Formal Civil Procedure Rules Protocol relating to Claims For Damages In Relation To The Physical State Of Commercial Property At The Termination Of A Tenancy (Protocol)

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Abstract

There will no doubt be many articles written and seminars given on how the Protocol now requires dilapidations claims to be presented and pursued, but the aim of this paper is to consider how the formal adoption of the Protocol as part of the Civil Procedure Rules (CPR) will have a broader impact on those professionals engaged in the business of providing advice on dilapidations claims.

Keywords: dilapidations, damages, breach of contract, CPR

CIVIL PROCEDURE RULES

There has of course been an informal protocol in relation to dilapidations claims for many years, but the incorporation of the Protocol within the CPR is a significant development in the evolution of the process of 'dilapidations' — but perhaps not in the most obvious way. Much will probably be written over the coming months about the court's powers to condemn those litigants who fail to comply with the provisions of the Protocol, and indeed, the power of the courts to apply sanctions for such failures is something that those professionals who have conduct of dilapidations claims should have in mind when advising their clients. But the Protocol is a protocol and nothing more. It does not affect the substantive law relating to the pursuit of claims for damages recoverable at law as a consequence of alleged breach of contract on the part of tenants of commercial property after the expiry of a lease term. If a party to a dispute were to choose to disregard the provisions of the Protocol (cognisant of the sanctions in costs that the court can impose), then the merits of their substantive claim would be unaffected. The Protocol does not change the law relating to dilapidations but it should focus the minds of those who advise on such claims as to a number of issues. Specifically, it cannot be considered in isolation from the remainder of the CPR.

The CPR make up a procedural code whose overriding aim is to enable the courts to

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deal with cases justly. They are a detailed and complex series of rules. The individual rules are supplemented by a series of practice directions. In addition, there are schedules that retain some provisions of the rules prior to the introduction of the CPR in 1999, and then there are, of course, the protocols in respect of pre-action conduct. The CPR is a step-by-step guide for taking disputes through the courts, setting out what is required of the parties to a dispute from first intimation of a dispute right through to judgment and enforcement.

With regard to dilapidations claims, therefore, the CPR now govern the process from the moment a client seeks advice on a potential claim or the need to respond to such a claim. In giving advice on any dispute to which the CPR apply, it is probably necessary for the professional giving that advice to have an understanding of the rules as a whole rather than perhaps just looking at individual aspects in isolation. In particular, those professionals who give advice on the strategy relating to any dilapidations claim should have regard to the impact of the Protocol within the context of the CPR as a whole, and the extent to which clients should be given specific advice on the impact of the CPR generally. They should also have regard to the extent to which the CPR govern their own conduct in advising on, and preparing evidence in relation to such a claim.

The formal adoption of the Protocol therefore makes a fundamental change to the process of dilapidations because, for the first time, whoever is advising on the early stages of a dilapidations claim (whether for landlord or tenant) is acting under the governance of these rules. Failure to act properly in accordance with the rules could have the consequence that their client suffers sanctions further into the process or, perhaps more seriously, that they have compromised their client's ability to pursue (or defend) a claim.

DILAPIDATIONS PRACTICE

Based on experience in practice, the author would venture to suggest that in many cases the traditional approach to dilapidations was for a client to contact a surveyor and instruct them to prepare a schedule of dilapidations. A schedule of dilapidations would be produced sometimes (as in *Latimer v Carney*) without the surveyor having the relevant covenants in front of them, and then the schedule would be served. Negotiation would ensue with in many cases a settlement being agreed without the need to involve valuers, solicitors and so forth.

Fundamentally, there is no reason why claims cannot still be pursued in this way, but given that the initial process of preparing the schedule (and Quantified Demand) is now governed by the CPR, those who undertake this work will need to ensure that they do nothing in those early stages of a dispute that could prejudice their client if the claim is not settled quickly by negotiation. Those professionals who take on the responsibility for quantifying the sums alleged to be recoverable as damages (whether advising landlord or tenant) should have regard to the fact that they now do so within the context of a complex set of rules which have an impact on much more than just the preparation and sending of a schedule or response.

