Tribunal Rules

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

Responses to the 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

(9 November 2017 to 1 February 2018)

Reply from the Tribunal Procedure Committee

June 2018

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Summary

This is the Reply from the Tribunal Procedure Committee ("the TPC") to the responses to its consultation paper on the question of placing a cap or caps on costs recoverable in leasehold and residential property cases under the "unreasonable behaviour" costs provisions in the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

The TPC wishes to thank respondents for their responses from which it has benefited considerably. Having considered all of the responses in detail, the TPC has concluded that at this stage a case has not been made out for changes to the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 in respect of such capping of costs. In particular, the TPC considers that the recent guidance as to the circumstances in which the First-tier Tribunal (Property Chamber) may make an order of costs for "unreasonable behaviour" provided in the *Willow Court* judgment (see paragraph 20 below) may have the effect of significantly alleviating some of the problems identified by respondents, especially if steps are taken to publicise that guidance in a clear form to parties involved in leasehold and residential property cases.

However, conscious of the concerns expressed, the TPC proposes to keep the matter under review and to consider in due course whether to call for further evidence in support of any such rule changes.

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.

The Property Chamber of the First-tier Tribunal and the Lands Chamber of the Upper Tribunal

4. One of the Chambers of the First-tier Tribunal is the Property Chamber ("PC"), and the Rules which apply to proceedings in that Chamber are the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "PC Rules"). The Residential Property Division is one of the PC's three divisions.

5. Appeals from decisions of the Residential Property Division are dealt with by the Lands Chamber of the Upper Tribunal (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").

6. The PC Rules and the UT(LC) Rules can be found in the "Publications" section of our website:

PC Rules: https://www.gov.uk/government/publications/property-chamber-tribunal-procedure-rules

UT(LC) Rules: https://www.gov.uk/government/publications/upper-tribunal-lands-chamber-procedure-rules

The Residential Property Division

7. By reference to rule 1 of the PC Rules, most of the cases in the PC's Residential Property Division are classified as either a "leasehold case" or a "residential property case".

Leasehold Cases

8. Leasehold cases form the bulk of the Residential Property Division's work. There are two types of leasehold work:

    (a) Cases dealing with leasehold management issues, arising in connection 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.

    (b) Enfranchisement cases. A high proportion of enfranchisement cases settle before hearing. In London, the value of the cases can be very high.

Residential Property Cases

9. There are two types of residential property work:

    (a) Cases under the Housing Act 2004 where an appellate jurisdiction was conferred in 2006, being appeals against local authority enforcement action and appeals in respect of houses in multiple occupation together with the new '*rogue landlord*' jurisdictions introduced by the Housing and Planning Act 2016.

    (b) 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.

Costs in the Property Chamber

10. Cost rules for 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 in its own initiative: rule 13(2).

11. Accordingly, rule 13(1)(b) deals with costs which may be awarded in respect of what may be termed (for convenience) "unreasonable behaviour". Such costs will be referred to in this Response as "rule 13(1)(b) costs". Under the present rules, there is no "cap" on such costs.

Costs in the Upper Tribunal (Lands Chamber)

12. Costs 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 for costs incurred in applying for an order for such costs;*
>
> *(b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;*

13. Again therefore, as with the PC, there is a rule dealing with costs which may be awarded for "unreasonable behaviour". Under the present rules, there is no "cap" on such costs. The Tribunal may make an order on an application or on its own initiative (rule 10 (1)).

The Consultation Process

14. A consultation (the consultation paper is termed the "Consultation") ran over the period 9 November 2017 to 1 February 2018, its purpose being solely to seek views as to the PC Rules and the UT(LC) Rules in relation to the question of placing a cap or caps on rule 13(1)(b) costs in leasehold and residential property cases.

15. Paragraphs 54 to 60 of the Consultation addressed the TPC's reasoning as to any consequent change to UT(LC) rule 10 which might be appropriate were the PC rules to be amended.

Background to the Consultation

16. Prior to the creation of the PC Rules in 2013, for both leasehold cases and residential property cases, legislation had earlier provided for the award of costs for "unreasonable behaviour".

    (i) 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 that such costs shall not exceed £500 (or such other amount as may be specified in procedure regulations). That paragraph had described unreasonable behaviour in terms of acting "*frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings*".

    (ii) For residential property cases, paragraph 12 of schedule 13 to the Housing Act 2004 (the "2004 Act") (again, still applicable in Wales), had provided that such costs must not exceed £500 or, in the case of an application to a tribunal under the Mobile Homes Act 1983, £5,000 (or, in each case, such other amount as may be specified in procedure regulations). That paragraph had again described unreasonable behaviour in terms of acting "*frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings*."

17. Upon the PC Rules being created, the TPC (after a consultation as to such Rules) expressed the criteria for awarding rule 13(1)(b) costs differently than had been provided for by statute (see above), and adopted the recommendation set out in the report Costs in Tribunals (December 2011) to remove the upper limit or "*cap*" on the amount of costs that might be awarded for unreasonable behaviour (for cases other than those from Wales). There was also 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."

However, the prescribed information to accompany a demand for the payment of a service charge did not 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.*"

18. Provision for making costs awards for unreasonable behaviour is an exceptional jurisdiction available where costs shifting does not otherwise apply. The Consultation suggested (paragraph 34) that the purposes behind the existence of the jurisdiction included:

    (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.

19. 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. The Consultation suggested (paragraph 36) that 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 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.

20. The UT(LC) considered the jurisdiction to award costs (and its application), in *Willow Court Management Company (1985) Limited v Alexander* [2016] UKUT 290 (LC). In what follows, this decision is referred to as "*Willow Court*".

21. The Consultation set out (paragraph 42) that the TPC had understood that there remained a concern that the absence of a cap on rule 13(1)(b) costs as regards these cases had affected litigant behaviour, and in a way which may run counter to fairness and justice between the parties. That concern was held by the President of the PC, Judge McGrath. A threat of a costs award may have a very real effect, particularly upon those with limited means, thereby restricting access to justice. The TPC understood the following points to arise, anecdotally, from PC judiciary with whom the PC President had raised the matter.

    (a) The frequency of applications for rule 13(1)(b) costs had 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 had 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 were 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 was again 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.

22. As the Consultation set out (paragraph 43), the TPC had considered it possible that some of this litigant behaviour, 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, the Consultation had set out that 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/limit a landlord adding Tribunal costs to a service charge) or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (power to prevent/limit a landlord charging a tenant Tribunal costs as administration charges). If there was a cap on rule 13(1)(b) costs, this might bring greater clarity to parties' understanding of the consequences of an exposure to Tribunal costs.

(c) The sums claimed, and indeed awarded, 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.

23. The Consultation explained that the TPC was 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. If there were to be such capping of costs, the TPC considered 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 was thought to be occurring. Paragraph 47 of the Consultation set out a possible amendment to rule 13 if the decision taken was to introduce costs capping.

24. The Consultation also set out (paragraphs 53 to 57) particular points arising in connection with the application of the "unreasonable behaviour" costs rule in the UT(LC) Rules, and stated that it might be thought 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. If there sound reasons for costs capping for these types of case in the PC, it might be thought that they were equally sound for such cases on appeal to the UT(LC).

Responses to the Consultation

25. There were 18 responses to the Consultation – see Annex A. The respondents included judges, lay members and valuers of the PC, representative bodies, and other persons with experience of the jurisdictions in question. Some of the responses offered the joint views of several individuals; in what follows, these are referred to as from a single respondent, but it is borne well in mind that joint views were expressed. The exceptional length and detail of this Reply reflects the following.

    (i) The issues raised concern many jurisdictions, and include the making of threats said to be occurring prior to the initiation of proceedings (Tribunal Rules ordinarily being directed to the fair and efficient conduct of proceedings once in place).

    (ii) The wide range of points made in the responses.

26. Many responses made composite points in favour of, or opposed to, costs capping generally across all (or some) of the relevant jurisdictions: the points were of an overarching nature. It is convenient therefore to summarise these general points before considering additional points made in the responses to the jurisdiction-specific Consultation questions. To do otherwise would be to risk losing sight of these overarching points.

27. Additionally, a point made in many responses (whether in favour of, or opposed to, costs capping) was the desirability of further information being made available as to the nature and exercise of the rule 13 costs jurisdiction, across all relevant jurisdictions. It is convenient to note these at this stage too. (They are also supplemented in response to specific Consultation questions.)

Respondents in favour of costs capping in the relevant jurisdictions

28. One respondent (a personal response from four of the five Regional Judges of the PC) recognised that unreasonable conduct needed a deterrent and, in appropriate cases, to be penalised. Where it

occurred, it could and should be dealt with by robust case management (as mentioned in *Willow Court*).

29. However, this respondent considered that a costs cap was still needed, and at the same level for all case types (residential property and leasehold management cases), for the following reasons.

    (i) Evidence from cases seen by the Tribunal was that the threat of such costs was being used to deter lessees/occupiers from bringing or continuing challenges both before and during proceedings. Thus, the lack of a cap detrimentally affected litigant behaviour. A cap would reduce apprehension induced in reasonable lessees/occupiers: its effect would be to avoid any possible doubt in the minds of the public that they may be the subject of large awards of punitive costs. Unrepresented parties (in particular) were entitled to know the limit of any costs sanction that may be imposed on them. A cap would strike a balance between the need to sanction unreasonable conduct and the need not to deter genuine challenges, and would neutralise any change in litigant behaviour and/or abuse. It may also discourage the "over-preparation of cases" by represented parties.

