

Disrepair: preparing the case for trial

**Mathew McDermott & Stefan
Liberadzki**

Summary

■ Part 1 (Mathew):

- Do you understand the other side's case?
- Getting the necessary evidence:
 - Expert
 - Factual

■ Part 2 (Stefan):

- Getting the trial bundle right
- Specific performance/injunction claims
- Costs after trial

Understanding the case you have to meet

Getting further information

CPR Part 18.1 Obtaining further information

- 1) *The court may at any time order a party to: -*
 - a) *clarify any matter which is in dispute in the proceedings; or*
 - b) *give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case.*

Getting further information (cont.)

■ CPR 18.1 (cont.)

- 2) *Paragraph (1) is subject to any rule of law to the contrary.*
- 3) *Where the court makes an order under paragraph (1), the party against whom it is made must: -*
 - a) *file his response; and*
 - b) *serve it on the other parties, within the time specified by the court.*

Getting further information (cont.)

Examples

- 1) *“Particulars of Breach”*
- 2) *“Particulars of Knowledge/Notice”*
- 3) *Assertion that works have been done*

CPR Pt 18 – when to use

- “...at any time...”: CPR 18.1 (1)
- “clarify any matter which is in dispute”: CPR 18.1 (1) (a)
- “give additional information in relation to any such matter”: CPR 18.1 (1) (b)
- Statement of case or not
- Not applicable to small claims: CPR 27.2(1)(f), although court could do so on its own initiative
- Key theme: reasonably necessary and proportionate

CPR Pt 18 – how to use

Procedure – Practice Direction to CPR Pt 18

Before applying to Court, serve on the other party a written request seeking the clarification or further information

Give a date by which the response should be served (which ought to be reasonable)

“A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.”: paragraph 1.2, Practice Direction to CPR Pt 18

CPR Pt 18 – how to use

Procedure – Practice Direction to CPR Pt 18

Letter or separate document but must (see paragraph 1.6 to the PD to CPR Pt 18):

- Be headed with name of the court and title and number of the claim;
- in its heading state that it is a Request made under Part 18, identify the first party and the second party and state the date on which it is made,
- set out in a separate numbered paragraph each request for information or clarification
- where a Request relates to a document, identify that document and (if relevant) the paragraph or words to which it relates,

(cont.)

CPR Pt 18 – how to use

Procedure – Practice Direction to CPR Pt 18

Paragraph 1.6 of the PD to CPR Pt 18 cont:

- state the date by which the first party expects a response to the Request.
- A Request which is not in the form of a letter may, if convenient, be prepared in such a way that the response may be given on the same document.
- To do this the numbered paragraphs of the Request should appear on the left hand half of each sheet so that the paragraphs of the response may then appear on the right.
- Where a Request is prepared in this form an extra copy should be served for the use of the second party.

CPR Pt 18 – Responding to the request

Procedure – Practice Direction to CPR Pt 18

Response:

- In writing, dated and signed by party or legal representative
- Can reply to a letter in a letter, but must identify itself as a response to the request and deal with no other matters
- If not a letter:
 - be headed with the name of the court and the title and number of the claim,

(cont.)

CPR Pt 18 – Responding to the request

Procedure – Practice Direction to CPR Pt 18

- in its heading identify itself as a response to that Request,
- repeat the text of each separate paragraph of the Request and set out under each paragraph the response to it,
- refer to and have attached to it a copy of any document not already in the possession of the first party which forms part of the response.
- Serve response on every other party and file with the court a copy of the Request and response: paragraph 2.4, PD to CPR Pt 18
- Response should be verified by a statement of truth: paragraph 3, PD to CPR Part 18

CPR Pt 18 – Responding to the request

Unable or unwilling to comply with request: paragraph 4, PD to CPR Pt 18

- If you object to complying with the Request or part of it or are unable to do so at all or within the time stated in the Request, inform the first party promptly and in any event within that time.
- May do so in a letter or in a separate document (a formal response), but in either case must give reasons and, where relevant, give a date by which expect to be able to comply.

