Tribunal Procedure Committee

Consultation on possible changes to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 concerning costs in leasehold cases and residential property cases

Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. These Rules are made pursuant to the Tribunals, Courts and Enforcement Act 2007 ("the TCE Act").

2. One of the Chambers of the First-tier Tribunal is the Property Chamber, and the Rules which apply to proceedings in that Chamber are the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. These Rules can be found in the "Publications" section of our website:

   www.gov.uk/government/publications/property-chamber-tribunal-procedure-rules

3. Appeals from decisions of the Property Chamber are dealt with by the Lands Chamber of the Upper Tribunal, and the Rules which apply to proceedings in that Chamber are the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. These Rules can be found in the "Publications" section of our website:

   www.gov.uk/government/publications/upper-tribunal-lands-chamber-procedure-rules

4. The purpose of this consultation is solely to seek views as to both sets of Rules in relation to the question of placing a cap or caps on costs recoverable under the costs provisions in leasehold and residential property cases. (Further, fees regulations are outside the scope of Rules made by the TPC, and do not form part of this consultation.) Responses to the consultation will be considered by the TPC.

5. Below you will find further information on the following:
    - the First-tier Tribunal and the Upper Tribunal
    - background information on the leasehold and residential property jurisdictions
    - possible amendment of the Rules
    - the consultation questions
    - how to respond and by when.

6. Further information on Tribunals can also be found on the HMCTS website at: www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals

7. Further information on the TPC can be found at our website: www.gov.uk/government/organisations/tribunal-procedure-committee
   The consultation questions are also in a separate Word document on our website, which can be used for submitting your response.

Background

8. The TCE Act provides for the First-tier Tribunal and the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions.

9. The First-tier Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills.

10. The First-tier Tribunal Chambers are presently:
    - Property Chamber
    - Social Entitlement Chamber
    - Health, Education and Social Care Chamber

- War Pensions and Armed Forces Compensation Chamber
- General Regulatory Chamber
- Immigration and Asylum Chamber
- Tax Chamber

11. Appeals from decisions of the First-tier Tribunal are made to the Upper Tribunal. Decisions of the Upper Tribunal are binding on the First-tier Tribunal.

The Property Chamber

12. The Property Chamber (the "PC"), as its name denotes, deals with cases concerning property, landlord and tenant, and housing. Such cases are predominantly *party v party* and altogether the PC deals with cases arising from about 130 separate statutory jurisdictions. The work of the Chamber is very diverse: it might relate, for example, to a complex lease variation case, a high value enfranchisement, or a modest increase in a fair rent. The work is similar to that dealt with in the County Court in some property cases, and in some instances, there is a parallel or overlapping jurisdiction.

13. The PC has three divisions: The Residential Property Division; the Land Registration Division and the Agricultural Land and Drainage division:
    (i) The Residential Property Division typically receives about 10,000 cases each year. By reference to rule 1 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "PC Rules"), most of its cases are classified as either a "leasehold case" or a "residential property case". The remainder of its cases are rents valuation cases, but these are not "residential property cases" as defined in PC rule 1.
    (ii) The Land Registration Division receives about 1,000 cases each year. These are predominantly referrals from HM Land Registry, although it also has jurisdiction to hear network access cases.
    (iii) The Agricultural Land and Drainage Division receives about 250 cases a year. In the main these are succession and drainage applications.

    This consultation relates only to leasehold and residential property cases within the Residential Property Division of the PC, and appeals to the Upper Tribunal (Lands Chamber) in such cases.

Leasehold Cases

14. Leasehold cases form the bulk of the Residential Property Division work. There are two types of leasehold work.

15. Firstly, there are cases dealing with leasehold management issues. These cases include applications for a determination of the payability of service charges. As well as construing the relevant lease this also requires the Tribunal to consider the application of the statutory requirements under sections 18 to 30 of the Landlord and Tenant Act 1985. Additionally, applications are made for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 and under the Right to Manage provisions in the Commonhold and Leasehold Reform Act 2002. Applications are also made under the 2002 Act for a determination that a breach of a lease has occurred and for the payability of administration charges. The Tribunal has exclusive jurisdiction to decide on residential lease variation and the recognition of tenants' associations.

