



## **CIVIL JUSTICE COUNCIL**

### **INTERIM REPORT OF THE WORKING GROUP ON PROPERTY DISPUTES IN THE COURTS AND TRIBUNALS**

#### **Executive Summary**

1. In July 2015, the Civil Justice Council set up a working party to consider whether there were advantages in deploying the judiciary in a flexible manner to ensure that all issues in dispute in property cases are dealt with in one forum.<sup>1</sup> The distribution of housing, landlord and tenant, property and land registration cases (“property disputes”) in the Courts and the First-tier Tribunal (Property Chamber) means that in some instances litigants are required to make separate applications and obtain several determinations in more than one forum to achieve a final outcome for their dispute.

2. In December 2015 the group issued a consultation, to which 21 responses were received. In March 2016 a workshop was held to consider options for flexible deployment; it was attended by fifty delegates. The overwhelming preference of respondents and participants was for a housing court to be established. However, if that is not realistic, there was a consensus in favour of the flexible use of judiciary in order to avoid a multiplicity of proceedings, to effect savings and to enhance consistency and to ensure that judicial expertise was appropriately targeted.

3. The group’s recommendations are as follows:

<sup>1</sup> As a result of amendments to the County Courts Act 1984 made by the Crime and Courts Act 2013 and as a consequence of the provisions of the Tribunals Courts and Enforcement Act 2007, all Tribunal Judges can hear cases and decide issues within the jurisdiction of the County Court and all County Court judges can hear cases and decide issues within the Tribunal’s jurisdiction.

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A list of specified property disputes where flexible deployment can be used should be drawn up for consideration by the Lord Chief Justice and the Senior President of Tribunals.

In the case management of such cases, judges should decide whether the court or the tribunal is the most appropriate forum

The County Court and the Tribunal should have the power to transfer cases to each other and

The County Court and the Tribunal should have the power to retain cases that they would otherwise have had to transfer.

In deciding whether to retain or transfer a case, judges should take into account: the need to avoid a multiplicity of proceedings; proportionality; the desirability for the case to be decided by those with expertise in property matters and the parties' funding arrangements.

4. We consider that further steps are required to give effect to the recommendations and suggest that we should continue work and provide a report on the following by September 2016:

The pilot deployment project currently being undertaken by the Tribunal<sup>2</sup> ;

A provisional list of specified disputes;

A protocol for the procedures to be adopted in transferred and retained cases;

Recommendations in appropriate cases<sup>3</sup> for the designation of Tribunal centres as County Court offices;

Recommendations for the ticketing and training of judges;

Opportunities for the enhancement and co-ordination of IT support for deployment;

Recommendations for ADR in property disputes;

Engagement with HMCTS in respect of practice and procedure.

<sup>2</sup> The pilot has been approved by the Flexible Deployment Group chaired by Mrs Justice Pauffley  
<sup>3</sup> An obvious example being 10, Alfred Place, the location of the London Region of the Residential Property Division of the First-tier Tribunal (Property Chamber) and of the Land Registration Division.

5. We believe that the project has been very worth while and that the recommendations will lead to a significant improvement in the determination of property disputes for both litigants and the justice system. I am very grateful for the help and support from the members of the working party (listed at Annex A) and for the invaluable assistance of the Civil Justice Council secretariat.

Siobhan McGrath

May 2016

# **Chapter One**

## **Introduction**

1. The idea for the project is simple: judges should be deployed in a way that ensures that litigants are able to resolve all the issues in a dispute in one forum. The idea is not new. In dealing with the concurrent jurisdiction of law and equity, section 49(2) of the Senior Courts Act 1981 requires that every court shall so exercise its jurisdiction in every cause or matter before it as to secure that as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.” As the White Book note observes this lies at the heart of the administration of civil justice in England and Wales.

2. In a range of property, landlord and tenant, land registration and housing cases (property disputes), the distribution of cases between the courts and the tribunals means that in some instances litigants are required to make separate applications and obtain several determinations in more than one forum to achieve a final outcome for their dispute.

3. The boundaries between issues considered fit for determination by the Court, and those allocated to the Tribunal, are not always drawn by reference to any consistent principle and are largely unrelated to complexity or value. Examples can be found of statutes which give the Court exclusive jurisdiction to determine issues which, if they arose on identical facts but under a different statute, would be within the exclusive jurisdiction of the Tribunal. Sometimes the demarcation is required because the Tribunal has only very limited powers of enforcement and cannot grant the remedies available to the Court, such as a money judgment or a mandatory order. Disputes involving property valuation, or the assessment of the value or quality of performance of service obligations are generally, though not exclusively, assigned to the Tribunal.

4. The benefits of having property disputes decided in one place by one Tribunal or one Judge are self evident: it will reduce costs for parties and for HMCTS, it will

provide continuity and consistency in decision making and it will mean that disputes are resolved more quickly. The issue is not been whether the resolution of disputes in one arena is a good idea, but how this may be best achieved. The proposition under consideration by the project group is that this can be achieved by the flexible deployment of the court and tribunal judiciary.

5. The opportunity for flexible deployment comes as a result of changes introduced by the Crime and Courts Act 2013. All County Court judges are First-tier Tribunal Judges.(sections 6 and 6A of the Tribunal Courts and Enforcement Act 2007). All First-tier Tribunal judges are now judges of the County Court (section 5(2)(t) and (u) of the County Courts Act 1984, as amended by the Crime and Courts Act 2013). The County Court is now a single court for England and Wales (section 1, 2013 Act). It is able to sit anywhere in England and Wales subject to directions given by the Lord Chancellor in consultation with the Lord Chief Justice (section 3). Therefore, subject to designation, all Tribunal judges can currently hear cases and decide issues within the jurisdiction of the County Court and all County Court judges can hear cases and decide issues within the Tribunal's jurisdiction.

6. The Terms of Reference for the project (at Annex A) require the group to consider proposals for changes in the deployment of judicial resource between the County Court and the Property Chamber in the determination of landlord and tenant, property and housing disputes having regard to access to justice; proportionality and judicial and administrative resource.

