

Tribunal Rules

Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

Responses to the consultation on possible changes to the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 arising from proposed reallocation of land registration cases

(23 August to 18 October 2017)

Reply from the Tribunal Procedure Committee

December 2017

Introduction

1. The Tribunal Procedure Committee (“the TPC”) is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

2. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
 - (a) in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done;
 - (b) the tribunal system is accessible and fair;
 - (c) proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently;
 - (d) the rules are both simple and simply expressed; and
 - (e) the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

3. In pursuing these aims the TPC seeks, among other things, to:
 - (a) make the rules as simple and streamlined as possible;
 - (b) avoid unnecessarily technical language;
 - (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
 - (d) adopt common rules across tribunals wherever possible.

4. One of the Chambers of the Upper Tribunal is the Lands Chamber (the “UT(LC)”), and the Rules which apply to proceedings in that Chamber are the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (the “UT(LC) Rules”). Another Chamber of the Upper Tribunal is the Tax and Chancery Chamber (the “UT(TCC)”), and the Rules which apply there are the Upper Tribunal Rules 2008 (the “UT Rules”). What are termed in this document “land registration cases” are first heard in the Land Registration Division of the Property Chamber of the First-tier Tribunal (the “PC”), and the Rules which apply there are the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. All sets of Rules can be found in the “Publications” section of our website:

<http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm>

5. Appeals from the PC in land registration cases are presently dealt with by the UT(TCC). They are not numerous. Such appeals are now proposed to be allocated instead to the UT(LC), by the Lord Chancellor exercising powers contained in section 7(1) and (9) of the TCEA with the concurrence of the Senior President of Tribunals.

The Consultation Process

6. A consultation (the “Consultation”) ran over the period August to October 2017, its purpose being solely to seek views as to the UT(LC) Rules in relation to this proposed allocation of appellate jurisdiction to the UT(LC).
7. The principal areas of difference between the UT Rules and the UT(LC) Rules in their treatment of appeals concern two matters: (a) applications for permission to appeal (“PTA”), and (b) costs. These areas of difference are highlighted below.

Permission to appeal

8. An application for PTA must be received by the UT(LC) within 14 days of the date of refusal of permission by the First-tier Tribunal, rather than within the one month allowed by the UT Rules (see UT(LC) Rules, rule 21(2) and UT Rules, rule 21(3)(b)).
9. Included in rule 21(8) and rule 22 of the UT(LC) Rules is a right for respondents to make representations before PTA is granted. Rule 21(8) limits the UT(LC)’s power to grant PTA by providing that unless it decides to dismiss an application for PTA without representations from the respondent, the Tribunal must send a copy of the application and accompanying documents to the respondent, and must specify a time limit within which any representations relating to the application must be made. Rule 22 provides for the manner in which such representations must be made. Such provisions are absent from the UT Rules.

10. The UT(LC) Rules contain no provision equivalent to rule 22(4) of the UT Rules, which gives an automatic right to reconsideration of an unsuccessful application for PTA (or PTA on limited grounds or subject to conditions) at an oral hearing. The UT(LC) has power however, under UT(LC) Rules, rule 5(3)(f), to direct an oral hearing of an application for PTA if it considers it appropriate to do so.

Costs

11. In the UT(TCC) there is a general jurisdiction to award costs in appeals of land registration cases. Such costs jurisdiction exists in the PC for these cases (PC Rules, rule 13(1)(c)), and UT(TCC) Rules, rule 10(1)(b) confers like jurisdiction in these cases on appeal. In the UT(LC) however, there is no costs jurisdiction in appeals from the PC except for unreasonable conduct or under the wasted costs jurisdiction (see UT(LC) Rules, rule 10).

Responses to specific consultation questions, and Conclusions

12. There were 4 responses to the Consultation – see Annex A. Some of the responses referred to specific paragraphs in the Consultation. For convenience, these are now set out.

Paragraph 38:

“There have been land registration cases in the UT(TCC) in which PTA has been refused on paper, granted upon oral reconsideration and then the appeal is 11 successful. The TPC understands that over the 3 calendar years 2014 to 2016, there have been 42 instances in which PTA has been sought from the UT(TCC), with PTA refused in 34 of them. Of these, 22 were then subject to an application for reconsideration at an oral hearing (before a different UT(TCC) judge), with 5 granted following such hearing. Of these 5 cases, 2 appeals succeeded (in whole or in part).”

