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CITIZEN FOCUS

By *Professor Sir Adrian Webb*, Chair of the AJTC Welsh Committee.



DURING ITS FIRST YEAR, the Welsh Committee of the Administrative Justice and Tribunals Council has considered how to develop a coherent approach to administrative justice in Wales. Tribunals in Wales reflect a complex intertwining of devolved and non-devolved systems which lacks a force for coherence given that responsibility for justice is not devolved. There is no 'Ministry of Justice' in Wales to champion change and integration.

The National Assembly and Welsh Ministers have responsibility for tribunals in key policy areas such as education, health, social and housing policy. In other key areas, UK or England and Wales tribunals operate on a non-devolved basis, partly through the Tribunals Service, partly outside it. The devolved tribunals fall wholly outside the current tribunal reform process and will not join the Tribunals Service or become part of the new two-tier tribunal structure.

Early on, the AJTC Welsh Committee decided to conduct a review of these tribunals as part of its statutory function of reporting to the Welsh Ministers and will report in autumn 2009.

The report will be mindful of the facts that the tribunals are dwarfed in both scope and scale by Tribunals Service tribunals operating in Wales. There are also distinctively Welsh considerations such as Welsh language, culture and geography (which also impinge on non-devolved tribunals) calling for a different approach. However, there is scope for Wales to lead the way in creating a best practice tribunal system.

Administrative justice is, however, clearly not just about tribunals and other redress mechanisms. It is also about learning lessons from what goes wrong and incorporating them into a vision of good public administration. We are eager to support and assist in formulating a streamlined common complaints procedure for those public bodies charged with delivering devolved services. In addition, from the user's perspective more

EDITORIAL



MY THREE-YEAR TERM as chair of the editorial board of this journal ends in December 2009. In that time we have recruited several new members, as the result of which there are now representatives from the First-tier and Upper Tribunals, as well as legal and expert members.

Within the pages of the journal we have consolidated well-established favourites such as the 'Principles in practice' series – continued now with articles on the overriding objective in tribunal procedural rules (on page 10) and on the correct way of handling non-unanimous decisions by tribunals (on page 2).

Our series of articles on the work of decision-making bodies falling outside the usual understanding of a tribunal, but whose work is judicial in nature, also continues in this issue with an article on page 15 on the Independent Safeguarding Authority.

It has been an exciting and fascinating three years and I am immensely grateful for the support I have received throughout that time from colleagues on the editorial board. One of them, Kenny Mullan, takes over from me in January 2010. Kenny has published extensively and is widely respected as an academic, as a trainer and as a judge. He is very committed to the aims of the journal and I know that I leave it in safe hands.

Godfrey Cole CBE

mundane matters are just as important, such as the need for sign-posting to assist citizens in navigating their way through complex systems.

The relatively small scale of central and local government in Wales should make for simplification, and the commitment to citizen-focused service for a sense of urgency. But change needs champions. For us, therefore, strong and informed leadership from the Welsh Assembly Government is essential, and we will continue to call for a single focal point for administrative justice in Wales.

WHEN DISAGREEMENTS ARE INEVITABLE



Kenny Mullan looks at ways in which tribunals record the reasons for a decision where there have been divergent views, and considers ways in which unanimity might be achieved.

IN WELCOME correspondence to this journal (see panel opposite), David Bleiman has raised important questions concerning the making and recording of non-unanimous decisions in appeal tribunals. This article is an attempt to add to ongoing discussion on this important issue.

Composition

There has always been a remarkable variance in the composition of appeal tribunals, with the number of panel members varying depending on the jurisdiction and even the subject matter of the appeal. Further, the background and qualifications of the members have also differed, including legally qualified chairs and specialised and expert members. In the past, the procedural rules for individual appeal tribunals have included provision for the composition of appeal tribunals, and the making and recording of their decisions where that decision has not been unanimous.¹ Further, appeal tribunals and their members were often given specific advice on the correct approach to be adopted with respect to non-unanimous decision-making and recording.² The composition of appeal tribunals has been thrown into greater focus by the creation of the First-tier and Upper Tribunals.

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Secondary legislation

The secondary legislation which has implemented the outline structure of the Tribunals Courts and Enforcement Act 2007 has recognised that there will be variance in the composition of the First-tier Tribunal, depending

on the specific chamber and the subject matter to be considered in individual appeals, and the qualifications of members of the tribunal. Accordingly, the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008³ provides that the number of members of the tribunal who are to decide any matter falls to be determined by the Senior President, having regard to, among other things, the need for members of the tribunal to have particular expertise, skills or knowledge. Thereafter, the Order makes provision for an Upper Tribunal consisting of one, two or three members and a First-tier Tribunal consisting of a single member or two or more members.

A second Order⁴ provides for the qualifications of tribunal members and recognises that there is a requirement to have non-legal but expert members of both the First-tier and Upper Tribunal, to continue the practice of specialised membership. In addition, the Senior President has made a number of Practice Statements⁵ making provision for composition and qualifications in specific types of appeal within the different chambers.