7. In preparation for this report the group agreed a discussion document which was sent to stakeholder organisations and individuals. Twenty-one substantive responses were received. Those responses were extremely helpful and are reflected in the following chapters. In March 2016 we also held a discussion workshop which was attended by 50 delegates who worked through a number of case scenarios for the purpose of identifying and if possible resolving issues and challenges.

8. The proposal under discussion was that:

(a) the County Court should have the discretion to transfer cases and issues to the Tribunal, and the Tribunal should have the discretion to transfer cases and issues to the County Court and \_\_\_\_\_

(b) the County Court should have the discretion to retain cases and issues that it would otherwise have had to transfer to the Tribunal, and the Tribunal should have the discretion to retain cases and issues that it would otherwise have had to transfer to the Court.

9. The rest of this report is structured as follows: in Chapter 2 the context for change is explained more fully; in Chapter 3 we look at the options for change; in Chapter 4 we address issues around procedure, costs and appeals and in Chapter 5 we set out our conclusions and recommendations.

## Chapter Two

### The context

1. The Property Chamber was established on 1<sup>st</sup> July 2013. It deals with about 11,000 cases a year. The judicial office holders include judges, experts and lay members. The Chamber has judges who have expertise in landlord and tenant, housing and property law. Members have expertise in valuation, housing condition, environmental health, agriculture and drainage. All are used to dealing with litigants in person and adopting an enabling approach to dispute resolution. The standards of adjudication in the Chamber are high. Onward appeals, with permission, are to the Lands or Tax and Chancery Chambers of the Upper Tribunal, with second appeals to the Court of Appeal. A list of the Chamber's jurisdictions is attached at Annex A.

2. Both the District and Circuit bench in the County Court deal with property, landlord and tenant and housing cases. The range of jurisdictions is also wide and includes the consideration of possession cases, chancery cases, co-ownership disputes and homelessness appeals. Judges have experience of dealing with these areas of law and for the more specialised Chancery cases are specifically ticketed to do so. Onward appeals, with permission, are generally to the High Court, with second appeals to the Court of Appeal.

3. The need for a better rationalisation of dispute resolution for housing and property disputes has long been recognised. See for example, the Law Commission consultation and report on *Housing: Proportionate Dispute Resolution* issued in 2008. The core problem is that the resolution of disputes is dispersed between the Courts and the Tribunals. For the user this may well mean that in order to obtain a remedy by litigation they must conduct proceedings in more than one forum. In particular:

(a) There are cases where jurisdiction to determine different stages of the same dispute is split between the Court and the Tribunal and a litigant must take

proceedings in both places to achieve a single remedy resolving the issues between the parties.

(b) There are cases where there is a parallel jurisdiction in the Court and the Tribunal and litigants must choose where to start proceedings. This may lead to an inconsistency in approach and decision making.

4. Over the past twenty years the nature of the work dealt with by the Tribunal has been transformed by the addition of jurisdictions that were originally dealt with by the Courts but which it was decided might be better dealt with in a different forum.

#### ***Examples of jurisdictional overlap.***

##### *5. Enfranchisement*

The jurisdiction to deal with enfranchisement claims is divided between the Courts and the Tribunals. Broadly, the County Court decides entitlement and the Tribunal decides disputed terms of acquisition, including price. The issues of entitlement which typically arise are the same as those which the Tribunal already decides in disputed claims to exercise the Right to Manage under the Commonhold and Leasehold Reform Act 2002, the qualifying conditions and procedures for which are modelled on the 1993 Act. The Court also decides disputed terms of contracts after the terms of acquisition have been resolved.

##### *Examples*

(a) If the right of a group of tenants collectively to acquire the freehold of a block of flats under the Leasehold Reform, Housing and Urban Development Act 1993 is disputed by their landlord on the basis that the building does not qualify or their claim notice was invalid, it may be necessary for the tenants to make a protective application to the Tribunal (to avoid the claim notice lapsing) whilst at the same time taking proceedings in the County Court to determine the issue of entitlement. If entitlement is established the tenants must then return to the Tribunal for a

determination of price etc. Finally, any further dispute over the terms of the contract must go back to the Court.

(b) Where a landlord is missing or cannot be identified, a tenant wishing to enfranchise is required to start proceedings as to entitlement to enfranchise in the Court and then to obtain a determination from the Tribunal of the price payable before returning to the Court for an order giving effect to that entitlement.

In appropriate cases it may be desirable for issues of entitlement and contract terms to be determined by the Tribunal so that the whole of the claim may be decided in one place.

#### *6. Service Charges*

This jurisdiction provides examples of both limbs of overlap.

#### *Examples*

(a) Both the Court and the Tribunal can decide the payability of service charges, but only the Tribunal can dispense with service charge consultation requirements under section 20(ZA) of the Landlord and Tenant Act 1985. If a service charge case is dealt with by the Court and there is also an issue about dispensation, that issue must be sent to the Tribunal.

(b) It is common for claims by landlords for arrears of service charge also to include claims for arrears of ground rent and interest. The Tribunal cannot deal with either of these often modest claims and litigants must return to the Court for them to be dealt with separately.

(c) It is not uncommon to find that lessees are withholding service charges because they consider that a landlord is in breach of a repairing covenant. Although the Tribunal can consider a defence of set-off in such cases up to the limit of the service

charge claim it often cannot deal with the whole of the tenant's claim, and can never order the landlord to carry out necessary works.

(d) In estates where maintenance charges are levied on both leaseholders and freeholders (for example for the upkeep of communal gardens etc.) the Tribunal can deal with cases brought by or against lessees but not by or against freeholders despite the subject matter of the claims being identical.

In an appropriate case it may be sensible for the whole of a service charge case to be decided in one place, at least to the point at which the sum finally payable is quantified.