    (ii) The effect of the PC being a "no costs shifting" forum was (to some extent) to redress the "inherent imbalance in power" between landlords and lessees/occupiers in the determination of disputes. Such imbalance was said to arise from the fact that, in general, landlords are better resourced, better organised, more experienced and more often represented than most lessees, park home owners and Housing Act appellants. This imbalance was said also to be the inevitable result of the inclusion in many leases and park home agreements of the obligation on the lessee/park home occupier to pay contractual costs. The existence of a potentially unlimited liability for costs under rule 13 undermined this "no-costs" regime.

    (iii) The absence of a cap was also said to offend the overriding objective in rule 3 of the PC Rules, i.e. to enable the Tribunal to deal with cases fairly and justly, which includes (amongst other things) dealing with the case in ways that are **proportionate** to the anticipated **costs** and **resources of the parties**; and ensuring, so far as practicable, that the parties are able to **participate** fully in the proceedings (emphasis added by this respondent).

30. This respondent also stated that there had been "*a great deal of public anxiety about alleged unfairness and injustice suffered by some leaseholders*", and that Parliament was presently looking at this subject. (The TPC took this to be a reference to the press release "*Crackdown on unfair*

leasehold practices" from the (now) Ministry of Housing, Communities and Local Government, dated 21 December 2017.) In the experience of this respondent, much of the problem involved "the endemic behaviour of a few professional landlords and managing agents". Park home owners could also be said to be subject to alleged unfairness and injustice, as they may be subject to similar behaviour by some site owners. Many leaseholders and park home owners may not consider that they have access to justice, because they are either threatened with claims for large amounts of punitive costs and/or the "guidance" (which the TPC takes as a reference to Government information – see paragraph 33 of the Consultation) does not make it clear enough that such awards are unlikely. Having a clear and readily understood cap would help access to justice, and having the same cap across all jurisdictions would make the rule straightforward and readily understood.

31. Another respondent (fee-paid judges, lay members and valuers of the Residential Property Division based in London), stated that the majority opinion within its membership was that there should be costs capping across the relevant jurisdictions (save as regards park home cases, as to which they had insufficient experience to comment), albeit a small minority considered that the imposition of a cap would adversely affect a party where the case fell within the parameters set out in *Willow Court*. Further comments were as follows.

    (i) Fear of a rule 13 costs order was "*discouraging applicants with justified complaints from issuing applications*"; there had been occasions when the threat of such an order had been used as a bullying tactic.

    (ii) Parties did not always appear to appreciate that such applications should only be made in exceptional cases: it was suggested that this may be due to the removal of "*vexatiously*" from the definition of behaviour which may lead to a rule 13 order being made (see paragraph 13 above).

32. This respondent suggested (in answer to Consultation Question 11) that there should be better guidance by (if the President of the PC were agreeable) a Practice Direction on rule 13 costs, so that parties were clear what is meant by unreasonable behaviour. The 2002 Act wording which had included "*vexatiously*" made it clear that the bar was set high. The current definition seemed to have been interpreted by many as being easier to satisfy, even if that was not the intention.

33. A further respondent (a PC judge) supported costs capping in residential property cases (leaving aside park home cases, upon which there was no comment) and in leasehold cases. Rule 13(1)(b) should only be used in the exceptional case, and then only in a proportionate manner (it should be

seen as a penal order). The means of the parties should be a relevant factor. Other points were as follows.

(i) This respondent had dealt with a growing number of applications, and *Willow Court* did not seem to have stemmed these. Awards had been made by this respondent in two situations. Firstly, where a party had requested an oral hearing (a Tribunal having directed a paper determination) yet had failed to appear. Secondly, in a leasehold case a very substantial repair/decoration cost had been in dispute (there were many tenants liable for service charges), and it was said that the landlord had failed to engage with the litigation. It had been considered disproportionate to have debarred the landlord for failure to comply with directions. A costs order of £5,500 (considered proportionate in the circumstances) had been imposed. Subsequently, a settlement had been agreed including addressing the future relationship between landlord and tenants (thereby achieving much more than determination of the historic dispute that had arisen). A significant award of costs at an early stage in the proceedings had, it was said, achieved a mutually satisfactory outcome.

(ii) However, it was apparent to this respondent that a consistent approach to the award of such costs was not being adopted by all Tribunal members. Disproportionate awards had been made in cases which did not merit any sanction. Some decisions had been appealed; others had not. The fact that some were not appealed may reflect "*the unfortunate reality that some litigants (or their advisors) are incompetent, rather than vexatious*", and a failure to recognise that an appeal would have a real prospect of success. In the experience of this respondent, in any rule 13 application it was essential to review the whole Tribunal file. Rule 13 was intended to penalise those "*who are vexatious and not those who are incompetent*". The incompetent (or their advisors) often fail to bring relevant factors to the attention of the Tribunal. In such circumstances, it is essential for the Tribunal to identify whether there was a substantive issue in dispute. There was also a need to discourage the "*current practice*" whereby rule 13 applications were being made as a matter of course. (One option would be to require the party applying for such an order to pay a fee of £100 which would be repayable were the application to succeed.)

(iii) Rule 13 orders can be a useful tool in case management (see the decision leading to settlement, in (i) above). If there is to be a cap which would be insignificant in high value claims, the onus will rather shift to more effective case management. More could be done to identify the minority of cases which should be reserved to a Regional Judge to

ensure that the issues in dispute are clearly identified and can be determined in a proportionate manner.

(iv) Rule 13(1)(b) orders should only be made where the unreasonable conduct is clearly that of the party, rather than that of their legal advisor. Rule 13(1)(a) orders are rarely made against the lawyer, because of the practical problems arising from legal professional privilege. If the default is that of the incompetent lawyer, it was, regretfully, unlikely that that the incompetent lawyer would volunteer to indemnify their client against a penal costs order under rule 13(1)(b).

34. This respondent stated (in answer to Consultation Question 11) that whilst judicial guidance had been given in a number of UT(LC) decisions, "practice guidance" could set out the relevant principles more succinctly. It was suggested that greater guidance could be given on all elements of the three-stage approach described in *Willow Court*.

35. Another respondent drew on experience in supervising a university-based student led *pro bono* housing advice clinic, advising many litigants in person. This respondent supported costs capping in residential property cases (leaving aside park home cases, as to which this respondent had no experience) and in leasehold cases. Points made were as follows.

(i) The prospect of paying the other party's costs was an issue that "*scared*" litigants in person, who are mainly tenants, but also include landlords. A cap would provide comfort and reassurance to litigants in person that, whilst there would not necessarily be no costs risk, such risk was limited from the outset.

(ii) Many landlords who are represented will threaten tenants with the costs consequences of bring a case. This may be as an administrative charge, or it may argue that the litigant in person's conduct is unreasonable, but often such letters threaten costs in vague and general terms.

(iii) Most litigants in person are of modest means and, "*given London's overheated property market and the current economic climate*", many are stretched to the limit. Most have genuine concerns about the level of their service charges, and bring cases in good faith. Even in those cases that are transferred from the County Court where the tenant is sued for non-payment, most tenant litigants in person believe that they should not have to pay, as they are genuinely disputing the amount charged. This was regardless of the eventual outcome.

36. This respondent suggested (in answer to Consultation Question 11) that it would be helpful if a summary of *Willow Court* was made widely available to litigants in person.

37. Another respondent, a management company, was in favour of costs capping across all relevant jurisdictions. All parties should be fully aware in advance of the existence of a cap. This respondent also said that "unreasonable behaviour" needed to have a fuller clarification as "*currently very little behaviour fits this category*".

38. A further respondent stated that it was important that Freeholders and Managing Agents were prevented from imposing their own (Freeholders') costs on owners (leaseholders) who lose in the Tribunals. "*I imagine the same is true where the victim is a tenant, etc., rather than a leasehold owner.*"

Respondents opposed to costs capping in the relevant jurisdictions

39. One respondent resisted costs capping, on the following grounds.

    (i) The reasons why the cap had been removed following the *Costs in Tribunals* report remained good reasons. There should remain an ultimate costs sanction to discourage litigants from behaving unreasonably, and which should also be available in an appropriate case to compensate parties who have incurred costs dealing with unreasonable behaviour.

    (i) The discretion whether to make an order, and if so, how much was subject to the guidance given in *Willow Court,* but otherwise should be unfettered so that the Tribunal is able, in an appropriate case, to make an award which is properly compensatory. The various cases which have been referred to the UT(LC) (see paragraphs 39, 40 of the Consultation) showed that the current system was working. There was now increased awareness of the rights of parties in leasehold and residential property disputes via certain websites. With such information freely available, it was less likely that threats of applications for costs would affect parties detrimentally.