The secondary legislation appears to recognise that in a tribunal which is composed of more than one member, there may be the possibility of disagreement on the outcome. Article 8 of the 2008 Order provides that ‘if the decision of the tribunal is not unanimous, the decision of the majority is the decision of the tribunal; and the presiding member has a casting vote if the

Minority decisions

From David Bleiman, a member of the Employment Appeal Tribunal.

Minority decisions raise a number of interesting questions, and are closely connected to the whole area of team work.

The key to the decision-making process has been described in this journal as 'constructive and professional disagreement allowing for the exchange of logical arguments and propositions in order to arrive at the correct decision'. In the vast majority of cases, the panel will work through the difficult issues in a case and end up with a unanimous view.

But what if the panel cannot reach agreement? Is it then necessary for the minority, usually an individual lay member, to express a contrary view to the majority? And are there different

approaches to minority views among tribunals? As to the process of decision-writing, should the chairman include the view of the minority in the judgment? Or should the minority member write up their own report? Should the approach differ depending on whether it is a minority view of the facts or the law? And how important is it that the chairman's comments are sought out as part of the drafting process?

Finally, what about those rare occasions when a lay majority outvote the legal chairman, who then has to compose a minority report? Is it satisfactory for the chair to state the law and write up all aspects on which the panel are agreed, leaving the majority with responsibility only to take up the story from the point at which there is divergence?

I'm sure that your readers would welcome any guidance you have to give on the matter.

votes are equally divided'. That provision is not restricted to a specific chamber, or a specific type of appeal.

Finally, the procedural rules for the individual chambers within the First-tier Tribunal make provision for decision-making and, more importantly, the provision of reasons for those decisions. So, for example, Rule 34 of the procedure rules for the Social Entitlement Chamber⁶ makes provision for the giving of reasons in connection with appeals within that chamber. Unlike a previous procedural rule for similar appeals,⁷ there is no specific provision within Rule 34 for separate reasons for majority and minority decisions where the decision is non-unanimous. There is a similar rule in the new procedural rules for other chambers.⁸

Divergent views

There appear to be divergent views on the impact of the new procedural rules in respect of non-unanimous decision-making. One

commentary on Rule 34 of the new legislative provisions⁹ noted:

'... there is no longer any express duty to record the reasons of the dissenting member of the Tribunal where the decision is made by a majority, or even to record that the decision was reached only by a majority'.¹⁰

Earlier, in discussing the new Rule 33, which deals with 'Notices of Decisions' the authors had also commented that there was no longer any express requirement to state whether or not a decision has been made by a majority.

On the ground, the practice and procedure appears to be different. My understanding is that the Decision Notices for appeals in the Social Entitlement Chamber continue to permit an indication as to whether the decision was unanimous or by a majority and some judges in the Social Entitlement Chamber continue to provide separate reasons for the majority and

minority opinions where the decision is not unanimous. Most significantly of all, in the latest version of the judicial benchbook for judges in the Social Entitlement Chamber, the following advice is given:¹¹

‘The fact that the decision is by majority will, as stated above, be recorded on the summary decision and the reasons for dissent should be included in the full statement . . . if one is subsequently requested.’

The practice and procedure in the Social Entitlement Chamber appears to be in marked contrast to that in the other chambers of the First-tier Tribunal, where a decision is that of the majority, with no reference to a dissenting view in any statement of reasons.

Employment

What about those tribunals outside the reformed structure?

The procedural rules for the Employment Tribunals provide that ‘where a tribunal is composed of three persons any order or judgment may be made or issued by a majority; and if a tribunal is composed of two persons only, the chairman has a second or casting vote’.¹² The requirements for a statement of reasons for a judgment of an employment tribunal are then set out,¹³ but make no mention of separate and distinct reasons for majority or minority decisions.

Guidance on appropriate practice with respect to non-unanimous judgments comes from the decision of the Court of Appeal in *Anglian Home Improvements v Kelly*.¹⁴ Mummery LJ stated the following, at paragraphs 12–13:

‘I add this comment in relation to decisions in which the members of the Tribunal are not unanimous. It is the responsibility of the Chairman, as is noted above, to write up the

decision. In my view, where the members are unable to agree, at the conclusion of the hearing, on what the result of the complaint should be, it is preferable, in general, for the Chairman to reserve the decision so that he can write it up and circulate it to the other members of the Tribunal. If, as happened in this case, it is the two lay members who are in the majority and are disagreeing with the Chairman, it is preferable to give the two lay members not only an opportunity to see that their views are correctly expressed in the decision document drafted by the Chairman, but also an opportunity to reflect on the grounds on which they are disagreeing with the Chairman about the outcome of the hearing.

There is nothing in the procedural rules for the Employment Appeal Tribunal which provides for majority decisions.

‘In my judgment, it is undesirable, on the whole, for Tribunals to reach split decisions. It will, of course, be inevitable in some cases, but it is preferable, if it is possible to do so, for all efforts to be made to reach a unanimous decision. Unanimity is more likely if time is given after an initial disagreement for everybody to consider the position. Such time is given by reserving a decision rather than giving it extempore.’