BREACH OF CONTRACT — DAMAGES

Dilapidations claims are allegations of breach of contract. Consequently, for any such claim to succeed there will need to be various matters established to the court. The terms of the contract, breach, loss and so forth. So for any professional engaged to advise on such a breach of contract claim, then it is important that they have an understanding of the legal principles relating to, for example, interpretation of contractual terms. If, for example, a surveyor is to advise on whether the standard of repair of a property falls below that contemplated by the lease, then it is clearly essential that they are able to identify properly the extent of the contractual obligations entered into by the parties. What in fact is the standard of repair

required by the terms of the contract? To what extent has the standard of repair fallen below that required?

But is such a forensic analysis really required? After all, most dilapidations claims go nowhere near the courts. Most are settled by 'negotiations'. The usual sequence of events is that the landlord serves a schedule, the tenant's surveyor responds, and they negotiate a settlement. The claim goes nowhere near lawyers or the courts and therefore is there really any need for a detailed understanding of the substantive law by which these claims are formulated and pursued?

In the past, perhaps not, but now, from the moment a client seeks advice as to whether a dilapidations claim might be pursued, the professional providing that advice is of course, by virtue of the Protocol, acting under the governance of the CPR. The first step in any dilapidations claim is the preparation of the schedule and the Quantified Demand. Both are documents required to be produced by the CPR and therefore documents that are being produced for the purposes of (potential) court proceedings. In short, whoever is preparing those documents is preparing evidence under the auspices of the CPR, which may ultimately come to be scrutinised by a judge at trial. Further, whoever prepares the Quantified Demand is setting out what they consider are the damages that are properly recoverable at law as a consequence of breach of contract and, of course, at some point in the future they may come to be cross-examined on how they came to those conclusions. It would be embarrassing to say the least, if at that stage it became apparent that they had failed to apply the proper legal principles applicable to the quantification of damages.

EVIDENCE

Ultimately, if a dilapidations claim does proceed to trial, then the evidence presented to the court will be governed by the provisions of the CPR. Parts 32 and 35 of the CPR relate to evidence. Specifically, in relation to dilapidations claims, Part 35 will apply in relation to the preparation of expert witness evidence given to the court in the form of expert witness reports prepared by the surveyors retained by each party. From the landlord's perspective, by the time this evidence is presented to the court there will have been a number of occasions on which various parties will have had to sign statements in accordance with the provisions of the CPR as to the veracity of the landlord's claim:

(i) The surveyor will have signed the endorsement to the schedule and Quantified Demand (Protocol).
(ii) The statement of claim on issuing the proceedings will have a statement of truth signed by the Landlord or their solicitor (Parts 7 and 22).
(iii) Witnesses as to facts will have signed statements of truth on their witness statements (Parts 32 and 22).
(iv) Expert witness reports will contain statements and declarations in accordance with the Practice Direction to Part 35 of the CPR.

Given that the surveyor who signs the endorsement at stage (i) above may ultimately be preparing the expert report at stage (iv), then they need to have an understanding of, and have regard to, the requirements of Part 35 in preparing the initial schedule.

CPR PART 35

The presentation of evidence of their expert opinion is probably one of the sternest tests of a professional's expertise. If the court accepts that evidence, then the expert is acknowledged as just that, an 'expert', and the consequence should be that their client's position on the matter is vindicated. As the process of preparing a schedule of

dilapidations and a Quantified Demand under the CPR is now effectively the first step in that process, then it is important that the professional preparing the schedule and Quantified Demand should have regard to the specific requirements of Part 35 so as to ensure that there is no inconsistency between their approach to, and evidence in, their initial schedule/Quantified Demand and subsequent expert witness report.

In preparing an expert witness report for the court there are certain standards that are imposed on expert witnesses, and certain formalities required of their report. For example, the Practice Direction to Part 35 requires an expert witness report to incorporate a statement that the expert:

(a) understands their duty to the court, and has complied with that duty; and
(b) is aware of the requirements of Part 35, this practice direction and the Protocol for Instruction of Experts to give Evidence in Civil Claims.

Referring to paragraph (a) the expert's duty to the court is set out at part 35.3 of the CPR as follows:

(1) It is the duty of experts to help the court on matters within their expertise.
(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

In addition, the expert witness report must be verified by a statement of truth in accordance with the Practice Direction to Part 35:

> I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

In addition to the specific provisions of the CPR, the courts expect certain standards of those who present expert evidence to the court and have set out principles governing the responsibilities and duties of an expert in judicial proceedings.