    (ii) There was no evidence within the Consultation of litigants being discouraged from bringing or defending claims for fear of being met with a costs award. The Lord Chancellor's fears, expressed in 2002 (see paragraph 35 of the Consultation), were

speculative. Likewise, the current fear of the President of the PC (see paragraph 42 of the Consultation) appeared to be hypothetical.

(iii) In court proceedings, there had long been a similar costs regime for the small claims track under CPR rule 27.14 (party who has behaved unreasonably) and before that, arbitrations in the County Court under CCR Order 19 rule 6 (unreasonable conduct in relation to the proceedings or the claim). It had never been suggested that the absence of a cap on those costs discouraged litigation.

40. Another respondent accepted that threats of applications for costs could result in individuals either not bringing cases or withdrawing cases, and that this was a genuine concern to be addressed. It was suggested, however, that a costs cap was not the best way to do this. There were a number of factors in play, as detailed below.

(i) Tribunals are designed to be more informal and user-friendly for unrepresented parties (as a part of this, the PC is for the most part a no-costs shifting jurisdiction). However, the legal and procedural issues before the Tribunal can be complex and so representation is utilised, not only by commercial landlords, but also by management companies, local authorities and individuals. The involvement of legal representation can be helpful in informing the parties of their legal obligations and thereby aiding settlement. Legal representation can also assist the Tribunal for example, by the provision of bundles in the required format. As the PC is a no-costs shifting jurisdiction often it is the corporate side (landlords or local authorities) that is represented.

(ii) As to recovery of costs, it is already possible for landlords to recover their costs through the service charge where the lease allows for this. Additionally, some leases contain a covenant entitling the landlord to recover certain legal costs from a lessee outside of the service charge regime (administration charges). Therefore, litigants in person may already face the risk of paying some of the costs (the size of that risk depending upon the lease and size of the development). Both service charges and administration charges can be challenged within the PC. Already the costs position is not straightforward. Thus, whilst it is correct to state that the PC is generally a no-costs jurisdiction, applicants may believe that there are no costs consequences when, depending upon their lease and the facts of their case, there might be.

(iii) The “Crackdown on unfair leasehold practices” press release of 21 December 2017 had indicated that the government would look at providing leaseholders with clear support on the various routes to redress and a wider internal review of the support and advice to

leaseholders to make sure that it is fit for the legislative and regulatory environment. The complexity of this area means that parties require access to better information and in the absence of access to legal aid it is hoped that the review will go some way to addressing the problems being faced by individual users of the courts and tribunals.

(iv) If a party deliberately increased costs believing that the costs will either not be paid by him or her, or only a proportion via the service charge, that can in itself be a way to injure the other party. The threat of a costs award in that case can be justified and valuable.

(v) There are cases where applications to Tribunals are akin to neighbour disputes where the lessees not involved in the management company are in long-standing conflict with those running the management company. In that sort of case the cost risk can be a valuable deterrent to unreasonable conduct. In the exceptional case where an order is made under rule 13(1)(b) it would ensure that the legal costs are not paid by the lessees with whom the applicant is in dispute.

(vi) There will be cases of aggressive landlords seeking to bully tenants, and a threat of an adverse costs order against the landlord can be a restraining measure. A cap on these costs could mean that rule 13 costs become no more than a (modest) price for poor behaviour, stripping the Tribunal of its power to make an award that represents the true effect of the conduct. If the cap is too low it lacks any impact; if it is too high it does not achieve the stated result of reassuring potential applicants.

41. This respondent suggested that a better way to deal with threats of applications for costs was to improve the information available to litigants in person. That the other party is legally represented can be daunting for an individual, as they may feel at a disadvantage in terms of their knowledge of the law and the procedural steps required by the Tribunal. If a represented party threatens to seek to recover its legal costs from an individual, in the absence of further information, a litigant could be discouraged. Such information should be made available from a source that they will trust: namely guidance approved by the Tribunal.

(i) A standard form guidance note should be prepared that explains rule 13(1)(b) in the context of the judicial guidance in Willow Court, such guidance being condensed into a form easily understood by non-lawyers.

(ii) The Tribunal should require every party to provide a copy of that guidance whenever a costs application under rule 13(1)(b) is threatened or issued. Rule 13(4) could be amended to add a subsection (c) that requires a party to send, with the application and schedule of costs, evidence that the standard form note has been sent to the receiving party. The Tribunal should issue a practice note that a failure to provide this information at the appropriate time can itself result in a costs order (under rule 13(1)(a) or (b)) and that no costs order will be made where the guidance has not been provided. The Practice Note and guidance should also be publicised on the Tribunal's website and Lease website for tribunal users to access.

(iii) The power to award costs was a valuable tool where it can be shown that there is unreasonable behaviour, and a flat rate cap would detract from this power considerably. Exercising the existing powers but taking into account the resources available to the parties would be preferable.

42. Another respondent (a PC judge) said that there should be flexibility to compensate a party who has been put to expense by a party behaving unreasonably. A costs cap may not allow such flexibility. This respondent also suggested that rule 13(1)(b) should be the subject of guidance from the senior judiciary.

43. A further respondent (a PC valuer) opposed costs capping in residential property cases (leaving aside park home cases, as to which there was no comment) and in leasehold cases, save in two distinct types of case (see below). This respondent noted that the power to award costs under rule 13 was an important case management tool, and assisted the Tribunal in seeking compliance with the overriding objective under rule 3, and the PC Rules generally. Further points were as follows.

(i) It was recognised that rule 13 orders may also be raised inter partes as a threat against alleged misconduct. However, limiting the scope of rule 13 (via a costs cap) may therefore discourage compliance with the PC Rules.

(ii) As to the concern that an impecunious party may be discouraged from bringing a case because he/she fears that an adverse costs order may be made beyond his/her capacity to pay, to avoid this, the cap would need to be set at a very low level, probably £500. However, residential property cases (except under paragraph 11 to Schedule 5 of the Housing Act 1985, see paragraph 45 below) may involve disputed points of law, require expert evidence and benefit from professional advocacy. The Tribunal is adversarial,

and parties must use their own resources to prepare and present their cases; the costs incurred therefore may be substantial.

(iii) Since *Willow Court* sets out a clear three-stage test before the PC can properly award costs under rule 13, the circumstances where an adverse costs award can properly be made are likely to be few, and confined to cases of clear and serious misconduct. *Willow Court* made clear that the PC retains an overriding discretion, and that part only of an innocent party's costs may be ordered to be paid. If costs capping was adopted it would therefore cause injustice to the innocent part(ies) in what are likely to be the small number of cases falling within *Willow Court*; the larger the case, the greater the potential injustice.

44. This respondent suggested that the concern could be better addressed by the issue of a Practice Direction setting out the limited circumstances when a rule 13 order might be made, by reference to examples. This would give guidance to Tribunals and reassurance to parties whilst retaining the rule in its present form for use in the small number of cases where it needs to be engaged. There was said to be a partial precedent in that the Practice Direction for the UT(LC) (29 November 2010) at paragraph 12 set out information as to how that Tribunal's costs discretion may be exercised. (The issue of a Practice Direction lies in the discretion of the Senior President of Tribunals or the Chamber President.)

45. The two distinct types of case for which this respondent considered a cap to be justified were as follows.

(i) Cases under paragraph 11 of Schedule 5 to the Housing Act 1985 (exemption to the right to buy for housing particularly suitable for elderly persons) which were largely confined to questions of fact for the Tribunal (normally following inspection).

(ii) Disputes under section 27A of the Landlord and Tenant Act 1985 (service charges), where the relevant interest is an assured tenancy or regulated tenancy and where the Tribunal has jurisdiction.

Responses to specific consultation questions, and Conclusions

46. In what follows, it is 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.

Consultation Questions

Residential property cases (other than park home cases)

Question 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.

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

47. Eight respondents were in favour of costs capping, and five respondents were opposed (albeit one supported a cap in one type of case). Five respondents did not comment. As to the size of any cap, one respondent suggested £250; one respondent suggested £500 for the single type of case that should be capped; four respondents suggested £1,000; one respondent suggested £2,000; one respondent suggested not less than £20,000; and one respondent suggested "*10% of the value of the dispute*".

Respondents in support of a costs cap

48. One respondent supplemented its general points (see paragraph 29 above) by stating that whilst rule 13 costs applications were fewer in residential property cases than in leasehold management cases, they remained a significant occurrence. It was said that (for example) in London since 2015, rule 13 costs were mentioned in more than 10% of all published residential property decisions; with such applications being made by both appellants and local authority respondents. Rule 13 costs had even been sought under the new jurisdictions introduced in April 2017 under the Housing and Planning Act 2016: in London, the fourth appeal received against a financial penalty had generated a rule 13 application by the local authority. (Although that application had been withdrawn, it was not until Tribunal resources had been expended considering the application and issuing directions; its effect on the appellant, already facing a financial penalty, was not known.)

49. This respondent suggested that the appropriate cap should be £2,000, as a sum large enough to act as a deterrent, but not so large that it will act as a disincentive for people who want access to justice. (An inflation increase, since the original cap of £500 had been introduced by the 2002 Act, would suggest about £790. While the original amount was "often felt to be a bit low", updating it to say £1,000 might not act as a sufficient deterrent in the worst cases.) A cap of £2000 was suggested across all the relevant jurisdictions, as striking the right balance, but with the knowledge and understanding that this amount would still represent a very substantial, perhaps prohibitive, amount for some lessees, park home owners and Housing Act appellants.