### *7. Right to Manage*

In Right to Manage cases the Tribunal has sole jurisdiction to deal with most issues arising under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002, but there are circumstances in which the Tribunal has no jurisdiction at all, or where it lacks enforcement powers. The jurisdiction of the Tribunal to resolve disputed entitlement may only be invoked by an RTM company and is dependent on the service of a counter-notice by a person who has received a claim notice from the company (s. 84(3), 2002 Act). If a person wishing to challenge the RTM company's entitlement to acquire the right to manage is not entitled to receive a claim notice or fails to give a counter-notice, their only remedy is to apply to the Court for a declaration that the right to manage has not been acquired. It may be sensible for all questions of entitlement to be decided in one place,

### *8. Pre Forfeiture Determinations*

Under section 168(4) of the Commonhold and Leasehold Reform Act 2002 the Tribunal can make a determination that a lessee is in breach of a lease but cannot go on to find whether the breach has been waived; nor can the Tribunal make a determination of the terms on which relief against forfeiture ought to be available to

the defaulting tenant. Having secured a determination of breach the landlord must first serve a notice under section 146, Law of Property Act 1925 before commencing

proceedings in Court for the forfeiture of the lease; at that stage the tenant will be able to claim relief against forfeiture or raise defences which may provide a complete answer to the claim.

It may be advantageous to both parties for the whole of the case to be decided in one place, at least to the point at which it is established whether the lease is to be terminated or is to continue.

### *9. Housing Act 2004*

(a) In October the Deregulation Act 2015 introduced a new regime to deal with retaliatory eviction where a tenant has complained about the condition of the premises to the local authority. If a Housing Act 2004 notice has been served or if the local authority are considering whether or not to serve a notice, then the power to serve a section 21 notice is restricted.

(b) For houses in multiple occupation the Tribunal deals with most jurisdictions however there is one particular omission namely the power to make declarations as to whether a property is or is not an HMO – at present this goes to the Court.

Since the Tribunal has expertise in these fields of housing standards and licensing it may make sense for the Tribunal also to deal with associated cases.

### *10. Park Homes*

Jurisdiction in cases under the Mobile Homes Act 1983 and the Caravan Sites and Control of Development Act 1961 is divided. Disputes over charges, site rules, contractual obligations are in the main dealt with by the Tribunal. Termination proceedings are dealt with by the Court. In two jurisdictions requiring the assessment of property condition it may make sense for the Tribunal to decide termination: firstly, where it is alleged that a mobile home is having a detrimental effect on the amenity of

a site and secondly where the issue is simply that the occupier is in breach of the park home agreement by failing to keep the mobile home in a state of repair.

### 11. *Land Registration*

Most of the land registration cases determined by the Tribunal arise from references, where an application has been made to HM Land Registry, an objection has been made which is not groundless, and the matter is referred to the Land registration Division. The order made by the Tribunal is therefore a direction to the Registrar either to give effect to an application or to cancel it. In many cases it would be helpful for the Tribunal to have additional powers, in particular to make declarations (often needed in boundary disputes) or to award damages (for example where there are allegations of trespass or nuisance, associated with a dispute about title or about an easement, for example). For such remedies the parties have to apply to the Court, but it would be helpful for the Tribunal to be able to deal with all associated issues.

Specific and technical difficulties arise where the Tribunal deals with cases where one party seeks to register a restriction to protect a claimed beneficial interest in a property registered in the name of another and accordingly the LR judges determine whether there exists a beneficial interest under a constructive trust. Three problems arise:

(a) The Tribunal cannot make a declaration so as to determine the respective shares of the parties in the affected property. In practice the LR judges ask the parties if they would like a decision on the point and, if so, they make findings of fact about the extent of beneficial ownership. Those findings will bind the parties in any further court proceedings and so, in practice, dispose of the dispute. This practice has not been tested on appeal.

(b) Such cases are often expressed in the alternative as a claim to an equity by estoppel. The Land Registration Act 2002 gives the Tribunal jurisdiction to decide how an estoppel equity should be satisfied in the context of an adverse possession claim; arguably therefore it does not have jurisdiction to do so in any other case.

(c) In any case where there is beneficial joint ownership under a trust or arising by estoppel, the Tribunal cannot make an order for sale of the property, or other order under sections 14 and 15 of the Trust of Land and Appointment of Trustees Act 1996..

The parties must go to Court. It would make sense for the Tribunal to exercise the 1996 Act powers in such cases.

The Tribunal also has a jurisdiction to rectify documents which lead to registration, under section 108 of the Land Registration Act 2002. This means that an application for rectification of a registered charge can be made to the Tribunal, but an application for the rectification of the discharge of a registered charge must be made to the Court. It would be sensible for the Tribunal's expertise to be available in both types of application.

### ***The Discussion Report Responses***

12. One of the questions posed in the discussion paper was whether there were jurisdictional areas not covered in the report where flexible deployment might be utilised. In the main the answer was that there were not, but the Association of District Judges pointed out that if there is flexible deployment new instances of overlap could easily be accommodated.

13. The Housing Law Practitioners Association suggested that both rent charges and freehold service charges should also be included. There is a very compelling case for freehold service charges to be considered by the Tribunal. Although they are not governed by sections 18 to 30 of the Landlord and Tenant Act 1985, disputes will often apply to estate charges payable by both freeholders and leaseholders and as it is, the Tribunal can only deal with the lessee applications.

14. The Property Bar Association suggested that rationalisation was needed in applications under section 84 of the Law of Property Act 1925 for the modification and discharge of restrictive covenants where Court proceedings are stayed pending an application to the Lands Chamber. The Association suggested that it would be better for the Land Chamber to deal with the whole issue rather than having a split jurisdiction.

### ***Determination by an Expert Judge or Tribunal***

15. In the report we also considered the benefits of having decisions made by those with expertise in property matters. The Tribunal is expert in the complex areas of law within its jurisdictions. Many of the Courts judiciary also have this expertise but others do not deal with these specialist jurisdictions with sufficient regularity to acquire or maintain a comparable expertise. It is important that judges with appropriate knowledge, experience and interest are able to sit in these interesting but technical jurisdictions. Any proposal must accommodate the ability to deploy judiciary with expertise from both the Courts and the Tribunals. The advantages of having expert judiciary in this area of law are clear - they include accuracy and consistency in decision making, efficiency and consequential savings in cost for parties and for the judicial system. Specialist expertise is vital where litigants are unrepresented.

