Tribunal Procedure Committee

Consultation on the proposed new (First-tier Tribunal) (Property Chamber) Rules 2013

Questionnaire

We would welcome responses to the following questions set out in the consultation paper. Please return the completed questionnaire by **Thursday 6 September 2012** to:

The Secretary, Tribunal Procedure Committee, Post point 4.37, 102 Petty France
London SW1H 9AJ
Email: tpcsecretariat@justice.gsi.gov.uk
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Respondent name	**MARK WEST, TAMSIN COX, SIMON SINATT**
Organisation	**CHANCERY BAR ASSOCIATION, LAW REFORM COMMITTEE**

Rent Assessment Committee source jurisdiction questions:

1) **Would the draft Rules work satisfactorily for cases within the RAC source jurisdiction?**
2) **If not, how would they not work satisfactorily, and for what reasons?**
3) **In what way could they be improved? Please suggest any drafting changes.**

Comments:

1 No comment.

2 n/a.

3 No suggestions.

Rent Tribunal source jurisdiction questions:

4) **Would the draft Rules work satisfactorily for cases within the RT source jurisdiction?**
5) **If not, how would they not work satisfactorily, and for what reasons?**
6) **In what way could they be improved? Please suggest any drafting changes.**

Comments:

4 No comment.

5 n/a

6 No suggestions.

Leasehold Valuation Tribunal source jurisdiction questions:

7) **Would the draft Rules work satisfactorily for cases within the LVT source jurisdiction?**
8) **If not, how would they not work satisfactorily, and for what reasons?**
9) **In what way could they be improved? Please suggest any drafting changes.**

Comments:

7 No.

8

- **Our understanding of Rule 8(5) is that, if a successful application for reinstatement of a case which has been struck out is made, the case will be reinstated, with the effect that it is treated as not having been struck out at all.**
- **If not, however, then difficulties could arise in circumstances where there are strict statutory time limits for the making of applications and provisions preventing further applications for a specified period.**
- **This is particularly likely to cause problems in relation to claims**

for extended leases or enfranchisement made under the Leasehold Reform, Housing and Urban Development Act 1993, where both the landlord and tenant are entitled to apply for a determination of the terms on which a freehold may be transferred, or a new lease granted.

- **If the tenant made such an application, and it was struck out, then the 1993 Act would provide that the tenant's case was deemed withdrawn, and that no new application could be brought for a specified period. Since the Rules are to take effect subject to statute, it would be arguable that the case could not be reinstated effectively. The result would be a significantly more severe penalty than the procedural sanction which is presumably intended here.**
- **Similarly, if the landlord were the applicant in such a case, and its case was struck out, there would be no extant application and the tenant might again be unfairly penalised.**
- **Rule 20 raises similar difficulties. A landlord could, for instance, unilaterally withdraw an application to the disadvantage of his tenant. It is therefore suggested that, Rule 20(5) should be modified, as set out below, in order to limit such risk.**
- **As to Rule 12, we consider that the Tribunal should have power to dismiss a representative where that representative's acting is not in the interests of justice. The preponderance of litigants in person in LVT matters, makes this of particular importance, and could reduce the number of occasions when the Tribunal is required to have recourse to the power to exclude individuals from hearings set out at Rule 43.**
- **The timings proposed in Rule 17(4) seem to us to sanction the current but very unsatisfactory position, where complex expert reports, often dealing with difficult valuation questions, are not disclosed until the day before the hearing, with the result that parties and their representatives struggle to prepare responses and cross-examination properly or in time.**