50. A further respondent supplemented its general points (see paragraph 33 above), albeit stating that the case in favour in costs capping in residential property cases was less cogent than for leasehold cases, as follows.

    (i) Fear of a rule 13 costs order discouraged applicants with justified complaints from issuing applications, having a "*chilling effect*" upon access to justice. The threat of a rule 13 costs order was being used to "*bully the weaker party*".

    (ii) Parties do not understand that applications should only be made in exceptional cases. (Lawyers have the ability to dress up any case as being "exceptional", and minor errors of judgement as being "unreasonable".) The removal of the cap had led to a significant increase in the number of applications, with a chilling effect on access to justice. This respondent also feared that awards had been unjustly made "*against the incompetent, rather than the vexatious*". A disproportionate amount of Tribunal resources were being expended on applications, most of which fail.

    (iii) The cap should be £1,000. It must be significantly large to penalise the "*outrageous conduct*", but not at a level which might deter an applicant of modest means from bringing their claim before the tribunal. £5,000 would be too high in most cases.

51. This respondent noted that the case against a cost cap is the high value application (see paragraph 33(i) above). In such a case, a cap could substantially reduce the effectiveness of a penal award of costs. However, this respondent suggested that there are other case management powers that a Tribunal could adopt in these circumstances.

52. A further respondent (a park home residents' association) suggested that a costs cap would perhaps make individuals and/or companies "think twice about their actions", rather than continuing with or renewing negotiations with the opposite party. The cap should be £250; "*the lesser the*

'reward', the greater the realisation as to the need for further discussions and or renegotiations with their 'opposition'".

53. Another respondent said there should be a costs cap to provide "*a more level field for [Leaseholder] v Tenant*". As to the size of the cap, "*10% of the value in dispute would seem fair". "However, the [Leaseholder] generally holds all the cards i.e. professional reports etc…*"

54. Other respondents referred to points earlier summarised. As regards one respondent (see paragraph 31 above), the majority opinion was that the cap should be set at £1,000 (one suggestion of £1,500 had been made and another that £500 should be reinstated). £1,000 was considered sufficiently large to penalise "*outrageous conduct*", but not so high as to deter most applicants of limited means. The tribunal should be a low-cost environment where it is not necessary for litigants to be legally represented or be faced with a cost shifting exercise; a higher cap would thwart this ethos. Another respondent (see paragraph 35 above) stated that the cap should be set at £1,000, as meeting the aim of not discouraging parties from bringing cases but being a high enough amount to act as a deterrent for unreasonable behaviour. A further respondent (see paragraph 37 above) stated that the cap should be £1000, as to "*stop claims being put in for those that do not understand how the system worked*" *… "£500 was always too low"*. Another respondent referred to comments summarised earlier (see paragraph 38 above).

Respondents opposed to a costs cap

55. One respondent (Regional Judge of the PC Southern Region, and others from that Region) stated that the Consultation had identified no evidence to suggest that there was a problem in connection with costs in residential property cases. It was considered that the principal reason for this was that majority of the cases involve the local authority as a party, which understands the legislative restrictions on awards of costs in Tribunal proceedings.

56. Another respondent (see paragraph 40 above) also considered that there was an absence of any evidence of a problem in this area. It noted that residential property cases included local authority enforcement-type cases where the Consultation had stated that local authorities are usually represented by in house solicitors or environmental health officers and landlords are represented in about 50% of cases. It was suggested that it was likely that in many cases landlords would have sufficient means to obtain legal advice (even if not representation), given that they have sufficient means to own property to rent out, and that a change to the PC Rules did not appear to be justified in view of the benefits of the jurisdiction under rule 13(1)(b). If a cap were imposed, it would need to be sufficiently high to deter parties with deep pockets: a cap of no less than £20,000.

57. Other respondents referred to points earlier summarised. One respondent (see paragraph 43 above) suggested that for cases under paragraph 11 of Schedule 5 to the Housing Act 1985 a cap should be £500 (as this was the previous amount and would be less likely to deter applicants than higher amounts); Two other respondents referred to comments summarised earlier (see paragraphs 39 and 42 above).

Conclusion

58. The comments summarised above are supplemented by the overarching comments described in paragraphs 28 to 45 above. From all the comments received, it is readily apparent that there was no clear consensus amongst respondents, either as to the principle of costs capping or in what sum any cap should be. Emergence of a clear consensus is not a prerequisite to the exercise by the TPC of its rule-making powers under section 22(4) of the TCEA, but the process of consultation assists the TPC in reaching its conclusions with regard to the matters sought to be secured through Rules (see paragraph 2 above). If persons are being discouraged from pursuing genuine cases by opportunistic and unmeritorious threats of costs orders against them, this engages with the requirement that the tribunal system should be accessible and fair. If a party incurs substantial costs in dealing with unreasonably conducted litigation (the three-stage approach in *Willow Court* having been followed) yet is nevertheless unable to recover them beyond a capped sum, this engages with the requirement that justice should be done. It is this tension which underlies the issue of costs capping across all the relevant jurisdictions covered in the Consultation. Having regard to all the comments put forward, the TPC considers that a case for rule change now to be made to cater for costs capping in these jurisdictions has not been sufficiently made out. The lack of clear consensus amongst respondents is however one reason why the TPC considers that the topic remains a live issue for further review by the TPC, within an appropriate timescale.

59. An important factor in this conclusion is the point commonly made (see paragraphs 32, 34, 36, 37, 41, 42 and 44 above, and paragraph 77(viii) below) that there was scope for further promulgation of the *Willow Court* guidance (in some form or other). The TPC considers this to be a step well worth taking at this stage. Were it to happen, then it may have the following benefits. Firstly, litigants (and prospective litigants) may be better placed to understand the limits of gaining a costs award for unreasonable behaviour. It would be appreciated that it was considered exceptional. Secondly, if that further information was made available (to all), there may be less opportunity for any unjustified or inappropriate threats (if made) to seek such costs to be effective. Further, applications for such costs may be less frequently made. In short, any exercise of a 'blunt instrument' of rule-change, in context of the tension described in paragraph 58 above, ought not to be taken without first assessing the impact of the provision of further relevant information. The TPC

therefore believes that the right course is for the President of the PC now to consider preparing appropriate materials for inclusion on the PC website, such as a Practice Direction including appropriate guidance on the *Willow Court* approach to the making of costs orders. (The form and content of such materials would be a matter for the President, as would be a review of materials on that website to ensure consistency.) Such a Practice Direction could direct that it be served with any application for rule 13(1)(b) costs.

60. An additional benefit would be to facilitate the availability of further evidence which may be relevant to possible costs capping. The TPC recognises that any decision whether or not to cap costs (and if capped, in what sum) may well be aided by gaining evidence as to litigant behaviour following promulgation of further information. The President of the PC will be able to assist in monitoring (for example) the number and outcome of applications for costs. The TPC will then return to the topic of possible costs capping in light of such evidence, and indeed any further evidence from those with experience of the relevant jurisdictions following the promulgation of further information. The TPC could then further consult through a 'Call for Evidence'. (The valuable responses to the Consultation would not need to be repeated once more; they are well understood by the TPC.)

61. As to particular points raised:
    (i) The requirement of payment of a fee to make an application for costs is not a matter for the TPC.
    (ii) Many of the overarching points were principally focused on leasehold cases and (to a lesser extent) park home cases. The TPC accepted that the case for capping costs in residential property cases (apart from park home cases) might well be seen as "*less cogent*" (see paragraph 50 above) than for leasehold cases.
    (iii) In light of the overall Conclusion (see above), the TPC does not at this stage further consider a costs cap for cases under paragraph 11 of Schedule 5 to the Housing Act 1985.

Park home cases

Question 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.

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

62. Four respondents were in favour of capping, and five respondents were opposed. Another suggested a different approach to costs. Eight respondents did not comment. As to the size of any cap, one respondent suggested £500; one respondent suggested £1,000; one respondent suggested £2,000; one respondent suggested a minimum of £10,000; and one respondent suggested not less than £20,000.

Respondents in favour of a costs cap

63. One respondent supplemented its general comments (see paragraph 29 above) by stating that park home disputes tend to be of low monetary value involving park home occupiers who are generally of a low-income group. The £5,000 costs cap was "*always too high*" for these cases, providing no real protection for park home occupiers, with their limited ability to pay. It was very likely that the existence of a potential £5,000 liability had deterred disputes in some cases, especially in an area where the rationale for introducing legislation and simplifying disputes had been because of the "*very unreasonable conduct of some site owners*". The appropriate cap should be £2,000 for the reasons earlier stated (see paragraph 49). While disputes under the Caravan Sites and Control of Development Act 1960 would be between site owners and local authorities (e.g. concerning site licensing), who will be generally better resourced than park home occupiers, it would be "*too unwieldy to make an exception*": the cap should apply to all cases.