16. The advantages of decision making by experts was recognised by most respondents to the discussion report. For example the Property Bar Association observed that many county court judges do not have any great depth or knowledge of property law and that where there is a specialist Chambers list very often property cases are not included. The Association suggested that there is a case for a property ticket for circuit and district judges and that it would be logical to expand ticketing to both the Property and Lands Chambers (and vice versa)

17. In cases requiring expert knowledge of valuation, housing conditions or agriculture, the Tribunal is able to offer members with practical experience and who are trained in adjudication in the relevant jurisdictions. The wing members in the Tribunal can test the expert evidence provided by the parties and contribute to the decisions making. These are advantages which are not available to judges sitting alone. In appropriate cases, the Tribunal can decide expert issues without the need for the parties to bring expert evidence at all (the most common example being the assessment of rents).

18. On that basis we suggested that it was also worth considering whether there are other types of case, currently assigned exclusively to the courts, that may benefit from

being decided by the Tribunal. Although this is strictly outside the ambit of our terms of reference the discussion of examples given below is of interest:

(a) *Low value disrepair claims* - the proposal that an expert Tribunal should determine disrepair cases was made at paragraph 5.54 of the Law Commission's report on Housing Dispute Resolution. It is a sensible proposal given that the Tribunal has experienced judges and surveyors who deal with housing cases. It may be worth considering a disrepair action which would roll-up claims under section 11 of the Landlord and Tenant Act 1985, the Defective Premises Act 1972 and possibly statutory nuisance. This proposal met with a mixed reaction. In particular Citizens Advice and Shelter were very clear that disrepair cases should remain with the courts if either legal aid was available or where conditional fee agreements provided funding for representation. This is a misunderstanding of the proposal. If a Tribunal judge is sitting as a County Court judge then funding arrangements will remain undisturbed, having said that. However, these concerns must be acknowledged and addressed. Funding arrangements aside, Shelter said that if the Tribunal were to gain the power to award damages and grant orders for works, they would support a proposal for the court to have power to transfer low level disrepair cases to the Tribunal for full disposal where it is considered appropriate to do so.

(b) *Tenancy deposit issues* – There are three organisations operating the statutory tenancy deposit schemes in England and Wales. Each sets out procedures for the resolution of disputes about deposits which may arise at the end of a tenancy. These procedures are free for parties to use. Between them, the three schemes deal with about 17,500 cases a year. Disputes are resolved on-line, on the basis of evidence submitted, usually electronically through a portal, by the parties. There are two potential problems of overlap with the courts: First, unlike the situation in Scotland and Northern Ireland, it is necessary for both the tenant and the landlord to agree to use the dispute resolution procedure (in Scotland and Northern Ireland if the tenant wishes to use the dispute resolution procedure the landlord is unable to withhold consent). There are a small number of cases where a party (usually the landlord) refuses to submit to the procedure, leaving the tenant to pursue any remedy in the

county court. Though rare, this undermines the purpose of the statutory scheme. This

problem could be resolved by amending the relevant law. It could also be mitigated by a clear practice direction that a court (or tribunal) would not hear a case which has not been submitted to the alternative dispute resolution procedure. Second, the jurisdiction of the scheme is limited to the amount of the deposit. There are cases where the landlord seeks more than the amount of the deposit, or where the tenant is effectively making a counter claim against the landlord, e.g. for failure to repair. In such cases, the statutory schemes cannot deal with them, insofar as they go beyond the value of the tenancy deposit, and where any further redress would have to be sought from a court. This might be more appropriate work for a Tribunal. This proposal is not intended to displace the adjudication provision in the schemes. The suggestion is simply that where there are residual issues on tenancy disputes that go to the County Court in any event, these might be most appropriately be dealt with in the Tribunal.

(c) *Leasehold issues* – aside from service charge disputes and determinations of breaches of covenant as a prelude to forfeiture, we suggested that the Tribunal could decide freestanding claims for remedies arising out of breaches of repairing covenants in long residential leases.

### ***Cases More Suitable for Determination by the Courts***

19. We recognise that for some jurisdictions deployment may not be necessary or desirable. In particular there is general agreement that possession cases for both tenancies and mortgages should remain within the exclusive jurisdiction of the Courts. As the Property Bar Association observed: “they impact so fundamentally on business and personal property rights, and the court has a wide enough range of remedies to deal with every eventuality, particularly where time is of the essence.” And whilst the National Landlord Association were keen for all matters to go to the Tribunal they expressed the caveat that: “However, it will be important to ensure that the new court or tribunal has all necessary powers and status, as well as the capability to effectively manage the large caseload. It would be a step backwards if the timeframe for decisions increased due to lack of funding, staff or capacity.”

20. Shelter expressed the firm view that unlawful eviction and homelessness should remain with the Courts and ~~this was echoed by others in the~~ voluntary sector.

21. As for business tenancies there was some equivocation. In particular we were interested to note that there was some support for the determinations of rental levels in low value business tenancy renewal cases going to the Tribunal.

## Chapter Three

### Options for Change

#### Introduction

1. The discussion question on options for changed asked recipients to consider the following options:
  - (a) To do nothing and continue with the existing system.
  - (b) By using flexible judicial deployment, to modify and extend the powers of the judges of the tribunal and the county court to move between those roles when hearing such cases;
  - (c) To establish a new housing court or tribunal to deal with all matters concerning housing and property.

#### The responses

2. Most of those who responded expressed a preference for a new housing court or tribunal. Generally it was considered that establishing such a forum would deal with the anomalies in the present system whilst preserving the expertise necessary to determine housing and property cases. The Association of Residential Letting Agents considered that option (c) would speed up the system, increase expertise in the decision making process and ensure greater consistency with reduced costs stating “we believe this will speed up the dispute process, improve consistency in judgments and reduce costs as many landlords are litigants in person and conduct legal proceedings on their own. This will then mean that expert judges will get to the bottom of cases without the need to employ expensive solicitors or barristers.” And the National Landlord’s Association observed that a dedicated court or tribunal would provide “Ease of access – in practice and in terms of user perception, having one point of access for all housing and property related issues would ensure landlords are not deterred from taking action against rogue tenants and likewise tenants are not deterred from taking action against rogue landlords.”