16. The Tribunal deals with leases in both the private and the public sector. Some cases are limited to disputes between an individual tenant and their landlord. In many cases the interests of a number of tenants will be brought to the Tribunal all together. The value of the claims also varies. The TPC understands that there is a greater incidence of representation for landlords than for tenants: as an estimate, approximately 70% of landlords have representation compared to about 30% of tenants. Where parties are represented, it is usually by barristers or solicitors. Most cases are dealt with at a hearing but about 20% are decided on the consideration of documents alone.

17. The second type of leasehold work comprises enfranchisement cases. This includes jurisdictions under the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993, relating to the extension of leases for both houses and flats, and the acquisition of the freehold of a house or the collective enfranchisement of flats by flat owners. The Tribunal also deals with some jurisdictions under the right of first refusal in the Landlord and Tenant Act 1987.

18. A high proportion of enfranchisement cases settle before hearing. The TPC understands that representation in enfranchisement cases is more common for all parties than in leasehold management cases. In London, the value of the cases can

be very high. Outside of London and generally for the lower value cases, representation may well be by a valuer/surveyor rather than a lawyer.

Residential Property Cases

19. Again, there are two types of residential property work.

20. Firstly, there are cases where an appellate jurisdiction was conferred after 2004, being appeals against local authority enforcement action and appeals in respect of houses in multiple occupation. These jurisdictions arise under the Housing Act 2004 and more recently under the Housing and Planning Act 2016. They include appeals against improvement notices, prohibition orders and other housing standard enforcement action under the Housing Health and Safety Rating System; appeals in respect of the licensing of houses in multiple occupation and selective licensing; applications for rent repayment orders by local authorities and by tenants; appeals against civil penalties for housing offences and applications for empty dwelling management orders.

21. The TPC understands that the extent of representation in these cases is variable. Local authorities are usually represented, often by in-house solicitors or by Environmental Health Officers. Landlords are represented in about 50% of cases.

22. The second type of residential property work comprises cases relating to park home sites either under the Mobile Homes Act 1983 or the Caravan Sites and Control of Development Act 1960. The range of cases under the 1983 Act is very wide and although there are specific jurisdictions to decide pitch fees and the terms of agreements, section 4 of that Act is most widely used to ask the Tribunal to decide any question arising from, or from the breach of, a park home agreement.

23. The TPC understands that there is generally an inequality of representation in park home cases: site owners are more often represented by solicitors or barristers, and park home occupiers more often represent themselves.

Costs in the Property Chamber

24. Cost rules for all Divisions of the PC are contained in rule 13 of the PC Rules. PC rule 13(1) provides:

"*13(1) The Tribunal may make an order in respect of costs only-*
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(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"

The Tribunal may make an order on an application or on its own initiative (rule 13(2)) and the remainder of the rule deals with procedural and assessment matters.

25. Rule 13(1)(b) deals with costs which may be awarded in respect of what may be termed (for convenience) "unreasonable behaviour". What we have referred to above as "rents valuation cases" can attract no award of costs under this sub-paragraph, since it applies only to leasehold cases, residential property cases and agricultural land and drainage cases. This consultation does not extend to agricultural land and drainage cases or to land registration cases (both as defined in PC rule 1). Land registration cases have full cost shifting powers and this mirrored the position before the creation of the PC.

The position prior to creation of the PC Rules

26. For both leasehold cases and residential property cases, legislation had earlier provided for the award of costs for "unreasonable behaviour".