64. Another respondent supplemented its general comments (see paragraph 37 above) by stating that there was no reason why this jurisdiction should be any different to other residential property cases, and that the costs cap should be £1000. Another respondent (see paragraph 52 above) stated that there should be a cap of £500: "*the level of 'fairness' needed to be created rather than the general level of representation inequality that existed in park home cases*". Such a cap would "*show the site owners that there are no major 'awards' at stake, merely justice*". The site owners might just consider representing themselves, to reduce their costs, and then perhaps a level playing field might be achieved. A further respondent referred to its earlier comments (see paragraph 38 above).

Respondents opposed to a costs cap

65. One respondent (see paragraph 55 above) stated that the Consultation had not analysed accurately the "costs problem" in park home cases.

66. Following the UT(LC) decision in *Silk Tree Properties Limited [2015] UKUT 686 (LC)*, site owners had been seeking to recover the costs of Tribunal proceedings through the terms of their pitch agreements with occupiers. Where the agreements allowed the recovery of costs, the park home

occupier did not have equivalent statutory protection afforded to leaseholders under section 20C of the 1985 Act (limiting the Landlord's recovery of legal costs through the service charge) or under paragraph 5A of schedule 11 to the 2002 Act (limiting or extinguishing liability to pay administration charges in respect of litigation costs). Also, there is no requirement to serve a Statement of Rights and Obligations on park home occupiers. It is these two areas that need addressing in respect of park home occupiers, not a cap on rule 13(1)(b) costs.

67. Appeals under the Caravan Sites and Control of Development Act 1960 involve the site owner and the local authority. There is no imbalance of power between these parties. The local authority should be fully aware of the legislative restrictions on awards of costs in Tribunal proceedings.

68. Another respondent made the following points.

    (i) As the Consultation had noted, the work of the PC is very diverse. The evidence in the Consultation was anecdotal and appeared focused on leasehold cases, particularly in London. No example was given of an actual or threatened costs application in a park home case which was thought to be inappropriate. Few applications are recorded in the published decisions. Accordingly, in park home cases there seemed to be no robust evidence undermining the good reasons leading to the removal of the costs cap in 2013, as outlined in the '*Costs in Tribunals'* report. Further, park home cases lack the complicating features which lead to the costs risks of "*tens of thousands of pounds*" in some leasehold cases discussed in paragraph 43(c) of the Consultation.

    (ii) It was suggested that the current safeguards against abuse of the costs jurisdiction were sufficient in park home cases. Professional legal representatives have specific professional obligations when they deal with litigants who are not represented. Tribunal directions provide for any costs application to be notified in advance, both the other party and to the tribunal. This enabled the Tribunal to respond promptly, should an application be plainly without merit. The respondent to an unreasonable and unsuccessful costs application might recover their costs, including costs as a litigant in person.

    (iii) If there were to be a cap, then it must preserve a meaningful deterrent for serious misuse of the Tribunal's procedures and time. Any cap should be not less than £10,000.

69. A further respondent supplemented its general points (see paragraph 40 above). It noted that the Consultation stated (in paragraph 23) that site owners are more often represented and occupiers more often represent themselves. There was therefore the potential for inequality of arms in some

of these cases. However, a costs cap was opposed for the reasons earlier summarised (see paragraph 36 above). If a cap were imposed, it would need to be sufficiently high to deter parties with deep pockets: a cap of no less than £20,000. There should instead be better information for occupiers.

70. Two other respondents referred to points earlier summarised (see paragraphs 39 and 42 above).

A different approach to costs

71. One respondent appeared to (i) oppose costs capping as far as a resident or a Qualifying Residents' Association (as receiving party) were concerned; and (ii) suggest that site owners should never be able to recover costs against an occupier. This respondent's points were as follows.

    (i) Site owners have everything stacked in their favour. Occupiers are basically poor, whereas a "*UPO*" (which the TPC takes as a reference to an "*Unscrupulous Park Owner/Operator*") is rich, and many enjoy taking on the relatively weak occupier, in order to create fear. Very few occupiers feel confident to take a UPO at a Tribunal, or a Court, but they should be encouraged to do so by limiting the cost to just the initial fee, and only if the '*Decision*' goes against the occupier.

    (ii) UPOs, on the other hand, should be discouraged from dragging a case out, in order to pile costs on to a losing occupier, often on a technicality; UPOs should pay all the costs incurred, after all, if they managed the site properly and in accordance with the legislation by the Department of Communities and Local Government (the "DCLG"), there should never be a need for elderly occupiers to go to the Tribunal. Most give up because it is so daunting.

    (iii) Occupiers are constantly let down by Councils, who should be able to deal with most of these problems, because they, and the Local Government Ombudsman, feel that they do not have to use the enormous powers devolved to them by the DCLG's 2013 Act. "*If that is their attitude, what is the point of the legislation?*"

Conclusion

72. The comments summarised above are again supplemented by the overarching comments described in paragraphs 28 to 45 above. From all the comments received, it is again readily

apparent that there was no clear consensus amongst respondents, either as to the principle of costs capping or in what sum any cap should be. Having regard to all the comments put forward, the TPC considers that a case for rule-change now to cater for costs capping in respect of these jurisdictions has not been sufficiently made out.

73. Important factors in this conclusion were the points addressed in paragraphs 58, 59 and 60 above.

74. As to particular points raised:

    (i) The TPC noted that where site agreements allowed the recovery of costs, the park home occupier did not have equivalent statutory protection to that afforded to leaseholders, and that there was no requirement to serve a Statement of Rights and Obligations on occupiers. This was not a matter for the TPC, but it could see that were these aspects to be rectified, they may well be of positive effect as regards reduction in unjustified/inappropriate costs threats.

    (ii) The TPC did not regard the "different approach to costs" (see paragraph 69 above) as appropriate. If there is to be scope for an award of Rule 13(1)(b) costs, then its availability ought to be for both parties. Likewise, any specific costs cap ought to apply to both sides.

Leasehold cases

Question 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.

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

75. Eight respondents were in favour of capping, and six respondents were opposed (albeit one was supportive of a cap in a particular type of case). Four respondents did not comment. As to the size of any cap, one respondent suggested £500 for the single type of case to be subject to a cap; four respondents suggested £1,000; one respondent suggested £2,000; one respondent suggested £5,000; one respondent differentiated between litigants in person (suggested £2,000) and those who were represented (suggested £5,000); and one respondent suggested not less than £20,000.

Respondents in favour of a costs cap

76. One respondent supplemented its general points (see paragraph 28 above) as follows.

(i) Leasehold management cases (involving service charges, administration charges, breaches of covenant and appointment of manager cases) represent about 28% of all Residential Property Division cases received, and about 50% of all decisions published. These cases are of great significance to lessees because they often involve charges that are levied on an annual basis, over which they have little control, or they relate to the security or management of their homes.

(ii) The greatest use of rule 13 is found in these leasehold management cases, with more than 16% of published decisions in London making reference to such applications (though this ignores the number of references made before and during proceedings, in advance of a determination, which is likely to raise the percentage much higher).

(iii) The threat of rule 13 costs was seen regularly by the Tribunal, especially in the pre-issue stage; but also during proceedings, including sometimes as part of the landlord's originating application. Tribunal judges report hearing lessees' concerns about costs at case management hearings; and, overall, the Tribunal has seen an increasing number of cases being withdrawn before final hearing. The introduction of a costs cap would alleviate these pressures. The appropriate cap should be £2,000.

77. Another respondent commented as follows.

(i) While the potential for costs awards can affect all parties, in these cases there is most frequently (although not always) an imbalance in the ability for the respective parties to absorb the costs of going to the tribunal. The threat of unlimited costs (albeit that these costs are not frequently ordered) is more likely to prevent an individual or group of individuals, whose own personal funds are at risk, bringing a tribunal claim to protect their rights, than a company.

(ii) Both landlords and leaseholders can be affected by the other party acting unreasonably, but it is most often individual leaseholders that find it the most difficult to take the risk of going to the tribunal.

(iii) The combined effect of the risk of unlimited costs awards and the additional effect this has on individuals results in further imbalance in an area whether the law is already

perceived to be on the side of the landlord. A cap would give greater clarity to all parties, and if it is set at the right level, also dissuade parties from acting in an unreasonable manner in the proceedings. The level of the cap is therefore very important to create the correct balance between preventing people from making the claim and to dissuade those who are involved in proceedings, acting unreasonably.

(iv) In practice, the parties would normally take into account the costs of going to the Tribunal when determining whether it is worth pursuing a claim. In enfranchisement and lease extension cases, this would normally be based on the difference in valuation figures between the parties and whether the likely improvement in value is worth the risk of the costs incurred in going to the Tribunal. If there were a cap, it would remove some uncertainty for the parties.

(v) This respondent was not however aware of there being a large number of successful costs claims having been made, although in practice the threat of seeking costs for unreasonable behaviour is seen frequently.

(vi) A reasonably significant cost cap, that would go a fair way to compensating a party for unreasonable behaviour but one which would not be too unreasonably high, would be £5,000. This would give the Tribunal discretion to award relatively substantial costs to act as a deterrent, but clearly the Tribunal could also award smaller amounts where that was appropriate.

(vii) This respondent understood that in practice, the costs of one party being represented at a tribunal by a solicitor and/or junior barrister and a valuer can vary significantly, but are likely to be in the many thousands of pounds. The award of costs would not be to cover this cost, but the additional cost that may have been incurred due to unreasonable behaviour.