3. For others, including the Association of Retirement Housing Managers, the Property Bar Association and the Leasehold Knowledge Partnership, option (c) and the creation of a new housing court was the main preference but they acknowledged that this is unlikely to occur at present and therefore supported the use of flexible deployment as a more realistic option.

4. The Housing Law Practitioners Association tentatively supported the creation of a housing court, merging all civil and criminal jurisdiction since a unified court would reduce the burden on both the remaining civil courts and the magistrates court and would resolve many of the jurisdictional issues identified in the paper. Citizen's Advice took a similar view but both were concerned that there should be a "court" on the basis that costs shifting is a requisite for legal aid and for conditional fee arrangements.

5. The Property Litigation Association welcomed the focus of the Council on the need for a better rationalisation of dispute and was supportive of the creation of a housing court but recognising that this was unlikely to happen supported a transfer of jurisdiction to the First-tier Tribunal as they considered that flexible deployment might add to the problems for litigants dealing with a disparate jurisdiction rather than solving them

6. Those whose first preference was the use of flexible judicial deployment included the Association of District Judges, the Bar Council and the British Property Federation who expressed the view that rather than dramatically altering the system it would be more efficient to use the existing infrastructure.

7. What was clear from the responses was a consensus that something needed to be done. Shelter observed that housing and property law is complex and required determination by those with expertise in the area: "the importance of housing to the health and welfare of individuals and families, and to society as a whole; and because of the fact that there exists a body of statutory law and jurisprudence which requires specialist knowledge and expertise and consistency of application"

## **A housing court or flexible deployment?**

8. Whilst it is recognised that the creation of a Housing Court or Tribunal is the preferred option, we acknowledge that this is unlikely to happen. In 2001, Sir Andrew Leggatt's report: *Tribunals for Users – One System , One Service*,<sup>4</sup> considered the arrangements for dealing with land, property and housing disputes. It was observed that:

“There are confusing overlaps of jurisdiction between courts and tribunals, as well as between tribunals. The tribunal model is a useful one, because it brings experts within the decision-making process...An expert decision-making forum without overlapping jurisdictions, is a precondition of effective procedural reform. The Law Commission should be enlisted...to assist the Government in working out a comprehensive solution, with a view to removing the overlaps and scope for forum-shopping to be found in the current arrangements”

9. In consequence, in 2002 a project to consider the position of land, valuation and housing tribunals was referred to the Law Commission. In September 2003 the report *Land Valuation and Housing Tribunals: The Future* was published<sup>5</sup>. The report made recommendations for the structural reform of the project tribunals (which included those now within the Property Chamber together with the Valuation Tribunal and the Lands Tribunal).

10. Probably as a result of developments in the wider Tribunal world, these recommendations were not taken forward. In 2004 the Government White paper *Transforming Public Services: Complaints, Redress and Tribunals* heralded the way for the Tribunal, Courts and Enforcement Act 2007. In November 2007 the government issued a consultation paper *Transforming Tribunals*<sup>6</sup> and on May 19<sup>th</sup>,

<sup>4</sup> Tribunals for users – One System, One Service – Report of the Review of Tribunals by Sir Andrew Leggatt – March 2001, paragraph 3.30  
Law Com No 281 (Cm 5948)



2008, the government's response to the consultation was published. On November 3, 2008<sup>7</sup>, the first two chambers of the Tribunal Service were statutorily launched.

11. During the same period of consultation and preparation for the new Tribunal Service, further work was being carried out by the Law Commission on the reform of housing law and practice. *Renting Homes*<sup>8</sup> made recommendations for the reform of the law relating to security of tenure in both the public and private sectors and *Encouraging Responsible Letting*<sup>9</sup> explored new approaches to the regulation of the private rented sector in order to improve housing management.

12. Chapter 12 of *Transforming Tribunals* set out the Government's "Long-Term Vision" for property tribunals. In broad terms the government's aim was for "a two-tier structure for those land, property and housing jurisdictions which are ultimately assigned to the tribunal system. As with other tribunal areas, the First-tier Tribunal should hear first instance cases and appeals against administrative decisions... The work should be allocated to a chamber dedicated to land, property and housing matters so that a proper level of expertise can be guaranteed through the appointment of a Chamber President.... The role of the Upper Tribunal... should predominantly be an expert appellate body, dealing authoritatively with issues of law and general practice.."<sup>10</sup>

13. In 2007 the Law Commission was asked to carry out a second review of the way in which residential property disputes are resolved. So far as formal dispute resolution was concerned, it was asked to consider the case for establishing a housing court or housing tribunal with jurisdiction to determine all major disputes including possession. The Law Commission's paper: *Housing: Proportionate Dispute Resolution*<sup>11</sup> is the result of that review. The report made recommendations in three broad areas: for better advice and assistance to parties; for non-formal dispute resolution and for formal dispute resolution. The report endorsed the approach in *Transforming Tribunals* to establishing a Land, Property and Housing Chamber and recommended

<sup>7</sup> "T1 day"

<sup>8</sup> *Renting Homes* (2006) Law Com No 297

- <sup>10</sup> *Encouraging Responsible Letting* (2007) Law Com No 312
- <sup>11</sup> *Transforming Tribunals* paras 308 and 309
- Housing Proportionate Dispute Resolution* Law Com No 309

that the Government should keep under review the possibility that further specific housing matters may be transferred to the Chamber since “a shift to a more specialised tribunal can result in the benefits of greater efficiency, lower cost to the user, and more access to justice.”

14. In 2013 the Property Chamber was established but has simply continued to exercise the jurisdictions previously undertaken by the incoming Tribunals. There seems to be no policy driver for change. Yet flexible deployment, facilitated by the amendments made by the Crime and Courts Act 2013 could well be the vehicle by which the recommendations made by the Law Commission can be brought to fruition.