27. For leasehold cases, paragraph 10 of schedule 12 to the Commonhold and Leasehold Reform Act 2002 (the "2002 Act") (still applicable in Wales), had provided:

"*10(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within subsection (2).*

(2) The circumstances are where –

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed –

(a) £500, or

(b) such other amount as may be specified in procedure regulations

……."

28. For residential property cases, paragraph 12 of schedule 13 to the Housing Act 2004 (the "2004 Act") (again, still applicable in Wales), had provided:

"*12. (1) A tribunal may determine that a party to proceedings before it is to pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).*

(2) The circumstances are where –

(a) he has failed to comply with an order of the tribunal;

(b) in accordance with regulations made by virtue of paragraph 5(4), the tribunal dismisses or allows the whole or part of an application or appeal by reason of his failure to comply with a requirement imposed by regulations made by virtue of paragraph 5;

(c) in accordance with regulations made by virtue of paragraph 9, the tribunal dismissed the whole or part of an application or appeal made by him to the tribunal; or

(d) he has, in the opinion of the tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph must not exceed –

(a) £500 or, in the case of an application to a tribunal under the Mobile Homes Act 1983, £5,000, or

(b) such other amount as may be specified in procedure regulations.

……."

29. Further, as regards leasehold cases, Regulation 3 of The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 set out the prescribed form and content of the summary of rights and obligations which must accompany a demand for the payment of a service charge. Amongst the information to be included was the following:

"(6) A leasehold valuation tribunal has the power to award costs, not exceeding £500, against a party to any proceedings where—
it dismisses a matter because it is frivolous, vexatious or an abuse of process; or
it considers a party has acted frivolously, vexatiously, abusively, disruptively or unreasonably."

The position upon creation of the PC Rules

30. Upon the PC Rules being created in 2013, the TPC (after a consultation as to such Rules) adopted the recommendation set out in the report *Costs in Tribunals* (Costs Review Group led by Mr Justice Warren, December 2011) to remove the upper limit or "cap" on the amount of costs that might be awarded for unreasonable behaviour. This was achieved through the Transfer of Tribunal Functions Order 2013 (SI 2013/1036) which transferred the relevant jurisdictions to the First-tier Tribunal and thereby conferred rule-making powers in relation to costs upon the TPC. By that Order, Schedule 12 of the 2002 Act (which contained the statutory limit) only applied after 1 July 2013 to the continuing functions of the Leasehold Valuation Tribunals in relation to Wales. Likewise, Schedule 13 of the 2004 Act only applied after 1 July 2013 as regards Residential Property Tribunals in relation to Wales.

31. Rule 13(1)(b) thus represented a significant change in two respects: firstly, removal of the statutory cap on the amount of costs that could be awarded; secondly, the criteria for the award of costs were differently expressed than had been provided for by statute.

32. By the Transfer of Tribunal Functions Order 2013, Schedule 2 paragraph 40, there was substituted into Regulation 3 of The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 the following:

"(6) The First-tier Tribunal and the Upper Tribunal (in determining an appeal against a decision of the First-tier Tribunal) have the power to award costs in accordance with section 29 of the Tribunals, Courts and Enforcement Act 2007."

Thus, the prescribed information did not now identify the circumstances in which such power might be exercised, which were set out in Tribunal Rules. The substituted provision did not say (for example) "…. *and any exercise of such power must be in accordance with applicable procedural rules for such Tribunals*."

33. Government information (see below) reflects the substituted wording.

    www.gov.uk/leasehold-property/service-charges-and-other-expenses

    www.lease-advice.org/advice-guide/summaries-of-rights-and-obligations-service-charges-england/

Costs awards for unreasonable behaviour, and capping

34. Provision for making costs awards for unreasonable behaviour is found in all the Tribunal rules created by the TPC, including those across all the Chambers of the First-tier Tribunal. It is an exceptional jurisdiction available where costs shifting does not otherwise apply. The purposes behind the existence of the jurisdiction include:
    (i) Discouraging litigants from acting unreasonably. That is for the benefit of all the parties in the case, that of the tribunal, and other tribunal users.
    (ii) Compensating the other party or parties who have incurred costs in dealing with unreasonable behaviour.