(viii) This respondent drew attention to the "*lack of clarity as to what is considered unreasonable behaviour*" in proceedings, as adding to the need for there to be a cap. If the parties could satisfy themselves that certain behaviour would not be considered unreasonable, there would be a reduced concern about there being a risk of being required to pay the other parties' costs.

78. A further respondent supplemented its general points (see paragraph 33 above) by stating that it might be thought that enfranchisement cases merit different considerations: should there be more

general cost shifting? However, on rule 13(1)(b) applications, the rule should be the same: a cap of £1,000.

79. Another respondent supplemented general points earlier summarised (see paragraph 35 above) by stating that most tenant litigants in person have genuine concern about the management of their homes, and bring cases in good faith. This was regardless of the eventual outcome. A cap should be set at £1,000, as meeting the aim of not discouraging parties from bringing cases but being a high enough amount to act as a deterrent for unreasonable behaviour.

80. Other respondents referred to their points as earlier summarised (see paragraph 31 above - a cap of £1,000 was appropriate; paragraph 37 above - one rule should cover all cases, at £1,000 for consistency; and paragraph 38 above).

81. One respondent referred to difficulties faced by leaseholders in dealing with the management company and their agents. Although every attempt was normally made by leaseholders to resolve matters, it was often the management company and their agents (management companies are unregulated), who caused unnecessary issues by "*apathy*" or an inability to "*manage leaseholders and those properties or sites correctly*", causing the leaseholder frustration. The Property Ombudsman could only deal with "*issues of service re the agent*", not any service charge or leasehold issues. As such, the management company had to be taken to the Tribunal in order to contest matters, and since the cost is prohibitive, the leaseholder must be a litigant in person. This respondent commented further as follows:

    (i) The effect of a costs cap would be to try to bring parties to the table, which is often not happening, pre-Tribunal process. Many management companies on residential sites are managed by the very people who own the property development companies that sold the leasehold and "*made the false promises*" to get leaseholders to purchase. For them, delaying and "messing about" is their best strategy, as most leaseholders "*get fed up*", and those that do try are threatened with huge legal bills to resolve relatively small issues.

    (ii) It was suggested (so the TPC understood) that for costs capable of being added to a service charge (or by way of administration charge), there should be a "*costs cap*" of £500 for the litigant/leaseholder in person, and £1,000 for litigants/leaseholders assisted by solicitors. However, for unreasonable behaviour there should be a costs cap of £2,000 for a litigant/leaseholder in person and £5,000 for litigants/leaseholders assisted by solicitors. However, there should be no costs cap for landlords or management companies, as this would make them more conscious of trying to resolve matters.

(iii) Many of the service charge issues and leasehold complaints "*which end up in court*" could be easily resolved by having an Ombudsman for Leasehold Properties, and this should be funded though the service charge and by the management companies, via a levy. There should be regulation of management companies, who are really the main focus of complaints or failures, as said to be highlighted by the Grenfell Tower tragedy.

Respondents opposed to a costs cap

82. One respondent (see paragraphs 55 and 65 above) commented that the analysis in the Consultation was flawed in the following respects.

(i) Institution of a cap would have little or no impact on the perceived problem. The Consultation had alluded to more appropriate solutions to deal with the perceived problem, which required more detailed examination before any changes were made to the Tribunal's powers. The perceived problem is that litigants are being discouraged from bringing or defending claims for fear of meeting a costs award. The occasions on which this respondent had come across this related to landlords or their representatives warning leaseholders that they may have to pay the landlords' costs through the terms of their lease (contractual legal costs). Rule 13(1)(b) has no relevance to contractual legal costs. The recent amendment to the 2002 Act tackles this problem.

(ii) The source of the problem is the inaccurate information given to leaseholders about the Tribunal's powers to award costs in the Rights and Obligations document, as rightly highlighted in paragraph 32 of the Consultation. The present wording in the Rights and Obligations document gives the impression to the uninitiated that the Tribunal has a general power to order costs. The headline information of LEASE (Leasehold Advisory Service) states: "*Reference to costs incurred by parties to legal proceedings. Courts and tribunals have powers to award costs for and/or against a party to proceedings*". A cap on costs will not solve the problem of the supply of inaccurate information to leaseholders.

(iii) A "*cap*" is also capable of misinterpretation, giving the impression that is what the Tribunal would award, which would act as deterrent to bringing proceedings by litigants in person many of whom make applications for relatively small amounts. It is not uncommon for the amount in dispute not to exceed £500.

(iv) The "*anecdotal evidence*" of the problem is principally derived from experiences before the publication of *Willow Court* and the amendment to the 2002 Act giving leaseholders better protection against contractual legal costs. *Willow Court* should ensure that Tribunals give the same message that an award of costs under rule 13(1)(b) is an exceptional event, and that the PC (in leasehold and residential property cases) is a "no costs jurisdiction". The amendment to the 2002 Act (which only came into force on 1 April 2017) giving the tenants the right to challenge contractual legal costs will go a long way in ameliorating the threat of costs.

(v) The "*anecdotal evidence*" is just that, and gives no objective understanding of the extent of the problem. In this respondent's Region it had originally been thought that the "*threat of costs*" (particularly contractual legal costs following the decision in *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258) may have been a factor in the sharp fall in "*New LVT*" applications (service charge applications etc). However, that Region has now recovered the workload, and is operating at the same level as it was three years ago.

83. There is no evidence in this respondent's Region that applications for rule 13(1)(b) costs are frequent (see paragraph 42(a) of the Consultation). In March 2015, the Regional Judge had requested Judge/Chairs to provide him with copies of costs orders made under rule 13 since the power came into force (October 2013). The Regional Judge heard from one Judge. There is no evidence in this respondent's Region of applications under rule 13(1)(b) being routinely made in the originating application (see paragraph 42(b) of the Consultation). If such an application was made, the Procedural Judge would make it clear in the directions addressed to both parties that the Tribunal would not entertain such an application (as an originating application). In this respondent's Region, rule 13 applications are made at the end of the proceedings if there is some evidence of "*unreasonable conduct*".

84. The scope of *Willow Court* had not been fully explored in the Consultation, which potentially results in erroneous conclusions about litigant behaviour. The Consultation refers to the possibility that if the "*uncapped*" jurisdiction exists a litigant might be tempted to pursue an application for a full award of costs or costs in excess of the sums in issue which would result in the other side having to incur costs in defending the application (paragraphs 42(c) and 43(c) of the Consultation). *Willow Court* emphasised that rule 13 applications should be dealt with summarily, preferably without the need for a hearing, and should only involve the other side if there is a case to answer.

85. The risks of an "*uncapped*" jurisdiction identified in paragraphs 42(c) and 43(c) of the Consultation are greatly exaggerated and remote. For example, if the claim is not proportionate to the sums in

issue, in all likelihood the Tribunal would dismiss it as no case to answer. No costs would be incurred by the other side.

86. The Consultation does not critically examine whether the drafting of rule 13 could be improved. The wording of rule 13 is not sufficiently robust, which led to a misunderstanding about the scope of the Tribunal's powers in respect of costs until the legal position was clarified in *Willow Court*. The opening words of rule 13(1) do not make it clear that the Tribunal, when exercising jurisdiction in residential property and leasehold cases, and in agricultural land and drainage, operates a "*no costs*" jurisdiction as a general rule. This failure to mention "*no costs jurisdiction*" led to a debate amongst legal practitioners whether the Tribunal's powers to award costs had been widened by the PC Rules, and may have resulted in unwarranted applications under rule 13.

87. Rule 13(1) should be redrafted to the effect that the Tribunal in an agricultural land and drainage case, a residential property case or a leasehold case shall not consider making an order for costs unless (a) under section 29(4) of the TCEA or (b) if a person has acted unreasonably in bringing, defending or conducting proceedings. There will be a need for a new rule 13(1)(A) to deal with the full costs powers of the Tribunal in a land registration case.

88. The analysis of the leasehold market is too simple and binary which gives a false impression of the mischief that a costs cap is supposed to solve. The Consultation (at paragraph 35) relies on a quotation from Lord Falconer describing the leasehold market as landlord v leaseholder, with the landlord holding the power, as the original justification for imposing a cap of £500 under the former regime. The leasehold market has become more complex since 2001 with the increase of buys-to-let. It is not uncommon for a service charge dispute to involve landlords on either side. Also, there is an increasing number of residents' management companies who are particularly vulnerable to challenges from unscrupulous tenants who may also be landlords. Two of the three cases referred to in *Willow Court* involved residents' management companies. Of the other three cases cited at paragraph 40 of the Consultation, two of them also involved residents' management companies.

89. Another respondent supplemented its general points (see paragraph 40 above) as follows.

    (i) The Consultation stated (in paragraph 18) that in enfranchisement cases both parties are usually represented (by a lawyer or surveyor), and so a change to the existing rules is not justified. For leasehold management cases, the Consultation stated (in paragraph 16) that landlords were represented 70% of the time and lessees 30% of the time. Accordingly, in this type of case there is a potential for inequality of arms. However, for the reasons earlier summarised (see paragraph 40 above), no cap should be imposed,

so that the Tribunal can discourage poor behaviour and adapt each decision to the facts of the case. Improved information at the appropriate time is preferred.