- **Instead, we would welcome a requirement that expert evidence be provided much earlier, at least 7 days before any hearing, and appropriate sanctions imposed if that requirement is breached, in order to discourage such late disclosure.**
- **We query whether Rule 24 is of benefit in the context of LVT matters. At present, there are a number of helpful individual forms which are designed to elicit the necessary information for various sorts of applications from applicants, and which are particularly useful for the litigants in person who make up a significant proportion of those using the LVT.**
- **The current LVT procedure rules deal well with the requirements for various applications. We consider that the proposal to use generic application requirements, and then have separate practice directions in addition, is excessively complicated and will be excessively onerous in some matters, such as enfranchisement cases where the basis of the parties' respective positions is clear from notices served by each party before an application is even made.**
- **If generic rules are kept for this purpose, then we would suggest that the Applicant also be obliged to name any mortgagee in the application – we can see no justification for leaving it to the Respondent, who may not be aware of any mortgagees, to be obliged to list them as per the proposed Rule 28(2)(g). Instead, the approach of requiring the Applicant to list all parties, and then the Respondent to fill in gaps, should apply to mortgagees as well as the other parties listed in Rule 24(2).**
- **The provision at Rule 27(8) entitling the Tribunal to serve documents by requiring a party to serve them, should apply to all instances where the Tribunal is required to serve documents. Applications with documents attached are often bulky in leasehold cases, and requiring the Tribunal to copy and pass on documents is excessively onerous.**

9

- **Rule 8(5) should make clear that, where a case is reinstated under that provision, it is to be deemed for all purposes never to have been struck out. Consideration should also be given for allowing a party to seek the reinstatement of another party's case, in case a sanction intended to affect only that party whose case has been struck out unintentionally causes disadvantage to others.**
- **Rule 20(5) should be modified to provide that any party is entitled to apply for the reinstatement of a withdrawn case, and that, if such a case is reinstated, it is deemed never to have been withdrawn.**
- **Rule 17(4)(a) should be modified to provide that expert reports should be provided at least 7 days before the date of the hearing.**
- **Rule 24 should be reconsidered with a view to having separate requirements for each jurisdiction, and all the requirements relating to jurisdiction in one place.**

Residential Property Tribunal source jurisdiction questions:

10) **Would the draft Rules work satisfactorily for cases within the RPT source jurisdiction?**
11) **If not, how would they not work satisfactorily, and for what reasons?**
12) **In what way could they be improved? Please suggest any drafting changes.**

Comments:

10 No Comment.

11 n/a

12 No suggestions.

Agricultural Land Tribunal source jurisdiction questions:

13) **Would the draft Rules work satisfactorily for cases within the ALT**

source jurisdiction?

14) **If not, how would they not work satisfactorily, and for what reasons?**

15) **In what way could they be improved? Please suggest any drafting changes.**

Comments:

13 No comment.

14 The comments made in relation to Rule 24 at Question 8 above are also applicable here.

15 Rule 24 should be reconsidered with a view to having separate requirements for each jurisdiction, and all the requirements relating to jurisdiction in one place.

<u>Adjudicator to the Land Registry source jurisdiction questions:</u>

16) **Would the draft Rules work satisfactorily for cases within the ALR source jurisdiction?**

17) **If not, how would they not work satisfactorily, and for what reasons?**

18) **In what way could they be improved? Please suggest any drafting changes.**

Comments:

16 No.

17

- **The comments made in relation to Rules 10, 12 and 20 and in answer to questions 8 and 9 above are also applicable in the ALR.**
- **In addition, we consider that it would be beneficial to include a power for the Tribunal to appoint litigation friends, in order to deal with the position where parties become unexpectedly incapacitated.**
- **In cases which have been referred to the Tribunal, we would welcome a provision making clear that costs can only be awarded in relation to the period beginning with the date of the referral,**

and not in relation to any pre-referral work.

- **We consider that Rule 15 is weaker than the current provision relating to documents before the Adjudicator (Rule 27(1) of the 2003 Rules), and that the present position is preferable and should be preserved. Currently, disclosed documents can only be used for the purpose of the proceedings in which they were disclosed, which encourages openness and provides a reasonable level of protection for litigants. It might be beneficial to allow documents to be used subsequently by parties to prove title as determined by the Tribunal, but documents should not be used more generally.**
- **The Rule should also apply to all litigants, whether or not they are at any specific time a 'party' within the Rule 1 definition.**
- **Rule 19, dealing with site visits, should be more broadly drafted to enable the Tribunal to request the attendance of anyone it considers expedient, which might include a former owner of land, or neighbour, who intends to give evidence and/or can assist. The Tribunal should, as in the present rule 30(5), be entitled to take a refusal of consent for access into account in making its decision, and that it is entitled to do so should be expressly stated.**
- **The provision at Rule 27(8) entitling the Tribunal to serve documents by requiring a party to serve them, should apply to all instances where the Tribunal is required to serve documents. Applications with documents attached are often bulky in cases dealt with by the ALR, and requiring the Tribunal to copy and pass on documents is excessively onerous.**
- **Rule 31(4) should include a more general power vested in the Tribunal to lift the automatic stay on proceedings, so that applications which have been dealt with in Court but have not reached a final determination and will not do so for any reason can be finalised and removed from the Register by the Tribunal.**

