

Tribunal Procedure Committee

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

Introduction

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

www.gov.uk/government/publications?departments%5B%5D=tribunal-procedure-committee

3. Appeals from the PC in land registration cases are presently dealt with by the UT(TCC). They are not numerous. Such appeals might instead be allocated instead to the UT(LC), by the Lord Chancellor exercising powers contained in section 7(1) and (9) of the Tribunals, Courts and Enforcement Act 2007 (“the TCE Act”), with the concurrence of the Senior President of Tribunals.
4. This consultation is not concerned with what appeal rights there should be in land registration cases, nor with the destination of appeals; those are not a matter for

the TPC. Rather, the purpose of this consultation is solely to seek views as to the UT(LC) Rules were there to be a reallocation of the route of appeal to the UT(LC) in land registration cases. (Further, fees regulations are outside the scope of the UT(LC) Rules, and do not form part of this consultation.) Responses to the consultation will be considered by the TPC.

5. Below you will find further information on the following:
 - the First-tier Tribunal and the Upper Tribunal
 - background information on the land registration jurisdiction and present appeal rights
 - possible amendment of the UT(LC) Rules
 - the consultation questions
 - how to respond and by when.

6. Further information on Tribunals can also be found on the HMCTS website at:

<https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals>

7. Further information on the TPC can be found at our website:

www.gov.uk/government/organisations/tribunal-procedure-committee

The consultation questions are also in a separate Word document on our website, which can be used for submitting your response.

Background

8. The TCE Act provides for the First-tier Tribunal and the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions.
9. The First-tier Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills.

10. The First-tier Tribunal Chambers are presently:

- Social Entitlement Chamber
- Health, Education and Social Care Chamber
- War Pensions and Armed Forces Compensation Chamber
- General Regulatory Chamber
- Immigration and Asylum Chamber
- Tax Chamber
- Property Chamber.

11. The Upper Tribunal mainly, but not exclusively, decides appeals from the First-tier Tribunal. Also, some cases (or a preliminary issue or issues in such cases) in the First-tier Tribunal may be transferred to the Upper Tribunal for a first instance decision.

12. Appeals from the First-tier Tribunal to the Upper Tribunal have a permission requirement. Permission to appeal (“PTA”) is first sought from the First-tier Tribunal: if granted, then the appeal to the Upper Tribunal may proceed. If PTA is not granted by the First-tier Tribunal, then the prospective appellant must ask the Upper Tribunal for PTA. Again, if granted, the appeal may proceed. (If PTA is refused by the Upper Tribunal, then the would-be appellant may consider seeking a judicial review remedy.)

13. The PC, as its name denotes, deals with cases concerning property. It accommodates applications, appeals and references which were, prior to its creation in 2013, determined by

- Tribunals or committees administered by the Residential Property Tribunal Service and comprising the Residential Property Tribunals, the Leasehold Valuation Tribunals, Rent Tribunals and Rent Assessment Committees in relation to premises in England
- The Agricultural Land Tribunals
- The Adjudicator to HM Land Registry.
These latter proceedings are “land registration cases”.

14. Land registration cases are disputes about registered land in England and Wales. Most of these disputes are referred by the Land Registry when an objection has been made to an application to the Land Registry and the registrar takes the view that the objection is not groundless; the registrar then has a statutory duty to refer the dispute to the PC for its determination. These land registration cases are therefore first instance decisions; they are not appeals. The TPC understands that a limited number are boundary disputes; many relate to adverse possession or to rights to easements (for example rights of way); some relate to equitable interests in property; and many involve allegations of fraud. These land registration cases are “party and party” disputes, and very “property and fact specific”. Once parties have had their particular dispute resolved, there is usually no reason for them to anticipate another land registration case.
15. Applications to rectify, correct or cancel documents (for example a transfer) relating to registered land are also determined by the PC, and these land registration cases are the subject of application by a party to the PC directly. Again, these are very property and fact specific and again, once resolved there is usually no reason to anticipate the application leading to a further land registration case. The PC also has jurisdiction over appeals against decisions of the Land Registry concerning Network Access Agreements, but to date no such decisions have ever been made.