15. In December 2015, Lord Justice Briggs issued his interim report on the structural review of Civil Courts. In respect of the deployment of judges he observed at paragraphs 8.44 that “...The more serious problem affecting the civil courts relates to the lack of enough civil-only judges, or judges for whom civil work represents a major part of their practice...and the need in many of the smallest hearing centres for the inevitably very small judicial teams to be, in effect, jacks of all trades.”

We suggest that the deployment of specialist tribunal judges could go some way to addressing this problem.

16. Lord Justice Briggs gave some consideration to this project. At Chapter 3 he describes the issue as one relating to “Boundaries”. At paragraphs 3.57 and 3.58 he describes the issue as follows:

“The first concerns the residential property work shared by the Property Chamber of the First-tier Tribunal and the County Court. The workload of the Property Chamber is not limited to this work. It include Land Registry adjudication and agricultural work as well, but the residential property work generates the largest number of its cases.

There are at present areas of shared jurisdiction but also areas of exclusive jurisdiction where different aspects of the same dispute have to be litigated in the Property Tribunal and the County Court. The areas of exclusive

jurisdiction cause the main practical problems. For example, a single dispute about a long leasehold relationship may commonly involve service charges

and ground rent. The Property Chamber has exclusive jurisdiction about service charges but ~~no jurisdiction about ground rents~~. A forfeiture claim may raise issues about breach, on which the Property Chamber can adjudicate, and waiver, upon which the County Court has exclusive jurisdiction. I need not provide a complete list.”

17. Then at paragraph 11.9 he expressed his view that:

“I can see no merit in trying to cram all the relevant business into either the County Court or the Property Chamber. It is sufficient to ensure, as far as possible, that the same dispute between the same parties does not have to be split up artificially and litigated in both, as currently happens at the moment...”

18. We agree and subject to the resolution of some of the practical issues dealt with in the next Chapter, there is no reason that the Tribunal, with its expert members, and the Courts cannot, by working together, become an effective forum for deciding housing, property and landlord and tenant cases without having to set up a separate court.

## Chapter Four

### Costs Shifting Rules and Remedies

1. One of the challenges in achieving flexible deployment between the Tribunals and the Courts is the difference between the procedural rules that govern the Tribunal procedure and the CPR. In this context it is vital to bear in mind that the proposal is that Tribunal judges will sit as County Court judges and vice versa. Therefore all of the powers of a County Court judge in respect of costs and remedies will be available to a Tribunal judge and the more limited powers of a Tribunal judge will be equally restrictive for a County Court judge when exercising a power wholly within the Tribunal's jurisdiction.

2. The view of the Association of District Judges in this respect is helpful. The Association observed as follows:

“The Association takes the view that the issues raised should not cause particular problems in practice.” Similar issues arise for example when dealing with cases partly within the family court jurisdiction: “The question whether CPR or FPR apply to which issue and which costs rules apply to which bit of the litigation have to be considered as does the appropriate ticketing for the judge. The cases cannot be consolidated but they can be heard by the same judge consecutively or at the same time as appropriate.”

“The same principle could be applied to the FLD solution. The judge will have to have the appropriate ticket for the County Court and the Tribunal. The Judge could then determine the County Court aspects of the case alone or the other Tribunal members could be appointed as assessors in the County Court part of the proceedings. The administration of the two aspects of the case might have to be dealt with in separate places (unless, as at Cambridge, the Court and Tribunal are in the same building) However, none of these problems are particularly difficult to overcome.”

3. There is however, a real concern that both litigants in person and professionals may find hybrid cases confusing so that access to justice is undermined and that there may be difficulties in being able to give accurate advice about costs shifting. It is therefore necessary to look at the issue in more detail.

*Deployment – the legislation*

4. Section 3 of the County Courts Act 1984 as amended provides that:

“3(1) Sittings of the county court may be held, and any other business of the county court may be conducted anywhere in England and Wales.

(1A) Sittings of the county court at any place may be continuous or intermittent or occasional.

(2) Sittings of the county court may be held simultaneously to take any number of different cases in the same place or different places, and the court may adjourn cases from place to place at any time.

(2A) The places at which the county court sits, and the days and times at which it sits in any place, are to be determined in accordance with directions given by the Lord Chancellor after consulting the Lord Chief Justice.

The provision therefore provides flexibility for County Court matters to be heard at any time or place and for cases to be adjourned from place to place at any time in accordance with directions given by the Lord Chancellor and Lord Chief Justice.

5. Section 5 of the 1984 Act, as amended, provides that judges of the First-tier Tribunal are judges of the county court and section 6 of the Tribunals Courts and Enforcement Act 2007 provides that a person is a judge of the First-tier Tribunal and Upper Tribunal if the person is a circuit judge or a district judge.

6. The purpose of the amendments to section 5 are described in a *Pepper v Hart* note in the White Book where at the report stage of the Bill in the House of Commons the Minister said:

“Amendment 59 relates to the judicial deployment provisions in schedule 14. The objective is to give the Lord Chief Justice more flexibility in deploying

judges to different courts and tribunals. That supports an important objective for the Government because it means that judges can be used efficiently.

Individual judges will also benefit, if they have a wider breadth of experience and can develop their judicial careers as a result.....”

7. The deployment responsibilities of the Lord Chief are set out in section 21 of the Crime and Courts Act 2013:

“21 Deployment of the judiciary

(1) The Lord Chief Justice’s deployment responsibility includes (so far as it would not otherwise do so, and subject to having regard to the responsibilities of the Senior President of Tribunals) responsibility for the maintenance of appropriate arrangements for –

- (a) the deployment to tribunals of judiciary deployable to tribunals, and
- (b) the deployment to courts in England and Wales of judiciary deployable to such courts”

8. Finally, although Tribunal members have no status in the County Court as such, they may act as assessors and section 63 of the Act provides that:

“63(1) In any proceedings the judge may, if he thinks fit, summon to his assistance .... One or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit within the county court a judge of the court, and act as assessors.”

