

## **Richard Blakeway, Housing Ombudsman**

Welcome to our latest podcast. Many social landlords are reporting a significant increase in legal disrepair claims. This podcast explores why and what it means for complaint procedures.

Effective complaint handling is preferable to increasing disrepair claims, which may take longer or leave the issue unresolved. So it's crucial for landlords to be clear and confident in the handling complaints when the pre-action protocol on housing conditions commences. The pre-action protocol itself, which we will refer to as 'the protocol' in this podcast, encourages the use of alternative dispute resolution to avoid court. For social housing this includes the complaints procedure and referral to the Housing Ombudsman. In turn, we are clear use of the protocol does not constitute legal proceedings which otherwise would mean we may not investigate.

Yet our recent Spotlight Report into complaints relating to damp and mould found this wasn't always happening. Instead the complaints process was sometimes ended prematurely. This may be a missed opportunity to resolve, where possible, an issue outside court, more quickly, less adversarially and without the associated costs for the resident and landlord. To help to avoid this, we have produced guidance on our jurisdiction and this podcast explores how the protocol and the complaints procedure should work in parallel.

Dave Simmons, our sector development lead, sets out the context for the pre-action protocol. Jenn Ryans, our head of dispute resolution, explains our jurisdiction and Liz Eves, our Quality Manager, discusses what this means in practice for landlords. The podcast will also address the most common questions we've been asked since our guidance was published.

We hope you find this podcast helpful, and this approach empowers complaints teams to resolve issues. Dave, over to you.

## **Dave Simmon, Sector development lead**

The housing sector is experiencing a rise in legal disrepair claims against landlords which can be attributed to a number of things. For a start, a significant backlog of repair requests built up during the COVID-19 pandemic which landlords are still catching up with. The easing of lockdown restrictions has placed higher expectations on landlords which they are not always able to meet. Some residents are viewing the legal route as a means through which they can get these outstanding repair disputes, particularly the more complex ones, completed and resolved more quickly.

Also changes in law i.e. the Fitness for Habitation Act, mean that residents are empowered to take their landlords to court if they fail to meet the fitness standards either at letting or at any point for the duration of a tenancy. The situation has been compounded by the increase in 'no win no fee' solicitors, encouraging residents to take matters through the legal process rather than trying to resolve them through their landlord's formal complaints procedure.

Legal disputes can be protracted and contentious as well as stressful, costly and time-consuming for both residents and landlords. Of particular concern is that the nature of legal disputes results in a deterioration in the relationship between residents and landlords which is something that can be difficult to restore.

The increasing number of legal claims was highlighted in our most recent thematic report which focusses on complaints about damp and mould. The report also highlighted the fact that landlords were not taking sufficient steps to try and prevent cases from turning into legal claims which includes not making the most effective use of their internal complaints procedures. The findings of that report, and the experience of our own casework, prompted us to publish some guidance for landlords on how to effectively manage cases involving legal claims, specifically those where the Pre-Action Protocol has been initiated. This podcast is intended as a supplement to that guidance and to the learning points identified in our thematic report.

I'm going to hand over to Jen now. Jen what is the protocol? And what are some of the related issues we are observing in our casework?

### **Jenn Ryans, Head of Dispute Resolution**

Thanks Dave. Firstly, the Protocol applies to residential properties situated in England and relates to claims by tenants in respect of poor housing conditions. It is intended for those cases where, despite the landlord's knowledge of the poor conditions, matters remain unresolved. Where such claims proceed to litigation, the court has power to order parties, who have unreasonably failed to comply with the Protocol, to pay costs or to be subject to other sanctions.

We are observing an increased number of cases where landlords are taking the decision to discontinue with their internal complaints procedures because there is evidence, such as a 'Letter of Claim,' that the Protocol has started. It should be remembered that the Protocol is intended to encourage the exchange of information between parties at an early stage. It is also intended to provide a clear framework within which the parties involved can attempt to achieve an early and appropriate resolution of the issues, without having to resort to the courts.

Commencing the protocol does not constitute legal proceedings. For the avoidance of doubt this includes correspondence entitled a 'letter before claim', 'letter before action', 'pre-action letter,' 'letter of intent' or something similar.' The Ombudsman's view is that a situation does not become legal until proceedings have been issued. The issuing of proceedings involves filing details of the claim, such as the Claim Form and Particulars of Claim, at court. The court will then serve this on the respondent for them to answer to.

Until this point, the Protocol allows for residents and landlords to pursue alternative dispute resolution to try and resolve the issues. As such, the complaints procedure still provides a valuable opportunity for both parties to reach a resolution and it should be utilised as effectively as possible to try and achieve this. Aside from the fact that the courts will look to see that alternative dispute resolution has been attempted in the first instance, there are a number of benefits attached to using the

landlord's internal complaints process and our own investigation process where required.

**Dave Simmon, Sector development lead**

Can you run through what these benefits are?

**Jenn Ryans, Head of Dispute Resolution**

The potential benefits include both parties being able to achieve a more timely resolution of the issues by using a simpler and more flexible process. No legal costs will be incurred by either party and the investigation and resolution will not be limited in scope in the way that a disrepair claim would be. Other residents in similar situations could benefit from any learning and improvements made as a result of a complaint that is considered through the internal complaints procedure. The Ombudsman can also provide an independent and impartial assessment of the landlord's actions if it remains unresolved.

**Dave Simmon, Sector development lead**

Thanks Jen. Liz – can you provide some specific guidance on how landlords can effectively manage complaints that are going through the Protocol?