18

- **The comments made in response to question 9 are repeated.**
- **Rule 15 should be strengthened to state that disclosed documents can only be used for the purposes of the proceedings in which they were disclosed and for the purpose of proving title following an ALR dispute.**
- **Rule 19 should include provision for the Tribunal to request admission of any person it considers appropriate.**
- **Rule 31(4) should entitle the Tribunal to lift the automatic stay if it considers it appropriate to do so for any other reason not covered in Rules 31(4)(a) and (b).**

<u>Structure questions:</u>

19) Do you have any comment on the proposed structure of the Rules?

20) Do you have any comment on the proposed use of Parts as opposed to Schedules to the Rules?

21) Do you have any comment on the proposed use of Practice Directions to supplement the Rules?

Comments:

19 We consider that only rules which are truly generic i.e. applicable to all cases within the Chamber, should appear in the main body of the order. There should be separate Schedules of Rules for non-generic rules applying to each individual jurisdiction. The proposed rules will be much more accessible and user-friendly if there were a reduced main body of the Rules and in each case only one of several Schedules actually being relevant. Litigants will not then have to wade through and eliminate a plethora of detail not relevant to their individual case.

20 We have no objection to using Parts rather than Schedules to achieve the objective set out in the response to 19) above.

21 The jurisdiction has worked well without Practice Directions since

2003. We have no objections to Practice Directions in other jurisdictions which find them useful, but they are an extra layer of regulation imposed on litigants which could just as easily be met either by rules or by judicial directions in particular cases as at present.

Questions on specific issues:

Case management powers – Rule 5

22 Do you consider it appropriate that case management powers be provided for in a single Rule? If not, why not?

23 Do you consider that Rule 5 is appropriately drafted? Please suggest any drafting changes.

Comments:

22 Yes.

23 Yes, save as otherwise appears from the rest of this response.

Striking out – Rule 8

24 Do you consider it appropriate to provide for striking out for no reasonable prospect of success? If not, why not?

25 Do you consider it appropriate also (or instead) to provide for strike out of applications that are frivolous, vexatious or abusive? If so, why?

26 Do you consider that the proposed strike out rule permits appropriate summary disposal of cases which have no reasonable prospects of success? If not, why?

Comments:

24 Yes.

25 Yes, we consider that it would be sensible to make additional provision for such cases, as is done in the CPR, see CPR 3.4(2)(b) and the commentary at 3.4.3. There are a category of cases which are not merely not going to succeed: they are ones which are launched e.g. to spite other parties, to relitigate issues already determined many times over and as vehicles for oppression. They should be stigmatised as

such.

26 Yes.

Fees: non-payment – Rule 10

27 Is the time period of 14 days in Rule 10(2) appropriate? If not, why not?

Comments:

27 The time limit of a mere 14 days seems overly draconian, particularly in the case of a deemed withdrawal of a case. 21 days (or even 28 days) would be more appropriate.

Costs – Rule 11

28 Is it appropriate to provide the Tribunal with a specific power to impose costs orders to sanction non-compliance? If not, why not?

29 If such a power is appropriate, is Rule 11(1)(b) appropriately drafted? If not, how should it be drafted?

30 Do you consider it appropriate to provide for a costs power in cases of unreasonable conduct? If not, why not – and how should a narrower power be drafted?

31 Is the time limit of 14 days in Rule 11(5) appropriate? If not, why not?

32 What provision should be made for the Tribunal to order payment of the costs of any costs assessment?

33 What provision should be made (if any) for the Tribunal to order payment of the costs of any costs assessment?

34 What provision should be made (if any) as regards the award of interest on costs?

Comments:

28 Yes.

29 Yes.

30 Yes.

31 No: if there is to be a time limit in the rules it should more appropriately be 28 days. We agree with the comment made by the Land Registry Adjudicator in his submission that it is faster and more efficient to deal with the incidence of costs and the amount of costs payable (if any) together in most cases. It should not be a default provision that, in effect, a party must produce both representations as to the incidence of costs and a schedule of those costs within 14 days. Given the power to extend in rule 5(3)(a), it is unclear what purpose is served by giving a specific time limit in the rule.