(ii) If a cap were to be imposed, it would need to be sufficiently high to deter parties with deep pockets: a cap should be no less than £20,000.

90. A further respondent noted that a wide variety of claims come before the PC under the umbrella of "*leasehold cases*". These claims can deal with, for example, service charge issues, Right to Manage issues and enfranchisement claims (both in relation to flats and houses). The identity of the potential claimants and defendants can also vary widely, from individuals to landed estates as can the amount of costs incurred by the parties. Given the wide variety of claims and parties with which the Tribunal deals, it would be very difficult for one cap to be appropriate for all the various types of claim.

91. Other respondents referred to points earlier summarised (see paragraphs 42 and 70 above). Another (see paragraph 43 above) did likewise, but as regards disputes under section 27A of the Landlord and Tenant Act 1985 (service charges), where the relevant interest is an assured tenancy or regulated tenancy, stated that there should be a cap of £500, because these tenants do not hold a property asset and regulated tenants are also frequently impecunious.

Conclusion

92. The comments summarised above are again supplemented by the overarching comments described in paragraphs 28 to 45 above. From all the comments received, it is again readily apparent that there was no clear consensus amongst respondents, either as to the principle of costs capping or in what sum any cap should be. Having regard to all the comments put forward, the TPC considers that a case for rule-change <u>now</u> to cater for costs capping in respect of these jurisdictions has not been sufficiently made out.

93. Important factors (again) in this conclusion were the points addressed in paragraphs 58, 59 and 60 above.

94. As to particular points raised:

(i) The TPC agreed that the inadequate information given to leaseholders about the Tribunal's powers to award costs in the Rights and Obligations document (see paragraph 32 of the Consultation) was likely to be a material factor in any consideration

of ‘problems’ in this area. This was not a matter for the TPC, but it could see that were this aspect to be rectified, there may well be a positive effect as regards reduction in unjustified/inappropriate costs threats. The TPC understands that the President of the PC intends to raise with the Ministry of Housing, Communities and Local Government the inadequacy of the wording of Regulation 3 of the Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007.

(ii) The TPC noted the points made about “anecdotal evidence”. The TPC does not consider such evidence to be readily dismissed, but accepts the limitations inherent in such evidence. It noted, for example, that the experiences of one Region were markedly different to those of others. That is an additional reason why the approach taken in paragraphs 59 and 60 above was appropriate. If, following promulgation of further information, evidence may be obtained which is less considered to be “*anecdotal*”, then all the better.

(iii) The TPC does not consider that the right course now is to amend rule 13 (as suggested by two respondents). Promulgation of further information may be effective to emphasise the exceptional nature of the jurisdiction. Further, as noted in paragraph 37 of the Consultation, the TPC was satisfied that the wording in the rule (so as to trigger the discretion to make an award) remained appropriate. That remains the present view of the TPC. Such wording is adopted uniformly across all Tribunal rules for which the TPC is responsible. There are benefits arising from such consistency in wording. For example, Willow Court has been relied upon by the First-tier Tribunal (Tax Chamber) as articulating the correct approach to award of costs under the Rules applicable in that Chamber.

(iv) In light of the overall Conclusion (see above), the TPC does not at this stage further consider a costs cap for disputes under section 27A of the Landlord and Tenant Act 1985 (service charges), where the relevant interest is an assured tenancy or regulated tenancy.

Drafting issues

Question 7: If a cap (or caps) is/are appropriate, is it/are they best achieved by drafting in the manner illustrated [in paragraph 47 of the Consultation]?
Question 8: If not, why not? Do you have any other drafting suggestions?

95. Thirteen respondents offered comments; five respondents did not.

96. Some respondents restated their opposition to any capping. One respondent (see paragraphs 55, 65 and 82 above) suggested that rule 13 should make it clear that costs awards in leasehold and residential property cases are exceptional, and referred to its suggested drafting (see paragraph 87 above). Another respondent (see paragraph 90 above) had no further drafting suggestions. One respondent (see paragraph 42 above) believed however that the PC Rules should be subject of guidance from the senior judiciary.

97. Of those who supported costs capping, views were expressed on the drafting suggestion made in paragraph 47 of the Consultation.

98. Four respondents considered the proposed drafting to be appropriate. Another respondent thought it was "*probably*" appropriate, but stated that there was a danger that the cap would be seen as the starting point where "*unreasonable conduct*" is established.

99. Another respondent stated that if a cap was adopted, the proposed drafting was supported, save that it was not clear why within paragraph (1)(b)(iii) leasehold management and enfranchisement cases are being treated as one class, when the legal representation differs between each class. In enfranchisement cases, tenants are likely to be represented and are unlikely to be deterred from making an application as they are motivated to gain an extended lease or freehold.

100. Another respondent stated there should be "*greater clarity on what is meant by unreasonable behaviour*" (see paragraph 77 above), but, if that was not to be addressed, then the drafting suggestions at paragraph 47 of the Consultation would be appropriate. That said, there should be a mechanism for increasing the costs over time, as any cap fixed would not remain at the correct level without the ability to increase it. It should potentially be linked to inflation and re-calculated every 5 years.

101. Another respondent referred to comments earlier summarised (see paragraph 43 above). A further respondent (see paragraph 37 above) noted that all parties should be fully aware (of a cap) in advance.

102. A further respondent (see paragraph 31 above) stated that the present wording may not provide sufficient comfort to litigants in person without better guidance. It was unrealistic to expect litigants in person to be familiar with the details and tests in *Willow Court*.

Conclusion

103. In light of the TPC's conclusions on the earlier questions, it is not necessary to reach a further conclusion on these questions, save as follows.

(i) The TPC remains satisfied at present that there should be no change to the drafting of rule 13. Costs awards in leasehold and residential property cases should already be seen as exceptional, given the *Willow Court* guidance. If this is to be supplemented by further formal guidance (see paragraph 59 above) then litigants in person – in particular – should be better placed to appreciate this.

(ii) If there were to be costs caps imposed, any later adjustment to the size of such cap(s) would be a matter for the TPC in light of the information then available.

Question 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?

104. Six respondents offered substantive comments; twelve offered no further comments.

105. Some respondents added to the views they had earlier expressed (for or against costs capping) by making specific reference to a need for certainty or clarification as to the circumstances in which an "*unreasonable behaviour*" costs order might be made.

106. One respondent (see paragraph 90 above) stated that it would appreciate more certainty on the scenarios where it might be worth pursuing a costs application under rule 13(1)(b). "*There is very little guidance available and there are very few reported cases on this point*." Its experience was that the Tribunal had been reluctant to use the costs sanction in rule 13(1)(b).

107. Another respondent (see paragraph 37 above) repeated that "*unreasonable behaviour*" needed to have a fuller clarification "*as currently very little behaviour fits this category*".

108. A further respondent (see paragraphs 55, 65 and 82 above) considered that *Willow Court* gave comprehensive guidance on how these applications should be dealt with. Attention was drawn to the advice in *Willow Court* about the use of effective case management to prevent potential problems with the conduct of the case arising in the first place.

109. Another respondent (see paragraph 33 above) stated that the phrase "*has acted unreasonably in bringing, defending or conducting proceedings*" can suggest a relatively low threshold, despite the judicial guidance that had been given. An alternative formulation was suggested: "*has acted so unreasonably in bringing, defending or conducting proceedings as to justify a penal costs order*", with additional wording "and any exercise of such power must be in accordance with applicable procedural rules for the Tribunal." Such wording would emphasise the difference in cost rules before the Tribunal when compared with the civil courts. "*We should be developing our own approach as to the conduct that merits a costs order*"; *Willow Court* is rather based on the jurisdiction established in the civil courts. In considering a "*penal*" order, the means of the party would be more apparent as a relevant factor.

110. Another respondent (see paragraph 28 above) noted that guidance on how the Tribunal should apply the costs rule would still be provided by *Willow Court*, subject only to any cap being imposed. It was suggested that a fee should be payable for making a costs application, which may also have the effect of deterring unmeritorious costs applications. Further, rule 31(4) might be amended to permit the tribunal expressly to deal with costs applications without a hearing, if it wished to do so, by adding after the words "*rule 9 (striking out a party's case)*" *the further words "or under rule 13(1)(b) (awarding costs for unreasonable conduct)*".

111. A further respondent (see paragraph 68 above) suggested that rule 13(1)(b) be amended to require any legally represented party considering the recovery of costs to give written notification to the Tribunal within 7 days of telling the opponent that an application was under consideration, with reasons, even if the application was not made at that time. This would enable the Tribunal to intervene, if appropriate, and reduce further the case for a costs cap in park home cases.

Conclusion

112. In light of the TPC's conclusions on the earlier questions, it is not necessary to reach a further conclusion on the topics raised by this question, save as follows.

(i) The TPC remains satisfied at present that there should be no change to the drafting of rule 13. Costs awards in leasehold and residential property cases should already be seen as exceptional given the *Willow Court* guidance. If this is to be supplemented by further formal guidance then litigants in person – in particular – should be better placed to appreciate this.

