CHANCELLOR
OF THE HIGH COURT

**Professionalism in Property Conference 2018**

**Speech by Sir Geoffrey Vos, Chancellor of the High Court**

**Wednesday 9th May 2018**

Introduction

1. I want to return this morning to the now familiar topic of the overlap between the jurisdiction of the courts and the tribunals in property matters. The work in this area has been spear-headed by the President of the First-tier Tribunal (Property Chamber), Judge Siobhan McGrath and I know that she will be speaking for herself to this conference later in the day. What I want to do, if I may, is to provide something of a high-level overview as the judge with responsibility for the Business and Property Courts.

2. The problem is well-known and can be shortly stated. Property legislation in recent years has bifurcated the responsibility for determining specific property disputes in numerous areas between the courts and the tribunals, such that in a significant number of cases, the parties have no choice but to engage in both types of proceeding. This increases the costs, causes additional delay, and in some cases, stress and frustration associated with an illogical judicial process. Many of the parties in this area are litigants in person and many are vulnerable.

3. As Professor Dame Hazel Genn QC explained so cogently in her recent President's lecture to the Bentham Society, there is an undeniable logic in integrating legal advice into the health service, because many, if not most, health problems are caused or exacerbated by legal or social issues.

Foremost amongst those issues are employment and housing problems leading, in whichever order, to loss of a person's job followed or preceded by loss of that person's home or at least a bitter dispute with their landlord.

4. There is, therefore, a great imperative for those responsible for the justice system to ensure that such legal issues can be resolved speedily, at minimum cost, and without the need to bring or defend multiple proceedings in different legal *fora*. So much is generally common ground. But how exactly to achieve these obvious objectives is not so simple, and is not even the subject of complete unanimity amongst property professionals, legal and otherwise.

## The historical context

5. Let me start with a little of the historical context. The first (and somewhat unsuccessful) railway tribunal was established in 1873. The history of tribunals in the 20th century is beyond the scope of this talk, but they rapidly expanded in number between the wars, mainly in national insurance and pensions. In property, the rent assessment committee was very active after the 2nd war. There were three major reviews of the tribunal system in the 20th century: the Earl of Donoughmore's report in 1932, Sir Oliver Franks's report in 1957, and Sir Andrew Leggatt's report in March 2001. The present tapestry of tribunals was created by the Tribunals, Courts and Enforcement Act 2007. Generally, there are now 7 chambers in the FTT and four in the UT, not including, of course, the separate Employment Tribunal and Employment Appeals Tribunal.

6. The Property Chamber was established in July 2013. It sits in 5 regions: London, Southern, Midlands, Northern and Eastern, and has at FTT level 17 salaried judges and 155 fee paid judges. At Upper Tribunal level, the Lands Chamber has 10 judges, most of whom only spend part of their time on Property Chambers' appeals. The Crime and Courts Act

2013 also brought in the formal ability to inter-operate between the tribunals and the courts.

7. In July 2015, the Civil Justice Council set up its working party to consider whether there were advantages in deploying the judiciary in a flexible manner to ensure that all issues in dispute in property cases were dealt with in one forum. The working party reported in May 2016 recommending flexible judicial deployment in landlord and tenant, property and land registration cases and a pilot to evaluate feasibility.

8. On 1st October 2017, the then Communities Secretary, now Home Secretary, announced a consultation on the creation of a new Housing Court "so that we can get faster, more efficient justice".

9. In January 2018, the Civil Justice Council working group reported on its pilot, which had by then dealt with some 100 cases where judges had been double-hatted to sit as both tribunal judges and county court judges at one and the same time, and to deal with issues that would otherwise have involved ping-pong between the jurisdictions.

10. At the same time as the cross-deployment project on service charge cases, park home cases, enfranchisement and even land registration cases, there is a separate pilot whereby the London region of the Property Chamber is hearing uncontested business tenancy cases in cooperation with the Central London County Court.

