A peek into the Property Chamber

Daniel Dovar *examines new proposals to create a Property Chamber comprising the Residential Property Tribunal Service, the Adjudicator to HM Land Registry and the Agricultural Land Tribunals.*

Merger

Since 1 April 2011, there has been a subtle change to the signage on our courts and tribunals; out with HMCS in with HMCTS. At present, as outlined in a ministry statement, HMCTS consists of the courts and tribunals. The tribunals are divided into first tier and upper tribunals, the upper tribunals being both the appellate body for the first tier as well as the point of entry for some specified cases.

Tribunals

There are currently six "chambers" within the first tier tribunal. In addition, there are "other tribunals", which include: Adjudicator to HM Land Registry (ALR), Agricultural Land Tribunals (ALTs) and the Rent Assessment Panels (RAPs). The latter, the RAPs, are the panels from which the rent assessment committees are formed, which – as well as sitting in their own right – sit as rent tribunals (RTs), rent assessment committees (RACs), leasehold valuation tribunals (LVTs) and residential property tribunals (RPTs), and which collectively operate under the non-statutory title of the Residential Property Tribunal Service (RPTS).

The Ministry of Justice proposes that in 2013 these three tribunals will be swept up and placed in a new, seventh, first-tier tribunal chamber, the Property Chamber. It is also intended to add to that chamber at a later date the valuation tribunal. The common theme is that all these tribunals deal with property, albeit in a wide variety of contexts. This will take place by abolishing all these tribunals and reforming them within the chamber.

The ministry's aim is to create "cohesion within the system and allow more flexible deployment of judges and panel members across jurisdictions".

The Property Chamber Rules

One example of cohesion is the creation of a common set of procedural rules, which is currently being consulted on. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (PC Rules) will replace and unify the various rules governing the individual tribunals. This will no doubt come as some relief to those practising in this area, who are faced not only with different rules for different tribunals, but also different rules for the same tribunal sitting in different jurisdictions. This is most acute in the RPTS, where the procedural rules differ depending on whether the case is one before a RAP sitting as an RAC, RT, LVT or RPT. There are also varying provisions before the ALT depending on jurisdiction.

Overall, the proposed rules provide a unified code, but they do in part divide off into separate provisions for separate jurisdictions to accommodate the particular characteristics of each tribunal. So, for the ALR, specific provision is made for directions to be given to the registrar to enable changes to be made to the register following a determination.

Points of interest in the proposed rules

While the rules are at consultation stage, they provide a fairly good idea of what can be expected. Any perceived faults in the proposed rules highlighted below should be read in that context.

The first substantive section provides for the "overriding objective", a concept imported from the Civil Procedure Rules (CPR) and now familiar to all those practising in the civil courts. Further echoes of the CPR are found in r 5, which provides for case management.

Rule 4 permits delegation of certain decisions to tribunal staff. It doesn't specify precisely what decisions, but provides that a party can request such a decision to be considered afresh by a judge. Could a staff member be appointed to deal with less contentious paper applications for adjournments/extensions of time?

Applications for directions must first be canvassed with the other side and, in default of agreement, the proposed directions must first be sent to the other side notifying them that if they object they must send their objections in to the tribunal (r 6). This leaves matters a little unclear for the other side as:

(a) although they have received the proposed directions, they don't know when or whether the application has actually been made as there is no requirement to serve them with a copy of the actual application; and
(b) there is no time limit within which they must respond.

Rule 10 provides for an automatic withdrawal of an application if the correct fee is not paid within 14 days. It is not clear what warning is given of this, but it seems a little harsh. The rules committee appears apprehensive about this guillotine as it has specifically requested comments on this point.

The tricky issue of costs is dealt with at r 11. Tribunals are on the whole regarded as informal (at least less formal than the courts), low-cost jurisdictions. The proposed rules recognise and maintain the current difference between ALR and the RPTS and ALT in that, for the former, cost recovery is provided for on a costs-follow-the-event basis, whereas for the latter two tribunals it is only allowable in prescribed circumstances: generally either for non-compliance, wasted costs or unreasonably bringing, defending or conducting proceedings. The cost provisions in the PC Rules are wider and more extensive than the current rules in the RPTS (and most of the ALT) which at best allow for £500 when one party has acted unreasonably etc in connection with the proceedings. Not only is the scope widened to bringing and defending, but also the cap on recovery is lifted. There is additionally provision for transfer of assessment of costs to the county court.