### *Procedural Rules*

9. The procedure in the Property Chamber is governed by the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, derived from the Tribunal Courts and Enforcement Act 2007. The Courts proceed under the Civil Procedure Rules governed by the Civil Procedure Act 1997.

10. The rules of the Tribunal provide greater flexibility for Tribunals to determine their own procedure than is available in the CPR and the overriding objective for each

is different. So far as flexible deployment is concerned, the challenge here is to ensure that parties (and indeed judges and members) are able to proceed with a case without

any confusion or difficulty that might be caused by the operation of two sets of rules. As the Bar Council observed it might be difficult for a litigant in person to understand the “changing hat” concept and that “A confusing and overly legalistic approach may impede a litigants ability to engage with the legal process in a meaningful way.” The Housing Law Practitioner’s Association thought that operating under two sets of rules would not be a problem for lawyers but the courts’ more rigorous approach to case management (and relief from sanctions) *Mitchell* etc. may cause philosophical problems.

11. On the other hand and on balance, the Bar Council considered that in fact the procedural rules created more of a perceived hurdle rather than an actual hurdle and that the difficulties could be overcome with clear rules and guidance. Shelter also thought that having two sets of rules not a major hurdle and suggested starting with CPR or adopting a hybrid approach. And interestingly the Property Bar Association suggested that “The courts have a sophisticated set of procedural rules which are beyond the comprehension of many lawyers, let alone litigants in person. The Property Chamber has much simpler rules, sufficient for its limited jurisdiction. They provide structure but allow flexibility.”

12. We consider that the rules challenges arising from the different rules can be overcome with guidance and co-operation. Rule 6 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 provides that : “6(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.” For the County Court, it may be that the way in which cases are dealt with whilst being considered by a Tribunal, could be prescribed in a practice direction or, if that is insufficient, it is possible that specific rules could be made under section 3A of the Civil Procedure Act.

13. One practical issue that will need to be addressed is whether County Court proceedings may be started in the Tribunals. This is an important point. Many of the statutory powers of County Court judges can only be exercised where proceedings have been issued and/or an application made in the County Court. The objective of

flexible deployment would be frustrated if, in order for a tribunal judge to exercise his or her powers as a County Court judge, the litigant in the tribunal were forced to make

an application in a different building and to find their way through a separate administrative system. Without considering the matter in detail here it is worth observing that CPR Practice Direction 2C states that a claim or application may be started in any county court hearing centre unless any rule, practice direction or enactment provides otherwise and that by Practice Direction 2A, county court offices shall be situated at such places as the Lord Chancellor directs for the transaction of the business of the court and therefore are not confined to traditional court premises

### *Costs*

13. The incidence of costs may present a greater challenge than procedural rules at least insofar as Residential Property cases are concerned. The Property Chamber has limited powers to award costs. In the Courts costs are governed by section 51 of the Senior Courts Act 1981 and by CPR. Section 51 provides that

“s.51(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –

- (a) the civil division of the Court of Appeal;
- (b) the High Court;
- (ba) the family court
- (c) the county court

Shall be in the discretion of the court”

The CPR provides for a single costs regime for the High Court and the county courts, subject to an exception for county court cases below £3,000.

14. In the Tribunal section 29 of the Tribunal Courts and Enforcement Act 2007 provides that:

“29(1) The costs of and incidental to –

- (a) all proceedings in the First-tier Tribunal, and
- (b) all proceedings in the Upper Tribunal,

Shall be in the discretion of the Tribunal in which the proceedings take place.

(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.

(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.”

14. The open discretion in section 29(1)(2) is then cut down by rule 13 of the Tribunal Procedure Rules which provides that:

“13(1) The Tribunal may make an order in respect of costs only –

(a) under section 29(4) of the 2007 Act...

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.”

15. Thus in LR cases there are full cost shifting powers whereas in RP cases inter partes costs may only be awarded where there has been unreasonable behaviour. A number of respondents regarded this as a problem. In RP cases although a judge would be sitting as a court judge and would have the court’s powers as to costs, it is anticipated that the difficulties would be in perception and understanding. The Bar Council commented that the different costs regimes may mean access to justice difficulties – parties enter litigation either expecting costs shifting or non-costs shifting and this may be determinative of whether a party brings a claim and said that “Costs should not have a freezing effect on necessary litigation.” The Housing Law Practitioners Association observed that people often chose the FTT because of more restrictive costs powers and were concerned about difficulties in costs assessments.

16. The main reservation in respect of costs was however that legal aid should continue to be available if it was available in the county court and that conditional fee agreements could still be used. Theoretically neither matter should be a problem if a county court jurisdiction is being exercised, however this would be an area where very clear guidance and process would need to be in place.

17. For many cases of course, the Residential Property Tribunal will deal with matters that might have been a County Court small claim. In that event the costs rules that apply are very similar and the problem would not arise. In Land Registration cases the

full costs shifting powers that would be exercised in a fast-track or multi-track case are equally available in both the Tribunal and the Courts.

### *Appeals*

18. Appeals from the Tribunal lie to the Upper Tribunal. In the case of Residential Property matters appeal is to the Lands Chamber and in the case of Land Registration, it is to the Tax and Chancery Chamber. The Presidents of the Upper Tribunal are High Court judges but cases are also heard by Deputy High Court Judges and in the Lands Chamber by Senior Circuit Judges.

19. Appeals in the Courts are dealt with under the Access to Justice Act 1999 and in particular by the Access to Justice Act 1999 (Destination of Appeals) Order 2000

“3(1) Subject to articles 4 and 5 and to paragraph (2) an appeal shall lie from a decision of a county court to the High Court.

(2) Subject to articles 4 and 5, where the decision to be appealed is made by a district judge or deputy district judge of a county court, an appeal shall lie to a judge of a county court.”

Appeals in multi-track cases are to the Court of Appeal.