<u>An explanation of the problem</u>

11. Against this background, we need to consider the options. Thus far, we have the Government's more radical proposal for a united Housing Court to rationalise dispute resolution for housing and property disputes, and the ongoing pilots to deal with the statutory bifurcation of jurisdiction across really quite a wide range of property issues.

12. There are also a number of issues that are not dealt with by either of these two activities: for example, the problem that forfeiture and relief from forfeiture is still exclusively the province of the courts, and the inability of the Land Registration tribunal to deal with estoppel issues.

13. As it seems to me, however, we have two choices. We can either be ambitious and look for an imaginative and far-reaching solution, or we can employ reasonably workable sticking plasters that will have some beneficial effects but which will never solve the problems entirely.

14. The reason I make this latter point is that there are two issues that, whilst not fatal to the limited current pilots, are awkward and problematic. These are the problems raised by the wide disparity between the costs and appellate procedures in the courts and in the tribunals. There is limited costs shifting in the tribunals, and there are quite different routes of appeal in the courts. And ne'er the twain shall meet. There are workarounds, of course, and these are working quite well, but there is no reason why one dispute between one landlord and one tenant should not all be dealt with in one forum. Moreover, if we could achieve the alignment I am speaking about, I would expect to see far fewer cases ending up in the Court of Appeal, when in reality they should be dealt with by a specialist appellate body like the Lands Chamber of the Upper Tribunal.

15. I am a great supporter of a Housing Court, but I would like to see it as part of a rather more radical restructuring of the courts and tribunals jurisdiction.

<u>What should we be aiming to achieve?</u>

16. To get this problem into perspective, we need I think to consider first section 49(2) of the Senior Courts Act 1981 which provides that "every court shall so exercise its jurisdiction in every cause or matter before it as to secure that as far as possible, all matters in dispute between the parties are completely and finally determined, and all

multiplicity of legal proceedings with respect to any of those matters is avoided"

17. The concept behind the enactment of the Tribunal Courts and Enforcement Act 2007 and the merger of the Courts and Tribunal services was a more seam-less service to the public, and yet in a number of areas that has not occurred. Let us just take three other examples outside the property sector.

18. In employment cases, when an employment contract is terminated, there frequently have to be proceedings in the courts to deal with any alleged breaches of contract that may have occurred, and proceedings in the Employment Tribunal to deal with any claims for unfair dismissal or discrimination. This is, I think quite illogical, and multiplies legal proceedings to the detriment of employer and employee alike.

19. In tax cases, there is also an overlap between tribunal appeals and judicial review, most commonly where the tax payer wants to run first an argument that HMRC have miscontrued the taxing legislation when issuing the assessment (which goes to the tribunal) and secondly, in the alternative, an argument that HMRC raised a legitimate expectation that the taxing legislation would be construed in the way contended for by the taxpayer even if that does not in fact turn out to be the correct interpretation. In the tax field there is also an overlap between bankruptcy and tribunal appeals, where HMRC seek to wind up a company or bankrupt an individual taxpayer for unpaid taxes where the tax payer lodges an appeal with the tribunal against the assessment which is the subject of the insolvency petition.

20. In competition cases, some are capable of being heard by the Competition Appeals Tribunal under section 47A of the Competition Act 1998, but some are not and have to be determined in the Competition List of the Business and Property Courts. In some cases, issues are partially determined in each of the High Court and the CAT.

21. In immigration cases, it is very common for cases to be decided in the Immigration and Asylum Chamber and then to be the subject of judicial review proceedings in the High Court.

22. The same applies in numerous areas of property law, and yet the same lawyers and the same judges are the ones who have the expertise to deal with every aspect of the disputes between private landlord and tenant, between parties to business tenancies, and between adjoining owners and between housing authorities and their tenants. That was why we included the "property" in the new Business and Property Courts. We thereby recognised that property litigation was a specialist area like business or commercial litigation, or intellectual property or insolvency or such areas of expertise. That was why we included a "Property Trusts and Probate list" when we established the Business and Property Courts. That list undertakes quite a bit of High Court property work in London and a large proportion of the Business and Property litigation in the 7 regional centres for the Business and Property Courts across the country.