In keeping with the lesser formality of and accessibility to the tribunals, r 12 provides that a party can appoint a representative to act on their behalf, whether legally qualified or not. The spirit of this is no doubt to allow greater representation as of right, but there is a danger that this could be exploited. Perhaps some express provision could be

made permitting the tribunal to exclude representatives.

The withdrawal provisions allow a party who has brought an application to withdraw it on notice and to request reinstatement; they do not allow a respondent to object to the withdrawal or request a reinstatement or seemingly for the tribunal to refuse to allow a withdrawal. Presumably this will overcome the difficulty that occurred in the ALR case *Silkstone v Tatnall* [2012] 1 WLR 400, where the Court or Appeal determined that, in the absence of any provision permitting withdrawal, it was within the adjudicator's powers to continue an application despite the applicant's wish to withdraw.

Some additional responsibilities have been placed on tribunals, for example:

- Arrangements for site inspections require a written request to be made to the "occupier" (r 19). While it is obviously correct that the occupier (who in many cases, will not be a party) needs to give consent, practically this will entail the tribunal being informed of who is in occupation by the parties prior to making such a request.
- In service charge cases, the tribunal must notify a recognised tenants' association or any other party likely to be significantly affected by the application (r 27);
- In applications to rectify the register, the tribunal must notify any "person who in the opinion of the tribunal should be a party to the proceedings" (r 27).

There is also provision for significant or complex cases to be transferred directly to the upper tribunal for determination (r 23) and for the tribunal to review its own decision on receiving an application for permission to appeal, rather than give permission (r 51 and r 53).

Conclusion

The provisions for where a tribunal consists of more than one member are not clear, but it is also anticipated that practice directions will be provided and further jurisdictional changes will follow.

Consultation ends on 6 September 2012 and the Tribunal Procedure Committee (at the Ministry of Justice) is inviting comments before that date (see www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations).

Maybe one day those involved with property cases will attend property court and appear before property judges.

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Save our spaces

Tenants in a development had the right to park on specific spaces. The landlord had no right to change the spaces and build on the area.

Legal status of parking rights

Historically, the legal status of rights to park has been uncertain.

For any right over land to amount to an easement it must comprise certain essential characteristics. One of these characteristics is that the right in question must be capable of forming the subject matter of a grant of easement. This requirement is difficult to reconcile with the "ouster principle". The principle proposes that a right cannot be an easement if it is so extensive as to exclude the servient owner from using his land by effectively "ousting" him from his property altogether (see *Re Ellenborough Park* [1955] 3 All ER 667).

The relevant case law has considered where the dividing line lies between a right which constitutes an easement and a right which excludes the servient owner from his land to such an extent that it is incapable of being the subject matter of a grant of easement.

The "degree" test

The "degree" test states that if a right granted in relation to an area over which it is exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it is not an easement. In *Batchelor v Marlow* [2003] 4 All ER 78, the Court of Appeal held that the exclusive right to park cars on the servient land during the whole of the working week deprived the servient owner of any reasonable use of his land.

The test of "possession and control"

The decision in *Batchelor* has been widely criticised, most notably in the Scottish case of *Moncrieff v Jamieson* [2008] 4 All ER 752 (a case relating to servitudes, the Scottish equivalent of easements), as extending the "degree" test too far. The Lords stated that:

- a right to park can be recognised as an easement even if it is for an exclusive space;
- all easements preclude some use of the servient land by its owner (for example, rights to use a coal shed, rights of storage or the use of a communal garden, each of which have been held to be easements);
- a servient owner who has granted parking rights may still make some reasonable use of his land (for example, building under or over the land or placing advertising hoardings on the land; these possibilities were open to the owner in *Batchelor*);
- the "degree" test should be rejected; and
- the test should be whether the servient owner retains "possession and control" of the land subject to the reasonable exercise of the easement.

Kettel v Bloomfold

However, the House of Lords did not overrule *Batchelor*, and in *Kettel v Bloomfold* [2012] All ER (D) 04 (Jul), the High Court confirmed that it was obliged to apply the "degree" test. The long leases of various flats in a development contained the right for the tenant to park in a designated parking space. The High Court granted the tenants an injunction preventing Bloomfold from building a further block of flats that would cover their parking spaces.

No demise of space

The leases demised the premises together with the sole right to use the designated parking space for the purpose of parking a taxed car or motorbike. This could not be construed as a demise of the space.

"Sole use" and exclusive occupation

Nor did the reference to the "sole right" to use the space amount to exclusive occupation:

- The tenant was not granted "sole use" of the parking space; he was granted the sole right to use it for parking a