**Liz Eves, Quality Manager**

Thanks Dave. The Ombudsman's view is that it is up to landlords to decide how to consider complaints involving disrepair claims where the Protocol has started. A landlord may decide to deal with the matter through its internal complaints procedure. Alternatively, it may decide to close the complaint in its internal complaints procedure and address the matter through the Protocol, via its Legal Team. Another option is to deal with the situation using a combination of both its Legal Team and internal complaints procedure. What is important is that a landlord is clear and consistent as to how the issue will be addressed and that this is communicated to the resident at the outset.

If a landlord's Legal Team is dealing with the matter, it should be prepared to share copies of correspondence with the resident in line with Protocol. It should also provide copies of correspondence to us when this is requested. Landlords should remember that there may be issues that are not being looked at as part of the

Protocol, such as customer service or contractor's behaviour, which will also need addressing.

**Dave Simmon, Sector development lead**

Thanks Liz. Can you clarify the process for concluding cases involving the Protocol that are being handled outside of the internal complaints procedure? And can you also explain at what stage residents can refer them to us should they remain unresolved?

**Liz Eves, Quality Manager**

We have discretion to accept a landlord's final position on a complaint in a letter from its Legal Team or solicitors. An acceptable final decision letter may also be the landlord's response to the tenant's 'Letter of Claim' or a similarly named letter, under the Protocol. Therefore, if the matter has been considered by the landlord's Legal Team or solicitors and the resident has been provided with a final letter in respect of the complaint, we may consider the complaints process to be exhausted as the landlord has already considered the issues and set out its final response.

Either way, landlords should clearly communicate to the resident when a complaint has been concluded and be clear as to which correspondence represents its final complaint response. Landlords should also provide guidance about contacting us for an independent and impartial review of their case at that point. We will only exercise this discretion for complaints that are not the subject of court proceedings and which the complainant wishes to refer to the Ombudsman.

It is important to point out that the protocol can always fail and landlords should be open to allowing a resident the opportunity to bring a complaint back into the internal complaints procedure in the event that it does fail or stalls in trying to resolve the dispute. Court action should always be the last resort for the reasons already mentioned.

To avoid any concerns about 'excluding' a complaint that's with the Legal Team, landlords could consider keeping the complaint open and sending complaint responses as usual. It could include in those responses a section that explains which issues are being dealt with by the Legal Team through the Protocol. The response can also then address any matters that are not part of the potential proceedings such as concerns over communication or customer care.

## **Dave Simmon, Sector development lead**

Thanks Liz. Jen, is there anything else from the protocol guidance that we should take the opportunity to highlight in this podcast?

## **Jenn Ryans, Head of Dispute Resolution**

Yes, it is appropriate to point out that under the terms of the Ombudsman Scheme, the Ombudsman will not consider complaints that are subject to legal proceedings where the resident will have, or has had, the opportunity to pursue the subject matter of their complaint in court. Landlords and residents should remember that regardless of whether a landlord chooses to deal with the issue through its Complaints Team or its Legal Team, correspondence under the Protocol does not take the case outside of our jurisdiction as it is pre-action and no legal proceedings have started. Whilst landlords may manage residents' expectations around our jurisdiction, it is ultimately for us to decide whether we will investigate a complaint.

Landlords should also be mindful of the fact that, even when legal proceedings have been issued, care should be taken to consider whether any matters raised in subsequent correspondence form part of those proceedings. If not, consideration should be given as to whether those issues need addressing via another route, such as the internal complaints procedure.

Landlords should use their internal complaints procedures as an effective means to try and resolve disputes wherever possible and not prematurely close complaints because of existing unrelated proceedings. They should also use intelligence from these cases to identify any potentially systemic issues and take proactive actions to prevent similar cases arising.

## **Dave Simmon, Sector development lead**

As well as the guidance we have published on handling cases subject to the Protocol, the thematic report on damp and mould, mentioned at the outset of this podcast, dedicated an entire chapter to this issue. Chapter 3 of that report entitled 'From disrepair claims to resolution' sets out some recommendations for landlords on how they can proactively try and prevent complaints from becoming legal cases. Although these recommendations relate to the damp and mould cases that we examined as part of that report they can apply to any case involving outstanding repairs.

The report identified complex cases (specifically where there are issues in diagnosing, repairing and resolving the problems) as being those most likely to result in legal claims. In such cases landlords should take particular care to maintain relationships with residents. This can be achieved through such things as: keeping them updated and informed; routinely sharing the outcomes of surveys and; setting

out the next steps. Using independent surveyors is also useful to avoid concerns about bias and to have parity with the actions that would be expected if following the Protocol. Ultimately residents want to see cases being proactively progressed and landlords should have strategies in place for identifying the more complex cases early and managing them affectively.

The report also recommends that landlords give early consideration as to whether decanting the resident is necessary - particularly where vulnerable residents are concerned. This will avoid leaving them living in poor conditions for prolonged periods of time, with repeated visits and inspections of their home.

Aside from this, landlords should actively promote the internal complaints procedure and the Ombudsman Service as a means through which disputes can be effectively resolved so that residents don't feel the need to resort to legal disrepair claims. They should continue to use the internal complaints procedure as far as possible when the Protocol has commenced and ensure that their approach is consistent and commensurate with our guidance.

You can find a full version of the Spotlight report on damp and mould plus our guidance on the protocol on our website. That brings us to the end of this podcast. Thank you for listening.