23. In my view, there is an obvious ambitious reform that became, in reality, inevitable when the courts and tribunals were amalgamated under the responsibility of HMCTS. That reform is simply to integrate the courts and the tribunals hearing the same types of cases under the same umbrella. Of course, the procedures and practices of any integrated 'court' or 'tribunal' – call it what you will – would need to take the best from both the relevant antecedent courts and tribunals. We would not want to lose the benefit of the litigant in person friendly atmosphere of the tribunals in domestic housing cases, particularly where vulnerable parties are involved, nor would we want to be heavy handed in imposing costs consequences in such cases.

24. But the great prize nonetheless remains an absence of duplication – in the modern jargon – a one-stop shop. For my part, I think a rationalisation of how we resolve disputes is overdue. I think that we should be looking at reform in the context of our current HMCTS reform project which is

introducing an online solutions court in several areas – obviously excluding housing and tenancies generally at this stage. We should not, however, assume that the ambit of online dispute resolution will not expand once the technology has been proven and public confidence in it has been established.

25. I would like to see all the bifurcation between courts and tribunals in the same subject areas removed. It makes perfect sense to resolve all disputes between one landlord and one tenant in one place before one judge. It makes equal sense to resolve every argument between one employer and one employee in one place before one judge, and likewise all points of disagreement between the Secretary of State for the Home Department and each immigrant. I struggle to see the argument against such a rationalisation.

Has this been suggested before?

26. It is perhaps worth noting that this kind of rationalisation is not a new idea. As recently as September 2016, the then Lord Chief Justice, Lord Thomas, and the Senior President of Tribunals issued a joint statement about their plan to "create one system and one judiciary". Lord Thomas spoke about this plan in his Cardiff lecture on 21st October 2016 entitled "Building the Best Court Forum for Commercial Dispute Resolution". He envisaged that it would bring about:-

> "(a) an end to the parallel existence of courts and tribunals and the parallel courts and tribunals' judiciaries.
>
> (b) the creation of a single judiciary in a single system – a system that combines the best qualities and processes of the present courts and tribunals systems".

27. The overlapping property jurisdictions have been highlighted for change in Lord Briggs's Civil Courts Structural Review and in regular speeches by the Senior President of Tribunals.

As Lord Thomas said in his Cardiff lecture about the property jurisdictions: "we have seen the development of a situation as between the courts and tribunals that existed as between the courts in the 19th century". There is plainly a need for rationalisation.

How can this rationalisation occur?

28. It seems to me that the creditable pilot projects to which I have referred, and which have now dealt with some 120 cases, if not more, are one pragmatic step towards achieving what I am proposing. But it would obviously be better if we were able to take a more holistic view. I acknowledge that some ways of skinning this particular cat might necessitate legislation, and perhaps even primary legislation, but some might not.

29. Either way, I think the direction of travel ought to be clear. It should be directed by section 49(2) of the Senior Courts Act, to which I have already referred. In case you think that 1981 was the first time that such aspirations had been the subject of legislation, section 49(2) replaced section 43 of the Supreme Court of Judicature (Consolidation) Act 1925, and even that had provided that the court should grant all remedies (legal or equitable) to which the parties were entitled so that, as far as possible, all matters in controversy between the parties might be "completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters is avoided". That wording originated in section 24(7) of the Supreme Court of Judicature Acts 1873 and 1875. This is all of a piece with the rule in *Henderson v. Henderson* (1843) 3 Hare 100, which held that a party may be estopped from pursuing in subsequent proceedings issues that ought to have been raised and determined in the original proceedings.

30. Fortunately, for the time being, the double-hatting experiment is working well, and is causing far fewer problems than might have been expected. It is, as is to be

expected, extremely popular with lawyers and clients alike. It provides an excellent and valuable half-way house. I hope, however, that we will find a way to complete the logical reforms about which I have spoken before too long.

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