Cases in the UT(TCC)

16. The vast majority of cases dealt with in the UT(TCC) are appeals from the Tax Chamber of the First-tier Tribunal. There are also a number of other jurisdictions, including appeals from the Charity jurisdiction of the General Regulatory Chamber, and financial services cases, but those jurisdictions only rarely give rise to cases in the UT(TCC). Tribunal judiciary assigned to the UT(TCC) have expertise and experience across the range of all cases to be dealt with by that Chamber. Appeals from the PC in land registration cases are also presently dealt with by the UT(TCC), but again that jurisdiction only rarely gives rise to cases in the UT(TCC). Since land registration cases require distinct expertise and

experience, a limited number of UT(TCC) judiciary deal with these cases (see below).

Cases in the UT(LC)

17. Most appeals, and cases transferred, from the PC are decided by the UT(LC). In addition to its appellate jurisdiction, the UT(LC) determines disputed compensation claims in compulsory purchase and other types of land compensation cases, applications to discharge or modify restrictive covenants affecting land, contested blight notices, applications for rights of light certificates, and a range of other matters under various statutory provisions. It also acts as arbitrator in disputes referred to it by consent of the parties. The UT(LC) also hears appeals from the Valuation Tribunal for England and the Valuation Tribunal for Wales. The forerunner tribunal to the UT(LC), as regards certain jurisdictions, was the Lands Tribunal. Tribunal judiciary assigned to the UT(LC) have particular expertise and experience across the range of cases dealt with by that Chamber, which by their nature are concerned with property issues.

18. Thus, all appeals from the PC are to the UT(LC), save only for those in land registration cases. The exception of land registration appeals being allocated to the UT(TCC) might be ended: such appeals would go to the UT(LC) instead. As such, applications for PTA would also be made to the UT(LC) instead of to the UT(TCC).

Appeals in land registration cases

19. Appeals from decisions in each of the jurisdictions now placed in the PC were (prior to its creation) made variously to either the High Court or to the UT(LC). In particular, appeals in land registration cases were to the High Court, with no restriction on their scope, save for the exception of Network Access Agreement cases, where the appeal was on a point of law alone.

20. When the PC was created, the TPC understands that the choice of appellate route to the UT(TCC) in land registration cases reflected the background that these appeals had (previously) been dealt with by the Chancery Division of the High Court and the fact that all Chancery Division High Court Judges are automatically assigned to the UT(TCC) and not to the UT(LC). Tribunal judiciary assigned to the UT(TCC) could thus be supplemented as a matter of course with Chancery Division High Court Judges in order to deal with appeals in these cases.
21. Over the years since the creation of the PC, the volume of land registration cases disposed of by the PC has typically been over 1000 such cases per year. Yet very few of those have led to cases in the UT(TCC); there are only a handful of substantive appeals per year.
22. Appeals in these occasional cases have been dealt with by UT(TCC) judiciary with specific expertise in, and experience of, land registration law. Since Circuit Judges are also judges of the Upper Tribunal, certain Specialist Chancery Circuit Judges with the requisite skills have been assigned to the UT(TCC) for the purpose of hearing these appeals. The first Principal Judge of the Land Registration division of the PC was also assigned to the UT(TCC) for this purpose (he was also a Deputy Judge of the UT(LC)); and following his retirement as Principal Judge, the present Principal Judge of the Land Registration division of the PC (likewise assigned to the UT(TCC) for this purpose) has also dealt with these appeals. Of the very few appeals which have been dealt with in the UT(TCC) by a full-time Chancery Division Judge, all have been dealt with by the same Judge. The TPC understands that allocation of these cases within the UT(TCC) in this way has reflected the most efficient deployment of appropriately experienced judicial resource.
23. The TPC understands that an appellate route to the UT(LC), rather than to the UT(TCC), for these cases might be considered preferable, given the expertise of the UT(LC) judiciary across the field of property issues generally and its present and anticipated judicial resources (see below). Further, the UT(LC) Rules are

specifically designed for property cases, unlike the UT Rules which accommodate all manner of cases.