Paragraph 41:

“It may also be noted that the UT(LC) already has power, under UT(LC) Rules, rule 5(3)(f), to direct an oral hearing of an application for PTA if it considers it appropriate to do so. Although the TPC understands that this power is infrequently used by the UT(LC), it is a useful option in cases where facts are obscure, where a proposed ground of appeal has been poorly presented or is otherwise difficult to grasp, or (as does happen in land registration cases) where the judge and the parties or their representatives need to have features pointed out on a plan. It may be particularly helpful if a prospective appellant is without legal representation. (The same opportunity also exists in the UT Rules, and has been exercised in at least one land registration case.) A UT(LC) judge reviewing the documents should be well placed to make, and well capable of making, an assessment in light of the particular circumstances of the application whether it is one which ought to be the subject of a directed oral hearing or not.”

Paragraph 45:

“The TPC presently considers it clear that the costs jurisdiction currently in place for these cases in the UT(TCC) should likewise exist in the UT(LC) if there were reallocation to the UT(LC). Such would be consistent with the Costs in Tribunals Report, para 135 and 194, and would accord with the current costs regime applying to these appeals and

to land registration cases at first instance in the PC. There is no novelty to the awarding of costs in the UT(LC); there is already jurisdiction to award costs in appeals from the Valuation Tribunals of England and Wales and in other specified cases. An additional sub-paragraph to rule 10(6) would be required:

Costs – Rule 10

(6) The Tribunal may make an order for costs in proceedings—

(a) for compensation for compulsory purchase;

(b) for injurious affection of land;

(c) under section 84 of the Law of Property Act 1925 (discharge or modification of restrictive covenants affecting land);

(d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales;

(e) on an appeal from the First-tier Tribunal relating to a reference by the Chief Land Registrar or any other application, matter or appeal under the Land Registration Act 2002;

13. In what follows, it is considered appropriate to group the Consultation questions together where the responses given are linked. The responses are then set out, with the conclusions of the TPC (in light of the responses) then stated.

Permission to appeal

Question 1: Is it appropriate for the existing UT(LC) Rules in respect of Permission to Appeal to apply without modification to appeals in land registration cases?

Question 2: If not, why not?

Question 3: If not, what modification should be made?

14. One respondent answered 'Yes' to Question 1, stating that it was consistent with the revised approach to PTA in the Court of Appeal and that if land registration appeals are allocated to the UT(LC) they should, so far as procedure rather than substantive rights is concerned, fit in with the procedure for other such appeals. Another respondent had no objection to the appeal rules for the UT(LC) applying without modification to appeals in land registration cases.

15. A third respondent answered 'No' to Question 1, considering that the automatic right to reconsideration of an unsuccessful application for PTA at an oral hearing should not be abolished. It was said that the range of circumstances set out in the second and

third sentences of paragraph 41 of the Consultation (see above) were considered to be powerful reasons for keeping the automatic right: it was not sufficient to have a fallback and rarely used power of the judge on the paper hearing to direct an oral hearing. It was also noted that the research in paragraph 38 of the Consultation (see above) did not include the recent case of *Flowers* (UT/2017/0049) “where the Upper Tribunal judge at the oral hearing had differed from 3 experienced First-tier Tribunal judges, and the Upper Tribunal judge on paper, to allow an important point on jurisdiction to be argued”. It was stated that the case had merited the intervention of the Land Registry which will be represented by counsel on the Attorney-General’s panel.

16. A fourth respondent commented that without having to hand statistics for numbers of litigants in person as opposed to represented parties, a significant number of Land Registration Division cases have at least one party unrepresented. It was said that when references reach the Upper Tribunal legal advice is sought, often for the first time, and that a 28 day, rather than a 14 day, appeal period would alleviate unnecessary pressure on newly-instructed lawyers and perhaps avoid an appeal that would not be launched with due consideration. (This respondent did not raise any point about loss of an automatic right of renewal of an application for PTA.)