32 The Tribunal should certainly have the power to order payment of the costs of any costs assessment.

33 This seems to be a replication of the preceding question.

34 The Tribunal should certainly have the power to award interest on costs. There is no justification for treating Tribunal costs orders any differently from costs orders in Court cases.

Applications to start proceedings – Rule 24

35 Is it appropriate to use the term 'application notice' for the document which all applicants are required to provide at the outset of the proceedings (see also Rule 1 definition of applicant)? If not, why not?

36 Is it appropriate for the contents of the application notice to be set out for all cases in Rule 24(2)? If not, why not?

Comments:

35 No. We entirely agree with the comments of the Land Registry Adjudicator in his reply to the Committee in this respect which was submitted on 5th September.

36 No. The list has a number of entries which are relevant to some jurisdictions, but not others – which lends support to the point made above in relation to question 19 that Schedules should be used instead

of one set of overly-complicated rules.

Time limits – Rule 25

37 **Is it appropriate for a single rule to contain all the rules relating to time limits for providing a notice of application?**

38 **Would it be preferable for the rules to restate the statutory time limits for the RPT source jurisdiction? If so, how should the rules make this provision?**

39 **Is the structure of this Rule appropriate? If not, why not?**

40 **Are the time limits in Rule 25(2)-(4) appropriate? If not, why not?**

Comments:

37 No, for the reasons set out in relation to questions 19 and 36 above.

38 No comment.

39 No, for the reasons set out in relation to questions 19 and 36 above.

40 Yes.

The response – Rule 28

41 **Is it appropriate to provide that, as a general rule, respondents should provide a response?**

42 **Is 28 days a generally appropriate period for such a response?**

Comments:

41 Yes.

42 Yes.

Special cases – Part 4

43 **Should specific provision for assistance of the parties be added to the Rules? If so, why? How should any additional provisions be drafted?**

Comments:

43 We refer to our responses at 19-21 above and generally.

Land registration cases: requirements relating to court proceedings, registrar etc – Rules 29 to 32

44 Is it appropriate to make these specific provisions? Please give reasons for your views.

Comments:

44 Yes. The Tribunal will have the same power as does the Adjudicator at present to direct one of the parties to commence court proceedings under section 110 Land Registration Act 2002. The parties will also retain the ability to issue court proceedings of their own volition. These rules essentially re-enact existing provisions in the Adjudicator's rules dealing with these circumstances which work well in practice.

Land registration cases: requirements relating to court proceedings, registrar etc – Rules 29 to 32

45 Is it appropriate to make these specific provisions? Please give reasons for your views.

Comments:

45 This seems to be a replication of the preceding question.

Agricultural land and drainage cases relating to succession – Rules 33 to 35

46 Is it appropriate to make these specific provisions? Please give reasons for your views.

Comments:

46 These provisions should appear in a separate Schedule for the reasons set out above and not in the main body of the Rules.

Residential property cases: urgent cases - Rules 36 to 39

47 Is it appropriate to make these specific provisions? Please give reasons

for your views.

Comments:

47 Yes and we see nothing objectionable in the Rules as drafted.

Residential property cases: interim orders - Rules 40 and 41

48 Is it appropriate to make these specific provisions? Please give reasons for your views.

Comments:

48

- **No, as regards the very tight timetables proposed. Many of the cases to which this rule relates will involve litigants in person who are unfamiliar with legal process. In those circumstances, we consider that the presumed consent for a disposal without a hearing at Rule 41(3)(a) is unreasonably draconian in allowing only 14 days for parties to respond. That is simply not long enough for a litigant in person to obtain advice and put in a response. We suggest that 28 days would be more appropriate.**

Additional views

49) Do you have any other comments?

Comments:

49 We agree with the comment made by the Land Registry Adjudicator in his reply to the Committee of 5th September. Land registration is a specialist area of the law and it is imperative that it should be dealt with by Chancery judges, or at the very least by judges with Chancery experience.