35. There is however scope for the existence of such jurisdiction to be abused. Litigants may threaten a costs award in the hope that a claim might not be initiated, or if initiated be withdrawn, or the claim be settled on terms reflecting the threat having been made. Lord Falconer in the House of Lords, when promoting the 2002 Act (at Bill stage, 22 October 2001) stated:

    "*When service charge disputes were still a matter for the county court, landlords would intimidate leaseholders with the threat of large bills for costs. As landlords were generally able to afford the best legal advice, leaseholders doubted their own ability to win their case, even where they felt that they were clearly justified in their challenge, and often decided not to take their case to court. That is why this Bill provides a cap on the maximum sum payable. If this cap did not apply leaseholders might fear that even an innocent mistake in interpreting directions, or a failure to meet a deadline through some mishap or confusion, could lead to a very large costs bill. These fears would be exaggerated often by their lack of previous experience of LVT proceedings.*

Unscrupulous landlords would encourage such fears and use them to discourage leaseholders from exercising their rights."

36. In general, the reasons for any capping would include:
    (i) To ensure access to justice for all parties (not least those with limited means, or without representation); litigants ought not to be discouraged from bringing or defending claims for fear of being met with a costs award which they might not reasonably be able to afford, or from being unable, without professional advice, to assess the merits of a potential costs application.
    (ii) As a restraint to those being met with unreasonable behaviour: the incurring of costs responding to such behaviour ought not to be with a "carte blanche" approach. The incurring of legal fees in the anticipation that they will be recoverable from the other party, whatever their scale, may not be considered proportionate.
    (iii) To provide some monetary limitation to any threat that might be imposed.
    (iv) To reflect the "no costs shifting" character of the Tribunal.

Current operation of PC rule 13(1)(b)

37. The TPC is satisfied that the wording adopted in the rule (so as to trigger the discretion to make an award) remains appropriate, and is not consulting on any changes. Such wording is the same across all other Chambers for which the TPC has made Rules.

38. The Upper Tribunal (Lands Chamber) (the "UT(LC)") considered the jurisdiction to award costs (and its application) last year, in hearing appeals in 3 cases listed together, reported as *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC). The judgment in that case suggests to the TPC that the jurisdiction as presently defined by the wording of the Rule is capable of working fairly and without injustice, so long as it is applied correctly.

39. That said, it may be noted that of the 3 cases:

    (i) in *Willow Court,* the management company had been ordered by the First-tier Tribunal to pay £13,095 (plus VAT) towards the costs of the tenant, yet the service charges claimed in the proceedings were only £5,702. The tenant had sought costs of £19,206: more than 3 times the sum in issue. The UT(LC) set aside the Order.

(ii) In *Sinclair*, the tenant had been ordered by the First-tier Tribunal to pay £16,800 costs to the RTM company, in a dispute over a service charge of £9,767. The UT(LC) set aside the Order.

(iii) In *Stone*, the tenant had been ordered by the First-tier Tribunal to pay £2,260.80 to the landlord on the ground that he had acted unreasonably in not withdrawing his application earlier. The UT(LC) set aside the Order.

40. Three further cases of note have been heard in the UT(LC) this year. In *Matier v Christchurch Gardens (Epsom) Limited* [2017] UKUT 56 (LC), the tenant had been ordered by the First-tier Tribunal to pay £1,250 (plus VAT) towards the costs of the freeholder. The UT(LC) was satisfied that the First-tier Tribunal had been entitled to regard the tenant's behaviour as having been unreasonable and declined to set aside the Order. In *Primeview Developments Limited v Ahmed* [2017] UKUT 57 (LC), the freeholder had been ordered by the First-tier Tribunal to pay the tenant one third of the tenant's counsel's costs of the hearing, and in *Dougall & Dougall v Barrier Point RTM Company Limited* [2017] UKUT 207 (LC) the tenants had been ordered by the First-tier Tribunal to pay half of the RTM Company's costs of the hearing. In both cases the UT(LC) set aside the Orders.