24. A Chancery Division High Court Judge is already assigned to the UT(LC), so that were there to arise a case which it was considered needed a full-time Chancery Division Judge, then that specific judge could deal with the case, as he has done in the UT(TCC). The Principal Judge of the Land Registration Division of the PC is already a Deputy Judge in the UT(LC) and a Deputy High Court Judge of the Chancery Division. Two of the Specialist Chancery Circuit Judges are also already assigned to the UT(LC) as well as to the UT(TCC), and hear appeals on other UT(LC) matters. Further, the TPC understands that all Chancery Division High Court Judges and Specialist Circuit Judges who are not currently assigned to the UT(LC), and who are interested in retaining the ability to do this work, would be invited to accept assignment.

Possible changes to the UT(LC) Rules to accommodate land registration cases appealed or transferred from the Property Chamber

25. Aside from the issues discussed in more detail below, the TPC considers that very limited changes to the UT(LC) Rules are necessary to accommodate the rights of appeal from the PC in land registration cases. Parts 3 and 4 of the UT(LC) Rules already provide procedures for appellate cases, and the TPC is not aware of any circumstances in which they do not currently work satisfactorily.

26. As for land registration cases which might be transferred from the PC to the UT(LC), where any case in the PC is transferred for first-instance determination by the UT(LC), the UT(LC) will generally need to adopt similar procedures as would have applied had the case remained in the PC. The UT(LC) Rules already cater for this (see rule 44A).

27. What is of significance however is that the UT Rules and the UT(LC) Rules have differences which require consideration if land registration cases are to be allocated to the UT(LC).

Material differences between the UT(LC) Rules and the UT Rules

28. The principal areas of difference between UT Rules and UT(LC) Rules in their treatment of appeals concern two matters: (a) applications for PTA, and (b) costs. These differences have their genesis prior to the creation of the Upper Tribunal, and (as far as the UT(LC) Rules procedure is concerned) featured in amendments to the Lands Tribunal Rules 1996 introduced in 2002, when appeals against decisions of Leasehold Valuation Tribunals first came to the Lands Tribunal.

Permission to Appeal

29. Firstly, an application for PTA must be received by the UT(LC) within 14 days of the date of refusal of permission by the First-tier Tribunal, rather than within the one month allowed by the UT Rules (see UT(LC) Rules, rule 21(2) and UT Rules, rule 21(3)(b)).

30. In this respect, the TPC considers that land registration cases should be considered no differently within the UT(LC) compared to other cases within its allocated appellate jurisdiction. Land registration cases will already have been subject to an application for PTA in the PC within the time allowed for the same (within 28 days following receipt of written reasons, see PC Rules, rule 52(2)). There is nothing specific to land registration cases to suggest that a prospective appellant will have any inherent difficulty in applying to the UT(LC) in such cases for PTA within 14 days rather than 28 days. An application for an extension of time (under UT(LC) Rules, rule 5(3)(a)) may be made, should one be needed. At the PTA stage, under the present appellate route to the UT(TCC), most – but not all – appellants have legal representation.