Conclusion

17. The TPC is satisfied that the existing UT(LC) Rules in respect of PTA should apply without modification to appeals in land registration cases. The matters raised by two respondents (each raising points distinct from each other) are not considered to provide sufficient reason to justify bespoke procedures within the UT(LC) Rules for these cases. The TPC sees advantages, for the tribunal itself and for its users, of there being a consistent procedure across all types of case in the UT(LC).
18. Although one respondent objected to removal of the automatic right to reconsideration of an application for PTA, that was not the view of the other respondents.
19. When the UT(LC) directs an oral hearing of an application for PTA it is not a renewal of an already unsuccessful application; rather, it is the only determination of the application. This may be considered a more streamlined process, in that the decision on PTA is made more quickly than if there were first a refusal of the application, and then an oral renewed application. As stated in the Consultation, an oral hearing is

useful in cases where facts are obscure, where a proposed ground of appeal has been poorly presented or is otherwise difficult to grasp, and it may be particularly helpful if a prospective appellant is without legal representation. Although direction of an oral hearing for PTA is not currently used very often, the TPC is confident that UT(LC) judiciary will bear well in mind its possible use in land registration cases, especially in cases such as those described above.

20. In the *Flowers* case, the applicant applied to the PC to cancel or set aside a Deed. The applicant was not a party to the Deed, and had no interest in the property which was the subject of the application. The application was not considered on the merits by the PC, but was rejected on procedural and/or jurisdictional grounds (without joining the two parties to the Deed): the PC determined that the applicant lacked “standing” to make the application. The UT(TCC) judge granted PTA after a renewed oral hearing on the issue of “standing” and, having decided that the relevant parties to the appeal should be the two parties to the Deed and the Land Registry, directed that Respondent’s Notices may be served in relation to the issue. The appeal will be heard shortly. However, had the application been made to the UT(LC), once it had been considered (as above) who the respondents should be, rule 21(8) and rule 22 of the UT(LC) Rules (see above) might have been used to give the respondents an opportunity to make representations as to whether PTA should be granted. The TPC does not consider the PTA granted in the exceptional circumstances of the *Flowers* case to be a persuasive reason against the view it has taken.

21. As to the time within which an application for PTA must be made, the TPC understands that there may well be a tendency for some parties who had not sought advice at PC level to obtain legal advice in connection with an appeal to the Upper Tribunal. This may indeed be the case as regards many tribunal and court appeals. The period of 14 days within which to make an application to the UT(LC) for PTA is in addition to the period of 28 days for applying to the PC itself for PTA. As noted in the Consultation, at the PTA stage under the present appellate route to the UT(TCC), most (but not all) appellants have legal representation. It would be expected that those seeking legal assistance for the appellate stage would do so soon after a refusal of PTA by the PC, and that (if necessary) an application could then be made for an extension of time (under UT(LC) Rules, rule 5(3)(a)). In any event, the TPC anticipates that consideration would be given to information being placed on the UT(LC) website informing prospective applicants for PTA (with or without legal assistance) that they may ask for such an extension of time, or may make an application (within time) but

ask for an extension of time for provision of grounds. The UT(LC) will no doubt bear in mind, as regards the overriding objective of its Rules, the need to avoid unnecessary formality and maintain flexibility in the proceedings, so ensuring, so far as practicable, that the parties are able to participate fully (UT(LC) Rules, rule 2(2)(b) and (c)).

Costs

Question 4: Is it appropriate to amend the UT(LC) Rules to cater for the award of costs in appeals in land registration cases as proposed?

Question 5: If not, why not?

Question 6: If not, what suggestions do you have as regards how costs in appeals in land registration cases should be dealt with in the UT(LC) Rules?

22. All respondents supported the proposed amendment.

23. One respondent observed that there was no reason to take away substantive rights that parties to such appeals currently have, and noted that the costs jurisdiction on appeal currently reflects, and should reflect, the different approach to costs in the PC, depending on the subject matter of the case. Another respondent commented that Land Registration Division proceedings in the First-tier Tribunal are fully costs shifted (“an important sanction in citizen v citizen litigation”), and that this feature should be maintained at the Upper Tribunal stage. It was said that the UT(LC) is fully costs shifted in most of its work including rating and restrictive covenants (being two jurisdictions in the UT(LC) with which this respondent was familiar).

Conclusion

24. The TPC is satisfied that it is appropriate to amend the UT(LC) Rules to cater for the award of costs in appeals in land registration cases, as proposed. (It is correct that the general rule in the UT(LC) is that costs shifting applies, with the exception of cases on appeal from the PC (see above).)

Generally

Question 7: Do you have any further comments?

25. One respondent believed that regardless of allocation to one specialist chamber or another, the allocation of specialist judges with Chancery High Court expertise and experience, as necessary, was of particular importance. It was said that land registration cases and appeals range hugely in subject matter and importance, from

rural boundary disputes to technical statutory and conveyancing issues with significant value and consequences, e.g. fraud, equitable claims, mistake, and public indemnities. This respondent described this kind of case as rooted in Chancery work and distinct from the bulk of valuation, compensation or leasehold disputes that are dealt with by the PC and the UT(LC) on appeal. Another respondent stated that the main thing is to secure “the right judge for the right case”.