41. The TPC welcomes the guidance given by the UT(LC) in *Willow Court*, and trusts that parties contemplating applying for costs under PC rule 13(1)(b) will bear it well in mind. If applications for costs were being made on the basis that the "acting unreasonably" threshold was easier to achieve than the previous statutory criteria, that erroneous notion should now be dispelled. (The TPC understands that some costs applications had been made simply on the basis that the losing party ought necessarily to pay, or that it was "automatically unreasonable" to withdraw a case.)

42. However, the TPC understands that there remains a concern that the absence of a cap on rule 13(1)(b) costs as regards these cases has affected litigant behaviour, in a way which may run counter to fairness and justice between the parties. That concern is held by the President of the PC, Judge McGrath. The PC does not keep statistics on costs applications but the TPC understands that a review of the decisions made in leasehold cases and residential property cases in the last two and half years reveals that approximately 16% mention costs. However, this figure does not include cases which were settled or withdrawn prior to hearing, in which a threat of a costs award might have been made. A threat of a costs award may have a very real effect, particularly upon those with limited means, thereby restricting access to justice. In any

event, the TPC further understands the following points to arise, anecdotally, from PC judiciary with whom the PC President has raised the matter.

(a) The frequency of applications for rule 13(1)(b) costs has increased when compared with the frequency of applications that were made under the previously applying (capped) statutory provisions, before the creation of the PC Rules. It may be said that if the "uncapped" jurisdiction exists, then even a low chance of it being exercised is worth the application. But that may oblige the other party to expend its own cost on resisting the application, and unless such application is itself "unreasonable" then that cost will be irrecoverable.

(b) In London, at least, some parties seeking the determination of the payability of service charges have made applications for rule 13(1)(b) costs in the originating application itself. Such an approach may often savour of bullying, if the sought-for costs are uncapped.

(c) Applications for rule 13(1)(b) costs are routinely made for the whole amount of the costs incurred by the applying party, rather than just the costs referable to the alleged unreasonable behaviour. Although the *Willow Court* guidance accepts that all costs are at large, the case decided that it is equally open to the Tribunal to award less than the total costs at its discretion. However, it still may be said that if the "uncapped" jurisdiction exists, then even a low chance of it being exercised in order to gain an award of full costs is worth the application. Again, that may oblige the other party to expend its own cost on resisting the application, and unless such application is itself "unreasonable" then that cost will be irrecoverable.

43. It is possible that some of this litigant behavior, if encouraged by the current terms of rule 13(1)(b), would be addressed if a cap on the amount of costs were to be reintroduced. One objection to this might be that as a matter of principle, a clear unfettered discretion should be given to judges exercising the rule 13(1)(b) power. Whilst the correct approach to proper exercise of this discretion has now been described in *Willow Court*, there may be other relevant and potentially important factors:

(a) The threat of a rule 13(1)(b) costs order may deter a party from either bringing a case or continuing a case, and in those circumstances the discretion stage is never reached. Even if litigants (or prospective litigants) understand the basis of a rule 13(1)(b) costs order (as opposed to ordinary costs shifting) they may be unwilling to take the risk of an adverse costs order. In other words, the absence of a cap

may impede access to justice on the part of a litigant (or prospective litigant). Litigants or potential litigants in leasehold cases, faced with such a threat, are not helped in this regard by the current form of Regulation 3(6) of The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 (see above).

(b) The position on costs in leasehold cases is complex in any event. Some parties may misunderstand the extent of the power of the Tribunal under section 20C of the Landlord and Tenant Act 1985 (power to prevent a landlord adding Tribunal costs to a service charge). If a cap on rule 13(1)(b) costs was provided for, this might bring greater clarity to parties' understanding of the consequences of an exposure to Tribunal costs.

