

Disrepair seminar: Enforcement of Settlement Agreements

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WHY IS THIS RELEVANT?

- Claims seeking to enforce settlement agreements are on the increase for various reasons, including:
 - Increase in disrepair claims more generally, likely as a result of the pandemic and issues within the public housing sector
 - The impact of the pandemic on “access” to properties
 - Limited availability of contractors
 - Unrealistic deadlines being set for works to be completed in light of the above circumstances

THE STARTING POINT: THE TERMS OF THE AGREEMENT

■ What exactly is required of the landlord?

- Are surveyors' reports referred to within the agreement or is it just a standalone schedule of works?
- Which of the expert's schedules (or both) is agreed?
- Is the whole of a schedule of works agreed or is it only agreed in part?

■ When is the deadline for completion of work?

- Is there a date on the agreement or a clear number of days in which the work will be completed? If the latter, how is this said to be calculated?

■ What are the "provisos"?

- Are generalised or specific provisos in place? E.g. "subject to access" or "subject to the tenant granting access within 48 hours of a written request being made"

LEGAL STATUS OF THE AGREEMENT

■ Contractually binding agreement

- Legal obligation to complete works as set out in Schedule of Works
- Failure to complete works in breach of contract
- Claim or contemplated claim was compromised

■ Enforcement is not automatic and application (or claim) is required

- Court order or injunction to ensure works are completed
- Extreme cases involving penal notices and committal proceedings
- Enforcement of agreed sum for damages
- Timing of when application should be made is crucial

■ Ensuring correct application is made based on the legal nature of the agreement

- Part 7 claim; Application for interim/ mandatory injunction in form N16A; N244 application

NATURE OF UNDERLYING AGREEMENT

■ Pre-Issue Offer

- Pre-Action Protocol for Housing Conditions (England)
- Settlement reached without need to issue claim

■ Part 36 Offer

- Cost consequences pursuant to CPR 36.17
- Claim is stayed pursuant to CPR 36.14(1)

■ Consent or Tomlin Orders

- Post-issue settlement without a substantive hearing
- Terms of agreement set out within Schedule to consent order

ENFORCEMENT OF PRE-ISSUE AGREEMENTS

Possible claims where no underlying claim exists

- Option 1: Issuing of a Part 7 claim for specific performance of outstanding works agreed
- Option 2: Issuing a Part 7 claim for a mandatory injunction for outstanding works agreed to be completed
- Option 3: Breach of contract claim and/or claim for interim payment of damages under CPR 25.1(1)k
- Most effective approach: a combination of the above

INTERIM INJUNCTION?

■ CPR 25.1(a)

- Part 7 Claim Issued alongside N16A Form for Injunction
- Court will provide expedited hearing date
- Test within *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1
- Balance of convenience and would damages be an adequate remedy

■ *Parker v Camden* (1985) 17 HLR 380, CA

- Browne Wilkinson LJ at paragraph 389
- Mandatory interlocutory injunctions should only be granted in “the most exceptional circumstances” such as breach of repairing obligation/ settlement “giving rise to actual and immediate major discomfort and inconvenience and to a real risk of damage to health flowing from admitted breach”.

VALID DEFENCES?

- The agreement has not been breached?
 - Go back to the terms: have the provisos kicked in?
 - Not about whether there is ongoing disrepair but whether the agreed works have been done

- Injunction may be inappropriate
 - Current circumstances dictate it cannot be complied with
 - Reliance on *Parker v Camden* (1985) 17 HLR 380, CA

REALITY – AN OPPORTUNITY FOR FURTHER SETTLEMENT?

- Fresh proceedings equally capable of being compromised
- Settlement likely to include a new date for completion of the outstanding work and payment of some damages from the date at which the work should have been completed until the newly agreed date for completion of the work

ENFORCEMENT OF PART 36 OFFERS

■ N244 Application

- Existing proceedings
- No need for a new claim pursuant to CPR 36.14(8)

■ Is it necessary to lift the stay on proceedings?

- Able to enforce terms of settlement pursuant to CPR 36.14(5)(a)
- Court requires jurisdiction to determine new claim for damages
- Clear terms of order; stay lifted for purposes of assessment damages occasioned by breach of Part 36 agreement

■ Disposal Hearing

- Benefits of second hearing being listed

POST-ISSUE AGREEMENTS AND TOMLIN ORDERS

■ Consent Orders

- Written to the court to confirm that claim is stayed or consent order drafted
- Terms agreed do not form part of Schedule

■ Tomlin Orders

- Proceedings are stayed except for the purpose of enforcing terms set out in Schedule
- Pursuing an order for works to be completed by specific date

■ N244 Application

- Existing proceedings
- Form and content of application
- Same considerations in event of non-compliance with terms of order

RELEVANT EVIDENCE

- Witness statements
 - Factual witness with knowledge of state of premises
 - Potential expert surveyor witness addendum report?
- The underlying agreement itself (or the documents which taken together constitute the agreement)
- Correspondence
 - Between the parties
 - To and from contractors
 - Demonstrating any internal issues which are relied on
- Photographic evidence of current state of the premises

Damages?

■ Are they payable?

- Yes, in theory, though not always
- Any damages would be for breach of contract and the ongoing distress and inconvenience which flows from that. Not a breach of statutory duty.

■ What are the considerations as to whether they will be awarded?

- Length of the delay which has passed
- Reason for work not being completed
- Level of work which has been completed
- Has an injunction or specific performance order been made?
- Breach of own offer and/or agreement may lead to higher percentage of diminution of rental value

Costs

- N260 Statement of Costs
- Entitlement to costs due to breach of agreement
- Costs of the application and/or subsequent disposal hearing

QUESTIONS?

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