CPR Pt 18 – Application for Orders

Unable or unwilling to comply with request: paragraph 4, PD to CPR Pt 18

- Use N244 Application Notice
- Attach copy of order sought
- Describe any response
- Evidence permitted, but is it required?
- If no response provided to the initial request, "...the first party need not serve the application notice on the second party, and the court may deal with the application without a hearing.": Paragraph 5.5, PD to CPR Pt 18 (only if at least 14 days have passed since request served and the time stated in it for a response has expired)

CPR Pt 18 – Application for Orders

Paragraph 5, PD to CPR Pt 18

Otherwise, the application notice must be served on the other party
(and all other parties)

CPR Pt 18 – Consequences of not responding

- Conditional orders under CPR 3.1(3)?
- e.g unless order, if appropriate
- Conduct & costs

Evidence: expert

- What are the key determinative issues?
- Is the (permitted) expert evidence sufficient?
- Instructions clear, concise and direct
- Questions to expert pursuant to CPR 35.6

Evidence: expert

■ CPR 35.6 (1):

- 1) A party may put written questions about an expert's report (which must be proportionate) to:
 - a) an expert instructed by another party; or
 - b) a single joint expert appointed under rule 35.7

Evidence: expert

■ CPR 35.6 (2):

2) *Written questions under paragraph (1): -*

- a) may be put once only;*
- b) must be put within 28 days of service of the expert's report; and*
- c) must be for the purpose only of clarification of the report, unless in any case: -*
 - (i) the court gives permission; or*
 - (ii) the other party agrees.*

Evidence: factual

- What are the key determinative issues?
- Address the points that remain in dispute
- Why?
- A statement stands as his evidence in chief unless the Court orders otherwise: CPR 32.5 (2)
- A witness giving oral evidence at trial may with the Court's permission ((and good reason – CPR 32.5 (4)) amplify his statement and give evidence on matters which have arisen since: CPR 32.5(3)

Evidence: factual

- Ensure the WS addresses the points that remain in dispute
- Loss or damage, particularly loss of amenity, is unlikely to be admitted
- Access might be an issue raised by the Defendant

Evidence: factual

- Defendant witness for large landlords needs to be able to understand and explain:
 - How tenants notify landlord of issues
 - The repair records and documentation
 - The procedure for seeking/not obtaining access

Trial bundles – where to start

- Look at the case management order!

- Practice Direction 32, para 27

https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32

- Guides for Queens Bench and Chancery Division:

<https://www.judiciary.uk/wp-content/uploads/2022/02/QB-Guide-2022-Final-3-Feb-22-with-bookmarks.pdf> (section 14)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051246/ChanceryGuide_updated_28_January_2022__002_.pdf (21.34 onwards)

Trial bundles – whose responsibility?

- CPR 39.5: Normally the Claimant's job unless the court orders otherwise
- Both sides should always cooperate and try to agree
 - But be careful if you dispute a document: PD32, para 27.2
- Must lodge the bundle between 3 and 7 days before trial (clear working days)
- Don't forget to lodge 2 copies

Trial bundles – contents

- Refer to checklist in PD32 para 27.5, and the case management order
- Usual sections, separated by tabs:
 - Pleadings and orders
 - Expert reports
 - Witness statements
 - General documents
 - Repair records (if Defendant is a large landlord)
 - Medical records
- If you need more than one file, try to keep whole sections together

Trial bundles – contents

- Keep the size down by avoiding duplication of documents
 - Expert reports attached to Particulars of Claim
 - Exhibits to witness statements – see Queens Bench Guide, para 14.4
- Photos can be important in disrepair claims – make sure they're in colour and clear
- Big and distinct page numbers, not too close to the margins

Trial bundles – e-bundles

- General guidance on Judiciary website:
<https://www.judiciary.uk/announcements/general-guidance-on-electronic-court-bundles/>
- Consistent page numbering (start the index at page 1)
- OCR character recognition
- Bookmark key (not all) documents
- Rotate landscape or upside pages
- Court will accept up to 36MB email attachments

Trial bundles – late disclosure

- Usually better to file a supplementary bundle if the other side disputes the new documents (and make a formal application if it's important – relief from sanctions)
- If agreed, can insert into paper bundle (page 39a etc)
- E-bundles: always add to the end to avoid messing up page numbering

Claims for injunctions/specific performance

- Claimant needs to show that the issue is still outstanding at trial
 - If works have been done since exchanging statements/reports, consider further inspection by the single joint expert (or both experts)
- Important to be clear on what is a reasonable period to carry out the remaining works
- Defendant may need to put in a supplementary witness statement if they have been trying but tenant is refusing access

After trial – costs

- Consider having a bundle of without prejudice correspondence if there have been several offers and counter-offers
- Use Part 36: overall statement of costs, plus separate statement of costs incurred after a Part 36 offer expired
- If costs look high or unusual, brief your Counsel on why

Disclaimer

This material is intended for discussion purposes only and does not constitute legal advice. The presentation is not intended to be a substitute for obtaining legal advice in individual cases and appropriate advice should be sought in individual cases before any action is taken. No responsibility is assumed for the completeness or accuracy of this note or for any consequences of relying upon it. The legislative provisions are paraphrased. The precise wording should be examined.

Contact Us:

Mathew McDermott:

Mathew.McDermott@42br.com

Stefan Liberadzki:

Stefan.Liberadzki@42br.com