(c) The sums claimed, and indeed awarded, for costs may far exceed the value of the claim itself and may amount to tens of thousands of pounds. *Willow Court* emphasizes the role of proportionality and the overriding objective, in exercise of the judicial discretion. That said, if the "uncapped" jurisdiction continues to exist, then even a low chance of it being exercised in excess of the sums in issue may be thought worth the application being made. Again, that necessarily obliges the other party to expend its own cost on resisting the application, and unless such application is itself "unreasonable" then that cost will be irrecoverable.

44. The TPC is therefore considering whether rule 13(1)(b) should include a limit or limits on the amount of costs that can be awarded in leasehold and/or residential property cases.

45. The TPC notes that for the purposes of the 2002 Act (now 15 years ago), £500 was chosen as the cap. For the Housing Act 2004, the sum of £500 was again chosen. As for the figure of £5,000 for park homes disputes, see www.rickwood-estates.co.uk/docs/snsp-01080.pdf (page 20) for background.

(a) In May 2008, the Department for Communities and Local Government issued a consultation paper *A new approach for resolving disputes and to proceedings relating to Park Homes under the Mobile Homes Act 1983 (as amended)*. Included was the proposal that the Residential Property Tribunal should have a limited power to award costs against any party to a proceeding, subject to a maximum of £5,000. Whilst recognising that costs provisions in the 2002 and 2004 Acts were limited to £500, the proposal was "*to give the tribunal the flexibility (where it considers it appropriate) to award substantially greater costs in respect of park*

home disputes". It was considered that the ease of access to the Tribunal service needed to be counter weighted by an effective deterrent to the making of "*hopeless or malicious applications to the tribunal which we consider is more likely to happen in this jurisdiction if a proper financial deterrent is not in place*".

(b) On 12 May 2009, *Dispute resolution under the Mobile Homes Act 1983 (as amended): Summary of responses and further consultation* was issued. It included that the majority of consultees thought that £5,000 was the appropriate maximum amount of costs a tribunal should be able to award against a party. (Opinion as to the appropriate amount amongst those who did not support £5,000 varied significantly.)

(c) The Mobile Homes Act 1983 (Jurisdiction of Residential Property Tribunals) (England) Order 2011 came into force on 30 April 2011, creating the cap of £5,000.

46. If there is to be capping of costs awards under rule 13(1)(b) for leasehold and/or residential property cases, the TPC considers that any capped sum should represent an appropriate sum to compensate a party for the other party's unreasonable behaviour and at the same time providing, in some measure, a restraint on altered "litigant behaviour" which is thought to be occurring.

47. If there is to be rule change to include (for example) a single cap across all relevant types of leasehold and residential property case, this could be achieved by insertion of a new paragraph within Rule 13:

"(1A) The amount of costs to be paid under an order made under paragraph (1)(b)(ii) or (iii) of this rule shall not exceed £[ ]."

If there were to be rule change to accommodate different caps for different types of case, this could (for example) be catered for as follows:

"(1A) The amount of costs to be paid under an order made under

(i) paragraph (1)(b)(ii) of this rule, other than in a case under the 1983 Act or the 1960 Act, shall not exceed £[ ].

(ii) paragraph (1)(b)(ii) of this rule in a case under the 1983 Act or the 1960 Act shall not exceed £[ ]."

(iii) paragraph (1)(b)(iii) of this rule shall not exceed £[ ]."

The “1960 Act” could be defined in PC rule 1(3), with a consequential amendment to the definition of “residential property case”.