26. A third respondent noted the proposed allocation of judicial resource in order to hear PTA applications in land registration cases, and the appeals in such cases. However, this respondent remained concerned as to the level of resource available to the UT(LC) and would not want the allocation of these cases to the UT(LC) to affect the timely processing of the existing work of the UT(LC). It was said that the Consultation addressed concerns about judicial resource but did not address the likely additional administrative burden on the UT(LC) of dealing with about 14 applications for PTA per year, the “reconsideration of an application at an oral hearing” or the hearing of the appeal itself. (The TPC assumes that the reference to “reconsideration” was a reference to a directed oral hearing on an application for PTA.)
27. This respondent also expressed concern that existing resource at the UT(LC), both amongst its members and administrative staff, was insufficient to deal with the timely processing of references to a hearing and decision, and should be reviewed. This was said to be particularly important as regards claimants whose livelihoods or homes are significantly affected by the outcome of the hearing. This respondent said that there continue to be a number of large current and future infrastructure projects across the country where it may be expected that a significant number of compensation claims will arise. It was stated that given the importance of building fairness into the compulsory purchase system, where references to the UT(LC) are necessary they should be dealt with in a timely manner. It was suggested that one way in which this could be supported would be by the PC processing more routine compulsory purchase applications (for example, those hearings scheduled to take 2 days or fewer), increasing the capacity of the UT(LC) to deal with more complex cases.
28. A fourth respondent had been puzzled by paragraph 26 of the Consultation. “There is no power for a land registration case to be transferred from the PC to the UT: rule 25(4) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, and nor should there be.”

Conclusion

29. The allocation of judges to particular cases is not a matter for the TPC. However, as stated in the Consultation, allocation of the appellate route to the UT(LC) should mean that appropriately qualified judiciary will (as before) be available to deal with these cases, including a High Court Judge of the Chancery Division if considered necessary for a particular case. Leaving aside High Court Judges, of the 11 judges assigned to the UT(LC), 5 also sit as Deputy High Court Judges of the Chancery Division and another was formerly the Law Commissioner who (upon appointment) bore responsibility for later stages of the Law Commission's work towards the Land Registration Act 2002.
30. As for the workload of the UT(LC), again that is beyond the remit of the TPC. However, the TPC would not have issued the Consultation without the President and the Deputy President of the UT(LC) being content with the proposed allocation of these (relatively few) cases to the UT(LC), to be dealt with alongside its existing workload. Further, any such allocation will require the concurrence of the Senior President of Tribunals, who must (under section 2(3) of the TCEA), in undertaking his functions, have regard to the need for proceedings before tribunals to be fair, and to be handled quickly and efficiently. If these cases are now allocated to the UT(LC), any increased administrative burden should be without material detriment to other cases proceeding there.
31. As to compulsory purchase cases under the Land Compensation Act 1961, these (at present) can only be dealt with by the UT. Prior to 1 June 2009, such cases were dealt with by the Lands Tribunal. On that date, by the Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009, the functions of the Lands Tribunal were transferred to the UT, and hence these cases are dealt with by the UT(LC). There was no transfer of any part of those functions to the First-tier Tribunal. It would require an Order of the Lord Chancellor under section 30(3) of the TCEA to confer jurisdiction also upon the First-tier Tribunal, if it was considered that "routine" compulsory purchase applications (for example) might be dealt with in the PC. This is therefore not a matter within the rule-making remit of the TPC.

32. Finally, it is correct that there is no power for a land registration case to be transferred from the PC to the UT. The Consultation was in error in suggesting that there was such a power.

Keeping the Rules under review

33. The TPC wishes to thank those who contributed to the Consultation process. The TPC has benefited considerably from the responses.

34. The remit of the TPC is to keep rules under review.

Contact details

Please send any suggestions for further amendments to Rules to:

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Further copies of this Reply can be obtained from the Secretariat. The Consultation paper, this Reply and the Rules are available on the Secretariat's website:

<http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm>

Annex A – List of respondents to Consultation

1. The Chancery Bar Association
2. Simon Brilliant, barrister at Lamb Chambers, Temple, London
3. Roger Cohen, partner in Berwin Leighton Paisner LLP, part-time Land Registration Division judge, responding in personal capacity
4. Mayor of London and Transport for London