31. Secondly, included in rule 21(8) and rule 22 of the UT(LC) Rules is a right for respondents to make representations before PTA is granted. Rule 21(8) limits the UT(LC)'s power to grant PTA by providing that unless it decides to dismiss an application for PTA without representations from the respondent, the Tribunal must send a copy of the application and accompanying documents to the respondent, and must specify a time limit within which any representations relating to the application must be made. Rule 22 provides for the manner in which such representations must be made. Such provisions are absent from the UT Rules.
32. The TPC understands that respondents in the UT(LC) regularly respond via this procedure by making such (written) representations, and that these often assist the UT(LC) judge to gain a fuller picture of the dispute in considering whether or not to grant PTA. The TPC considers that the same might be expected as regards land registration cases, were they to be allocated to the UT(LC). This procedure, if followed, may further assist the UT(LC) to deal with these cases fairly and justly. If, upon a clearer picture being obtained, it is apparent that there should be no PTA, then the resources of both the judiciary and the parties would not be wasted on hearing a substantive appeal which is not reasonably arguable.
33. Thirdly, the UT(LC) Rules contain no provision equivalent to rule 22(4) of the UT Rules, which gives an automatic right to reconsideration of an unsuccessful application for PTA (or PTA on limited grounds or subject to conditions) at an oral hearing. That rule of the UT Rules applies across the full range of cases in the UT(TCC).
34. The TPC is mindful that allocation of appeals in land registration cases to the UT(LC) with maintenance of the current UT(LC) Rules as regards these cases would – in effect - remove a right to reconsideration of a failed application for PTA which a prospective appellant currently enjoys.
35. The TPC understands that the strong preference of the UT(LC) President and Deputy President, were there to be a reallocation of the route of appeal in land registration cases, is to retain the existing approach in the UT(LC) Rules to

applications for PTA, and not to create a separate regime for land registration appeals. Their preference is that all appeals from the PC be treated in the same way, under the existing procedure within the UT(LC) Rules, which (the TPC understands) works smoothly and with which the staff of the UT(LC) are familiar. Such views of the UT(LC) judiciary are not determinative; but they deserve appropriate weight.

36. This consultation is not concerned with consideration of the existing PTA regime in the UT(LC) across all its current range of cases, nor with the existing PTA regime in the UT(TCC) across all its current range of cases. It is concerned only with the UT(LC) Rules as they would apply to land registration cases, as proposed to be reallocated to the UT(LC). For one thing, the TPC consulted in 2012 on changes to the UT(LC) Rules as regards incoming appeals from the PC. No respondent then suggested that the regime concerning PTA in the UT(LC) Rules was unfair, or should be changed.

37. The TPC sees nothing remarkable in a PTA regime such as that in the UT(LC). With any appellate system involving application for PTA, a prospective appellant must be given a fair opportunity to show that they should be allowed to move up within the Tribunal system to try to displace a considered, independent and impartial judgment already rendered in the case. That fair opportunity is to seek to persuade the appellate Tribunal, acting by a single judge, that such party should have access to a full appeal and to be granted a fair allocation of the resources of the Tribunal in seeking to displace the existing judgment. Any regime of reconsideration at an oral hearing is based, as a matter of practice, on the opportunity it may present for one judge to take a different view to another (who has refused PTA on paper). But the TPC considers that there is no intrinsic right, arising from the need for fairness, for a prospective appellant to have “two bites at the cherry”. In relation to the UT(LC) Rules, the TPC is unaware of any suggestion that these are “unfair” in their application to the cases currently dealt with in the UT(LC).

38. There have been land registration cases in the UT(TCC) in which PTA has been refused on paper, granted upon oral reconsideration and then the appeal is

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

39. It will be noted that the figures are small, and recalled that these cases are very property and fact specific. Judicial views are bound to vary regarding the merits of cases, including in application of the arguability threshold on an application for PTA, and the figures are compatible with this aspect of legal decision-making. The object of an appeals system cannot be wholly to eliminate the risk that some cases do not proceed to a full appeal at which it might transpire that the appellant would be successful: that would be inconsistent with having a PTA requirement in the first place.
40. The very limited extent of appeals in land registration cases is not considered by the TPC to undermine the validity of the points made above; far from it. Rather, if a judge considers a PTA application and appreciates that their decision is final, without there being further recourse to the view of another judge, it may be expected that even greater diligence would then be applied
41. It may also be noted that the UT(LC) already has power, under UT(LC) Rules, rule 5(3)(f), to direct an oral hearing of an application for PTA if it considers it appropriate to do so. Although the TPC understands that this power is infrequently used by the UT(LC), it is a useful option in cases where facts are obscure, where a proposed ground of appeal has been poorly presented or is otherwise difficult to grasp, or (as does happen in land registration cases) where the judge and the parties or their representatives need to have features pointed out on a plan. It may be particularly helpful if a prospective appellant is without legal representation. (The same opportunity also exists in the UT Rules, and has been exercised in at least one land registration case.) A UT(LC) judge reviewing the documents should be well placed to make, and well capable of making, an

assessment in light of the particular circumstances of the application whether it is one which ought to be the subject of a directed oral hearing or not.