Costs in the Upper Tribunal (Lands Chamber)

Transferred cases

48. It may be noted that PC rule 25 concerns transfer of cases from the PC to the Upper Tribunal (Lands Chamber) (the “UT(LC)”) for their determination. It is understood that the power to transfer is used in about one or two cases a year, usually where an important point of principle arises. Under the Upper Tribunal (Lands Chamber) Rules 2010 (the “UT(LC) Rules”) rule 44A, subject to any direction by the UT(LC), the PC rules continue to apply (with necessary modifications) to a transferred case, and Part 2 of the UT(LC) Rules (which includes UT(LC) rule 10, dealing with costs) only applies to the extent provided for by a direction of the UT(LC). Thus, any costs cap(s) for leasehold and/or residential property cases in the PC would be maintained upon their being transferred to the UT(LC) unless a direction to the contrary was given by the UT(LC).

Cases on appeal

49. If there is to be capping of costs awards for leasehold cases and/or residential property cases in the PC, consideration should also be given to whether there should also be similar capping for such cases on appeal to the UT(LC).

50. Cost rules for all types of cases dealt with by the UT(LC) are contained in rule 10 of the UT(LC) Rules. UT(LC) rule 10(3) (insofar as relevant) provides:

“10(3) The Tribunal may in any proceedings make an order for costs-
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if the Tribunal considers that a party or its representative person has acted unreasonably in bringing, defending or conducting the proceedings;”

There is no cap on any award of costs pursuant to UT(LC) rule 10(3)(b). The Tribunal may make an order on an application or on its own initiative (rule 10(1)).

The position prior to creation of the PC Rules

51. Prior to creation of the PC, leasehold cases had been dealt with by Leasehold Valuation Tribunals, and residential property cases had been dealt with by Residential Property Tribunals. In each case, the appeal route was to the UT(LC). At that time, the UT(LC) Rules had provided for a costs cap for appeals in leasehold cases: costs recovered could not exceed £500. There was no costs cap in respect of appeals in residential property cases.

The position upon creation of the PC Rules

52. Upon creation of the PC Rules in 2013, alongside the removal of the statutory costs caps (as discussed above), the UT(LC) Rules were also amended (after a consultation as to such Rules) to remove the costs cap for appeals in leasehold cases.

Current operation of UT(LC) rule 10(3)(b)

53. It is understood that there have been few cases in which an award of costs under rule 10(3)(b) has been made in the UT(LC). One recent such case is *Primeview Developments Limited* (see paragraph 40 above), in which an award was made requiring the appellant to pay 50% of the respondents' costs of the appeal and cross appeal. (An award under rule 10(3)(b) was also sought by both parties in the case of *Matier* (again, see paragraph 40 above), but neither application was granted.)

54. We have referred above to the concern that the absence of a cap on PC rule 13(1)(b) costs in relation to leasehold cases and residential property cases has affected litigant behaviour in the PC. It does not follow that there is similar concern as regards litigant behaviour in such cases on appeal to the UT(LC).

55. First, if a threat of an "unreasonable behaviour" costs award is made, it is likely to be made with a view to deterring a party from bringing or continuing proceedings in the PC. If such a threat succeeds, there is no case to go on appeal. If it is resisted, then it may be thought less likely that a similar threat, if made in connection with the appellate stage, would <u>then</u> be acceded to.

56. Second, the potential for assertions of "unreasonable behaviour" in the context of an appeal to the UT(LC) is much more limited than with first instance proceedings in the PC:

(a) The permission to appeal requirement will filter out unmeritorious cases for potential appeal.
(b) The steps which parties are expected to take to prepare their cases for hearing on appeal are much more limited in nature than for a first instance hearing.
(c) Litigants will already have been through the process of litigating in the PC, and ought to have acquired an appreciation of how proceedings are reasonably to be conducted.

57. Third, any threat of a costs award for unreasonable behaviour (were one to be made) is not considered likely to be effective. It would be unlikely to deter a prospective appellant from seeking to bring an appeal, since permission to appeal is required and a prospective appellant would view the outcome of such an application (if positive) as endorsement of the reasonableness of pursuing an appeal. As for respondents, they too are considered unlikely to be deterred by a threat of an adverse costs order, since they were the successful party below.