20. There is therefore a potential difficulty in ensuring that appeals in “mixed cases” go to the appropriate destination. This is another example where deployment of judges or deputies from the High Court to the Upper Tribunal in an appropriate case could offer a solution. The appointed judge could sit in both capacities to reach a final determination on all issues. This is an important aspect of the project and more work to consider the legal position is required. In particular if legislative change is needed it will have to be identified as a matter of priority.

### *The Deployment Pilot*

21. In October 2015, the working group on flexible deployment chaired by Mrs Justice Pauffley, agreed that the Tribunal should carry out a limited pilot to see if the proposals in this paper would actually work in practice. Overall, the pilot has been

approached with some caution and only a handful of cases have been tried. However, the general view of the judges (and it seems) the parties is that the pilot so far, in a modest way, has been a success.

22. This is the note of a Tribunal Regional Judge on a park home case where he sat in both jurisdictions:

“We had an application from a park home occupier for the determination whether her quiet enjoyment was being disturbed by the site owner. Within days of the application being made, the site owner applied to the county court for an order allowing him to terminate her occupation agreement and for a mandatory injunction to remove her park home (both of which are county court only matters). I liaised with the District Judge at Kings Lynn who was delighted to agree that I would deal with both aspects of this case as they arise from the same facts and the same evidence. He made the appropriate orders at my request allocating the case to the Small Claims Track and appointing the other tribunal members as assessors.”

The case was heard and all matters were decided. A reasoned decision was given covering both the Tribunal and the County Court case and a County Court order was made.

23. If the recommendations in this paper are accepted, the Tribunal would like the opportunity to push the matter forward now with more confidence and to build relationships with District Judges to enable the initiative to be more effectively tested.

## Chapter Five

### Conclusions and Recommendations

1. We recommend that flexible judicial deployment be employed in landlord and tenant, housing, property and land registration cases. We conclude that this will be an effective way to avoid a multiplicity of proceedings. We are satisfied that this will produce savings for litigants and for the justice system. We consider that in some types of cases it will mean that there is greater consistency in approach and in decision making. We believe that flexible deployment will mean that expertise can be targeted in the determination of appropriate cases.

2. Although we feel able to make firm recommendations set out in full in the Executive Summary that precedes this Report, we consider that further work needs to be done on some of the practical issues identified in Chapter 4 and for that reason this is an interim report.

3. Work on practicalities has already started in the flexible deployment pilot. We would like to continue with that pilot and to carry out an evaluation which will inform us how best to take our proposals forward. We take the view that the success of the proposal depends upon early case management decisions being made in co-operation between the Courts and the Tribunal. Over the next few months the Tribunal will work with judicial colleagues in the civil courts to reach agreement on how best to identify cases and on criteria for retaining cases and for transferring cases.

4. By September 2016, we plan to provide the following:

- (a) A list of disputes suitable for the application of flexible deployment
  - (b) A protocol for the procedures to be adopted in transferred and retained cases. It is intended that this will give clear guidance on rules, costs and appeals.
  - (c) Recommendations for the designation of Tribunal centres as County Court offices.
- In undertaking the pilot we have already identified cases where it would be

convenient if parties were able to issue county court applications at the Tribunal

offices rather than having to start proceedings in two places and have one of those cases transferred.

(d) Recommendations for the ticketing and training of judges. We are very aware that not all judges will wish or be able to sit in both jurisdictions. We will attempt to make an assessment of potential workload to inform decisions on the number of cross-jurisdictional judges who are needed. We also consider that even within the Tribunal, ticketing for certain jurisdictions will be required. In particular for Land Registration cases our early thinking is that there should be an expressions of interest exercise for specialist judges from the courts and the tribunal.

(e) The identification of opportunities for the enhancement and co-ordination of IT support for deployment. We consider that the flexible deployment initiative reflects the drivers for HMCTS reform and will lead to better adjudication, to more effective use of the HMCTS estate. Additionally we are aware that the Delivery Roadmap for reform to 2020 includes the development of an IT portal for property disputes other than possession. The incorporation of deployment principles into the IT development may be of particular benefit.

(f) Recommendations for ADR in property disputes. There are a number of separate initiatives for mediation and for early neutral evaluation in the courts and the tribunals. We will consider the models available and how best they may be incorporated into our work.

5. Finally we are conscious that it is important to work with HMCTS colleagues to consider the impact of the proposals and how any changes may impact upon staff and processes. We see it as a priority that service standards are maintained and that any initiative is achieved in partnership with operations staff.

6. We believe that the project has been very worth while and that the recommendations will lead to a significant improvement in the determination of property disputes for both litigants and the justice system.

## **Annex A**



### **CIVIL JUSTICE COUNCIL**

#### **TERMS OF REFERENCE FOR PROPOSED WORKING GROUP ON PROPERTY DISPUTES IN THE COURTS AND TRIBUNALS**

1. To consider the distribution of jurisdictions in landlord and tenant, property and housing disputes with a particular focus on the work of the Property Chamber and its overlap with the County Court and any associated dispute resolution schemes;
2. To consider proposals for changes in the deployment of judicial resource between the County Court and the Property Chamber in the determination of landlord and tenant, property and housing disputes having regard to:
  - (a) Access to justice;
  - (b) Proportionality;
  - (c) Judicial and administrative resource.
3. To consider, in parallel, the benefits of and the models for alternative dispute resolution in resolving landlord and tenant, property and housing disputes
3. To report on the following:
  - (a) The benefits, if any, in making changes in the way landlord and tenant, property and housing disputes are resolved in the Court and the Tribunal;
  - (b) The likely impact of such changes, with particular focus on resource and access to justice issues and
  - (c) To make proposals for the practical steps required to implement any recommendations.

## **MEMBERSHIP**

Siobhan McGrath (President, First-tier Tribunal (Property Chamber)) - *Chair*

Professor Helen Carr

Elizabeth Cooke (Principal Judge, Land Registration Division)

Marc Dight (HHJ Central London Civil Justice Centre)

Anthony Essien

Graham French

Kerry Glanville

Professor Caroline Hunter

William Jackson (District Judge)

Professor Martin Partington

Tim Powell (London Regional Judge)

Philip Rainey QC

Martin Rodger QC