42. Given that the current UT(LC) Rules provide a sufficient and fair opportunity (in all cases they currently deal with) for a prospective appellant to seek PTA, any justification for treating land registration cases differently from other PC appeals arises solely from the fact that at present, for these cases, there is (in the UT(TCC)) a right to seek reconsideration at an oral hearing. Yet were land registration cases, upon any reallocation, now to be treated in the UT(LC) Rules differently from other PC appeals an anomaly would be created. Further, a perception may thereby be created that the current approach to PTA within the UT(LC) Rules for all PC appeals is considered inadequate. The TPC is not aware that such a perception presently exists; the TPC is unaware of any complaints regarding unfairness when PTA decisions are made by a single judge in the UT(LC). There is much to be said for consistency as regards all applications for PTA across all appeals from the PC when this does not give rise to injustice or unfairness.
43. In light of all the above, the TPC presently considers that creating a different procedure for PTA in the UT(LC) for land registration cases alone, by specially maintaining that provided for in the UT Rules, would require persuasive reasoning. It is appropriate therefore that the consultation questions set out below are asked.

Costs

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

45. The TPC presently considers it clear that the costs jurisdiction currently in place for these cases in the UT(TCC) should likewise exist in the UT(LC) if there were reallocation to the UT(LC). Such would be consistent with the Costs in Tribunals Report¹, para 135 and 194, and would accord with the current costs regime applying to these appeals and to land registration cases at first instance in the PC. There is no novelty to the awarding of costs in the UT(LC); there is already jurisdiction to award costs in appeals from the Valuation Tribunals of England and Wales and in other specified cases. An additional sub-paragraph to rule 10(6) would be required:

Costs – Rule 10

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

- (a) for compensation for compulsory purchase;
- (b) for injurious affection of land;
- (c) under section 84 of the Law of Property Act 1925 (discharge or modification of restrictive covenants affecting land);
- (d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales;
- (e) on an appeal from the First-tier Tribunal relating to a reference by the Chief Land Registrar or any other application, matter or appeal under the Land Registration Act 2002;

46. Again, this gives rise to consultation questions (see below).

Consultation Questions

47. The TPC is interested to receive your views on the suitability of the UT(LC) Rules for appeals in land registration cases, should they be reallocated to the UT(LC), including your replies to the questions below. When responding, please keep in mind that the rules should be simple and easy to follow. They should not impose unnecessary requirements or unnecessarily repeat requirements that are contained elsewhere. The TPC must secure the objectives set out in section

¹ www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf

22(4) of the TCE Act and it aims to do so in a consistent manner across all jurisdictions. Where your views are based upon practical problems which do or could arise, the TPC would be assisted by reference to relevant evidence.

Confidentiality and data protection

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

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

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

51. The following questions are raised on the premise of land registration cases becoming reallocated to the UT(LC).

Permission to appeal

1. Is it appropriate for the existing UT(LC) Rules in respect of Permission to Appeal to apply without modification to appeals in land registration cases?
2. If not, why not?

3. If not, what modification should be made?

Costs

4. Is it appropriate to amend the UT(LC) Rules to cater for the award of costs in appeals in land registration cases as proposed?
5. If not, why not?
6. If not, what suggestions do you have as regards how costs in appeals in land registration cases should be dealt with in the UT(LC) Rules?

Generally

7. Do you have any further comments?

How to Respond

We would welcome responses on the questionnaire provided. Please submit your response by **18 October 2017** to:

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