58. It might be thought, however, that in principle the costs rules in the UT(LC) should be the same as in the PC for these types of case on grounds of consistency and simplicity.

59. It is understood that, generally, parties who were unrepresented in the PC continue to be unrepresented on an appeal, and that those with professional representation retain it for the appeal. The overall cost of representation in appeals will usually be less than in first instance proceedings, since the issues will have narrowed. However, if there are considered to be sound reasons for costs capping for these types of case in the PC (see paragraph 36 above), it might be thought that they are equally sound for such cases on appeal to the UT(LC).

60. If there is to be capping of costs awards under rule 10(3)(b) for leasehold and/or residential property cases, this might be achieved by amending rule 10 to include a new paragraph (3A) dealing with limitations on costs awards for these cases on appeal. The TPC does not offer a detailed drafting suggestion, since drafting will depend on the replies to this Consultation as regards capping of costs in the PC.

Consultation Questions

61. The TPC is interested to receive your views on capping of costs in relation to leasehold cases and residential property cases, including your replies to the questions below. When responding, please keep in mind that the rules should be simple and easy to follow. They should not impose unnecessary requirements or unnecessarily repeat requirements that are contained elsewhere. The TPC must secure the objectives set out in section 22(4) of the TCE Act and it aims to do so in a consistent manner across all jurisdictions. Where your views are based upon practical problems which do or could arise, the TPC would be assisted by reference to specific details or evidence.

Confidentiality and data protection

62. In general, the TPC regards consultation replies as public documents. They may be published by the TPC and referred to in its response to the consultation.

63. If you would prefer your reply to be kept confidential, you should be aware that information you provide, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 and the Data Protection Act 1998.

64. In view of this, if you would prefer your reply to be kept confidential it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the TPC.

Consultation Questions

1. Is it appropriate to amend the PC Rules to include a cap on the award of rule 13(1)(b) costs in residential property cases other than applications under the Mobile Homes Act 1983 or the Caravan Sites and Control of Development Act 1960 (which are the subject of question 3 below)? If so, why? If not, why not? Please provide your reasons.

2. If so, in what amount should the cap be? Please provide your reasons.

3. Is it appropriate to amend the PC Rules to include a cap on the award of rule 13(1)(b) costs in applications under the Mobile Homes Act 1983 or the Caravan Sites and Control of Development Act 1960? If so, why? If not, why not? Please provide your reasons.

4. If so, in what amount should the cap be? Please provide your reasons.

5. Is it appropriate to amend the PC Rules to include a cap on the award of rule 13(1)(b) costs in leasehold cases? If so, why? If not, why not? Please provide your reasons.

6. If so, in what amount should the cap be? Please provide your reasons.

7. If a cap (or caps) is/are appropriate, is it/are they best achieved by drafting in the manner illustrated above?

8. If not, why not? Do you have any other drafting suggestions?

9. Do you have any other suggestions as regards how rule 13(1)(b) costs in these cases should be dealt with in the PC Rules?

10. If you consider it appropriate to amend the PC Rules in the respects you have identified in your answers to the questions above, is it also appropriate to amend the UT(LC) Rules likewise? If so, why? If not, why not? Please provide your reasons.

Generally

11. Do you have any further comments?

How to Respond

Contact Details

65. Any comments to the consultation should be sent to the Tribunal Procedure Committee Secretariat at:

Tony Allman
Secretary to the Tribunal Procedure Committee
Justice Policy Group
Ministry of Justice
1st Floor Piccadilly Exchange – 2 Piccadilly Plaza
Manchester
M1 4AH

Email: tpcsecretariat@justice.gsi.gov.uk

Copies of this report can be obtained from that address or on the website: www.gov.uk/government/organisations/Tribunal-procedure-committee