In the case of *Anglo Group Plc v Winther Brown & Co and Others* [2000]. All ER (D) 294, Toulmin J. commented at length on the duties of those who give expert evidence to the courts:

108. In the case of the *The Ikarian Reefer* [1993] 2 Lloyds Rep 68, at 81-82 Cresswell J analysed the role of the expert witness. The analysis, needs to be extended in accordance with the, Woolf reforms of civil procedure.
109. 1. An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert witness should never assume the role of an advocate.
2. The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.
3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending with-

out prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely arrears of disagreement to be set out in the joint statement of experts ordered by the court.

4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.

5. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

6. An expert witness should make it clear when a particular question or issue falls outside his expertise.

7. Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.

8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.

110. It is clear from the Judgment of Lord Woolf MR in *Stevens v Gullis* (Court of Appeal Transcript of 27 July 1999) that the new Civil Procedure Rules underline the existing duty which an expert owes to the Court as well as to the party which he represents.

111. The formulation set out above is also consistent with the judgment of Laddie J in *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 at 841 where Laddie J criticised a not dissimilar approach by an expert to that of FMC in this case. It is also consistent with the judgment of Pumfrey J in *Cantor Fitzgerald v Tradition UK Ltd* Judgment Transcript of 15 April 1999 paragraph 70 where he emphasised the particular importance of experts being scrupulously independent in highly technical cases like computer cases.

112. It needs to be recognised that a failure to take such an independent approach is not in the interest of the clients who retain the expert, since an expert taking a partisan approach, resulting in a failure to resolve before trial or at trial issues on which experts should agree, inflates the costs of resolving the dispute and may prevent the parties from resolving their disputes long before trial.

Given that the preparation of a schedule of dilapidations and Quantified Demand is now a process governed by the CPR, and the first step in a process that, if it runs to its ultimate conclusion, will end with the presentation of evidence to the court, those preparing schedules and Quantified Demands ought now to do so having regard to the rules and principles detailed above.

DILAPIDATIONS STRATEGY

Where a client seeks professional advice in relation to a dilapidations claim, then the professional providing the initial advice must consider the CPR and advise accordingly. They should ensure that they are fully cognisant of the impact of various parts of the CPR on how the claim should be progressed. Their role is therefore significantly more complex than simply preparing a schedule of dilapidations. They should identify the relevant contractual terms, identify to what extent these have been breached and then give careful consideration as to how any damages might then be quantified. They should provide early advice on costs liability (Part 43), and they should provide advice on the mechanism, and early tactical deployment, of offers of settlement under Part 36. As mentioned in the Protocol, it may be necessary to consider issues of pre-action disclosure under Part 31.

Under paragraph 8 of the Protocol the parties are required to consider whether some form of alternative dispute resolution (ADR) procedure would be more suitable than litigation. The professional adviser with conduct of the claim must therefore ensure that full advice is given in relation to the merits of various forms of ADR.

The Protocol states:

> Parties are warned that the court will take into account the extent of the parties' compliance with this protocol when making orders about who should pay costs (see CPR rule 44.3(4) and (5)(a)).

The adviser should therefore ensure that they give specific advice on these points and that they do so early in the process.

These are all issues that a professional advising on a claim under the CPR ought to be advising their client on as part of their advice on the overall strategy, and if they are not willing or able to give advice to this effect, then they should make this clear to their client.

CONCLUSION

Dilapidations claims are claims for damages recoverable at law as a consequence of alleged breach of contract by tenants. The conduct of these claims is now governed by the CPR from the moment a surveyor begins the process of preparing a schedule of dilapidations until final judgment at trial. Even though the majority of claims do not result in court proceedings, those providing professional advice in relation to such claims should ensure that they do so fully in accordance with the requirements of not just the Protocol, but the CPR as a whole. Failure to do so could have serious consequences for their clients and their ability to pursue or defend a claim further down the line. Where they are engaged to prepare schedules and Quantified Demands, then they should do so having regard to the requirements of the CPR in the event that they are subsequently required to formalise their expert opinion by way of a report pursuant to the provisions of Part 35.