages and provides a method of obtaining an independent assessment of a dispute between tenants and the Council. A tenant also has recourse to the Housing Ombudsman. Importantly, tenants may avail themselves of this process free of charge. In this case, the Tenants have not used the Council's complaints procedure. The Council nevertheless treated the Tenants' letter of claim as initiating the complaints procedure, but the Tenants have not pursued the procedure beyond stage 1.

38 The Council also has a process for the provision of a tenancy file. If a tenant wishes to obtain a copy of their tenancy file, they are entitled to request the same as of

right by making a subject access request under data protection legislation. The Council has anticipated the making of such requests and devised a "*simple but effective*" online system for tenants (and others making similar requests) to use. Importantly, tenants may make such a request and obtain this documentation free of charge. In this case, the Tenants have not made a subject access request in an acceptable form.

39 I have already analysed the evidence in relation to a subject access request in paragraph 29 above. In my judgement the Tenants ought to have availed themselves of the simple but effective online system and their failure to do so was, in my judgement, unreasonable. So far as their solicitor's letter to the Council dated 9 September 2020 was concerned, in my judgement the request was made in such a way as to be bound to elicit a refusal. That too was unreasonable.

40 I take into account the fact that the involvement of solicitors, the initiation of the PAP and the pursuit of a pre-action disclosure application all result in costs being incurred. The parties' costs schedules filed in advance of the hearing before Deputy District Judge Humphreys on 5 January 2021 totalled £5,806 and £6,073 for the Tenants and the Council respectively. I bear in mind the assertion in the Council's response to the letter of claim that "*the Council has finite resources which need to be distributed carefully in dealing with day to day repair issues*".

41 Having considered the competing factors in this case, and in particular having regard to the availability of the documentation, free of charge, via a subject access request, I have come to the conclusion that I should not exercise my discretion and make an order for pre-action disclosure.

42 I am fortified in my decision by the decisions of others. I am told by counsel that cases of this type are becoming increasingly common and I was referred to a number of first instance decisions involving Bristol City Council. In particular I was referred to the case of *Hockett v Bristol City Council*, a case involving very similar issues to the present case and in which an order for pre-action disclosure was refused at first instance. Mr Hockett appealed and on the appeal, His Honour Judge Ralton decided that although the jurisdictional test was met, as a matter of discretion an order for pre-action disclosure ought not to be made. Mr Hockett then sought permission to bring a second appeal. In refusing permission, Bean LJ gave reasons which are included in the appeal bundle in the present case. Whilst not constituting a binding judgment, these reasons are obviously persuasive. He stated as follows:

"*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 for 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 his 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 possession then the case for a renewed application for pre-action disclosure might well be strengthened.

The proposed appeal would not in my view have a real prospect of success and there is no other compelling reason to allow a second appeal."

Conclusion

43 For the reasons given above, the appeal is allowed.