(ii) As to the suggestion that rule 31(4) might be amended to permit the Tribunal expressly to deal with costs applications without a hearing, should it so wish, the TPC does not

agree that any such amendment is necessary. The TPC understands that most costs applications are dealt with without a hearing. Rule 31(4) deals with disposal of proceedings. An application for rule 13(1)(b) costs is simply an application in the proceedings. Case management powers (rule 6) will permit the Tribunal to decide the application in such manner as it determines to be fair and just.

(iii) The requirement of payment of a fee to make an application for costs is not a matter for the TPC.

Amending the UT(LC) Rules

Question 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.

113. Fourteen respondents commented; four offered no comments.

114. Generally, those respondents opposed to costs capping in the PC were also opposed to capping in the UT(LC).

115. One respondent (see paragraph 68 above) supported the observations at paragraphs 53-57 of the Consultation. This respondent was not aware of concern about litigant behaviour in park home cases in the UT(LC), including in respect of costs applications.

116. Another respondent (see paragraph 77 above) noted that if the matter had reached the stage of being dealt with by the UT(LC), then it should be for that Tribunal to have the discretion to make any award for costs for unreasonable behaviour, that it deems fit.

117. A further respondent (see paragraph 52 above) stated that "*clearly the level of disputes, information provided, respective arguments made etc., seem to be such that detailed scrutiny, questioning and decision-making is required*." Therefore, it was not appropriate to amend the (UT)(LC) Rules.

118. Another respondent (see paragraph 39 above) stated that in addition to points summarised earlier, the following additional reasons also applied. If there has been behaviour in relation to an appeal which was unreasonable and met the *Willow Court* test for an order under rule 10(3) of the UT(LC) Rules, then it was likely (on an appeal) that the level of the costs would be greater. The

requirement for compensation would likely also be greater, and the UT(LC) ought not to be constrained by a cap. There was no reason why a transferred case should be treated differently. If there had been behaviour in relation to a transferred case, then the existing PC Rules should continue to be applied in accordance with Rule 44A of the UT(LC) Rules.

119. A further respondent (see paragraph 40 above) stated that the Consultation had not identified any particular problem with the status quo. Other respondents referred to points earlier summarised (see paragraphs 38 and 42 above).

120. Those who supported costs capping in the PC also supported capping in the UT(LC). Others who opposed it in the PC suggested that if there were to be costs capping in the PC there should also be capping in the UT(LC).

121. One respondent (see paragraph 35 above) believed that as there was always a risk of an appeal to the UT(LC), the fear of costs at any level raised the same concerns for litigants in person.

122. Other respondents (see paragraphs 33, 37 and 43 above) referred to the desirability of consistency. One respondent (see paragraph 38 above) stated that it was important that these "*defences*" for owners (leaseholders) apply at all levels of Tribunal; "*otherwise, a lower-level Tribunal will find in favour of the party that has the money to appeal*".

123. Another respondent (see paragraph 28 above) had no particular views on costs orders in the UT(LC), save to note that an appeal cannot be brought without permission having been granted by either the PC or the UT(LC). This tended to limit such cases to those either with merit or where a point of general importance was involved. In these circumstances, the UT(LC) would tend to keep control of behaviour, and the need for a cap was reduced. However, if a cap was introduced under the PC Rules, it may make sense for there to be a similar cap in the UT(LC) Rules, simply for clarity and consistency. Another respondent (see paragraph 31 above) noted that there were mixed views among its members. A majority thought it appropriate to amend the UT(LC) Rules to ensure uniformity of approach. However, a minority did not consider that was necessary owing to the nature of the disputes heard by the UT(LC).

124. One respondent (see paragraph 90 above) was in favour of a unified approach to costs in both the PC and the UT(LC). Thus, if there was to be a cap in the PC, it would "*make sense*" for there to be a cap in the UT(LC) as well. However, the amount of costs at issue in the UT(LC) is usually much higher than in the PC, so any cap on costs in the UT(LC) would need to be adjusted accordingly.

Conclusion

125. In light of its conclusions on the earlier questions, it is not necessary for the TPC to reach a further conclusion on the topics raised by this question. However, if there is to be further promulgation of information by the PC (see paragraph 59 above), the TPC would expect its content to be discussed with senior UT(LC) judiciary. Equivalent information might be made available by the UT(LC).

Generally

Question 11: Do you have any further comments?

126. Eight respondents gave further comments; ten did not.

127. One respondent (see paragraph 35 above) noted that it would be helpful if a summary of the decision in *Willow Court* was made widely available to litigants in person.

128. Another respondent (see paragraph 52 above) stated that in relation to park home cases, the Mobile Homes Act 2013 had made a significant and real improvement to the rights of the home owner. If differences did arise with site owners, the need to resolve them required "*clear rules and precise direction*".

129. A further respondent (see paragraphs 55, 65, and 82 above) summarised its position, in that (i) the solution to the problem is providing leaseholders with accurate information about the Tribunal's powers to order costs; (ii) rule 13(1) should be redrafted to emphasise the characterisation of the tribunal in leasehold and residential property cases as a "no costs jurisdiction"; and (iii) the Tribunal should retain discretion in the exceptional case to make an award of costs for unreasonable conduct which befits the circumstances of that case.

130. Another respondent's comments are summarised earlier (see paragraphs 33 and 34 above).

131. A further respondent (see paragraph 31 above) referred to the need for better guidance by, if the President is agreeable, a Practice Direction on Rule 13 costs so that parties are clear what is meant by unreasonable behaviour. A suggestion was made that the cap should not apply in respect of Breach of Lease cases because such applications, being a precursor to an application for forfeiture, may be regarded in many cases as being aggressive although there will be occasions when the action is taken in the interests of the majority in a development. It is accepted that costs can be a useful case management tool but should be used sparingly.

132. Another respondent (see paragraph 71 above) had used the Tribunal twice, succeeding on both occasions. However, upon going to the County Court (because Tribunals cannot enforce their own 'Decisions'), the Court was only able to recover costs awarded. They were unable to enforce the actual 'Decision', because "*they had only ever enforced monetary Tribunal awards in their 27 years' experience*". "*The system is convoluted and falls down at Court level*", with different area Courts giving differing advice. "*The whole system is flawed, and these changes are only really tinkering*". Despite all the "hype" about the 2013 Act, very little works as was intended.

133. Another respondent (see paragraph 53 above) stated that its local authority's housing revenue account was getting "badly used" by a particular contractor and the council was then "*passing on the [Leaseholder] component of this to private individuals, meaning we have service charge bills for 10s of thousands of pounds for work that does not need to be done*".

134. Another respondent (see paragraph 38 above) described experience of repeated problems with Managing Agents failing to carry out maintenance (e.g. gutter leaks, roof leaks). This respondent had always avoided taking action in Tribunals because of the risk of costs. "*The effect, nationally, was that the housing stock will be deteriorating*". The question was also posed: can the Tribunals trust evidence, that costs are appropriate, from Managing Agents? The facts of this respondent's case were cited to suggest that evidence of costs from managing agents may not be reliable.

Conclusion

135. Many of these comments echoed points earlier summarised; all the TPC's Conclusions as stated above apply to these.

136. As regards other comments:

(i) It is always for the Tribunal to deal with issues arising in individual cases, including as to the reliability of evidence put forward.

(ii) Similarly, it is not the role of the TPC to consider issues concerned with the "*enforceability*" of Tribunal decisions, save as specifically dealt with in the TCEA, which prescribes the TPC's rule-making powers. If changes are desired to primary legislation, or to secondary legislation other than that implementing the TPC's rule-making powers, these fall to be addressed to the government department concerned.

Keeping the Rules under review

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

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

Contact details

Please send any suggestions for further amendments to Rules to:

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

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. British Holiday & Home Parks Association Ltd.
2. Mark Martynski (First-tier Tribunal (Property Chamber) Judge)
3. Keith Marston (of SnE Consulting Ltd.)
4. Mr D. Fernie
5. Colin Gray, park home resident
6. John W. Bunting PhD
7. Tony Martin (of BPP University), a personal response
8. CMS Cameron McKenna Nabarro Olswang LLP
9. Federation of Private Residents' Associations
10. Anchor Park Residents Association
11. Paul Taylor, of Remus Management
12. Regional Tribunal Judge Michael Tildesley, Deputy Regional Tribunal Judge Agnew, and Deputy Regional Valuer Dallas Banfield (all of First-tier Tribunal (Property Chamber), Southern Region)
13. Chancery Bar Association
14. Robert Latham (fee-paid Residential Property Tribunal Judge and Barrister), an individual response)
15. Law Reform Committee of the Property Litigation Association
16. Timothy Powell (London Region); Bruce Edgington (Eastern Region); David Jackson (Midland Region); and Simon Duffy (Northern Region) (all of First-tier Tribunal (Property Chamber) Residential Property Division), a personal response from four of the five Regional Judges of the First-tier Tribunal (Property Chamber) Residential Property Division (whose regions combined handle approximately 83% of the Residential Property Division's applications)
17. London Liaison Group (representing the fee-paid members of the First-tier Tribunal (Property Chamber) Residential Property Division, based in London)
18. Charles Norman FRICS (Valuer Chair, First-tier Tribunal (Property Chamber)), a personal response