There is nothing in the procedural rules for the Employment Appeal Tribunal that provides for majority decisions. Paragraph 18.06 of Blackstone’s *Employment Law Practice 2008*¹⁵ notes that:

‘The EAT’s decision may be given on a majority basis and . . . the judge may be outvoted by the lay members. This is a unique position within the appellate courts and rarely happens . . . The judgment is always given by the judge even if he is in the minority although he will express the minority view in the judgment as well as the dominant majority view.’

The appeal to the Court of Appeal in *Smith v Safeway plc*,¹⁶ was one of the rare examples where the decision of the Employment Appeal Tribunal had been a majority decision, with the lay members outvoting Pill J.¹⁷ The Court of Appeal allowed the appeal, adopting the reasoning of the minority in the EAT, but without commenting on the majority/minority dichotomy.

Asylum and immigration

Here, once again, there is nothing in the procedural rules which deals with non-unanimous decisions. Paragraph 10 of the Asylum and Immigration Tribunal Practice Directions¹⁸ states that ‘the determination is that reached by the majority of those members’ and that it is ‘accordingly inappropriate that a dissenting view should be expressed or that the determination should indicate that it is that of a majority’.

Anomaly

There is therefore an apparent anomaly between the various legislative provisions implementing the 2007 Act. Article 8 of the 2008 Order provides for non-unanimous decisions, applies across all of the First-tier and Upper Tribunals, and is not restricted to a specific chamber, or a specific type of appeal. The various procedural rules for individual chambers are ambivalent about the possibility of non-unanimous decisions, and the requirement to record reasons for dissent. In at least one chamber, the ambivalence is being interpreted as a requirement to actively record non-unanimity, where that is relevant, in decision notices and reasons. Irregularity in practice and procedure across individual chambers is surely not consistent with a unified, coherent tribunal structure? Or is there room for a divergence of process across the chambers?

There is a further discrepancy between other tribunal systems and the First-tier and Upper

Tribunal. As was noted above, and although the occasions on which it has occurred are rare, the possibility of a dissenting view, even a dissenting view which outvotes the legally qualified chairman, exists in the EAT. Are there certain characteristics associated with individual appeal tribunals which permit the possibility of non-unanimity in decision-making?

Inevitable

It is inevitable that where there is more than one participant in the decision-making process, there will be disagreement. That disagreement will usually arise as a result of a different interpretation or assessment of the evidence

which is before the appeal tribunal.

It should be rare that a non-legally qualified appeal tribunal panel member will disagree with the interpretation of the legal rules and principles applicable to the issues arising in the appeal.

Any discussion of decision-making in a judicial team has to commence with the proposition that what is ultimately desirable is unanimity.

How can such harmony be

achieved? Good decision-making begins with active and full participation by all members. Differing and competing opinions are a good thing and, in my view, assist in the resolution of difficult issues arising in an appeal. As observed in a previous article in this journal,¹⁹ ‘constructive and professional disagreement [allows] for the exchange of logical arguments and propositions in order to arrive at the correct decision’.

Accordingly, a key role of the chairman of an appeal tribunal is to ensure active participation in the decision-making process; to facilitate a full and frank exchange of views during the deliberation process; present the divergent views for analysis in an impartial manner, setting out the merits of the disparate opinions in a logical and coherent manner; and, finally, to

Any discussion of decision-making in a judicial team has to commence with the proposition that what is ultimately desirable is unanimity.

attempt to reconcile opposing views through the elimination of non-rational or inconsistent propositions. What the chairman must not do is to put pressure on the dissenting party to accept the views of the majority, particularly where the majority view accords with the chairman's own.

Principles

What, then, should happen where agreement cannot be achieved, and where the non-unanimous decision has to be, or ought to be, recorded? The following principles²⁰ ought, in my view, to apply:

- The chairman must articulate the reasons of the dissenting member as if they were his or her own. A failure to fulfil this duty is a failure of the judicial role.
- As the reasons will be prepared by the chairman, the chairman will also have the task of preparing and including the reasons of the dissenting member. It must never be the case that where the dissenting member is not the chairman, that the dissenting member is asked to prepare the reasons for disagreement. That role is for the chairman.
- In preparing the reasons of the dissenting member, the chairman must be diligent in ensuring that the reasons are reflective of the basis upon which the dissenting member disagreed with the majority. The reasons must:
 - i) Be comprehensive in dealing with the issues raised by the appeal.
 - ii) Include relevant findings in fact, where these differ from those of the majority.
 - iii) Provide an outline of the evidential assessment process.
 - iv) Detail which evidence is accepted and preferred, and give reasons why.
 - v) State, where necessary, why the dissenting member has adopted an interpretation of the law relevant to the issues in dispute.

vi) Give reasons relevant to the dissenting member's view.

- The reasons for the dissenting member's decision must never be a sketchy add-on to more complete reasons for the majority.
- The reasons must not identify the dissenting member by name or by judicial category.

Conclusion

The guidance given above may assist in those jurisdictions where non-unanimous decisions, while rare, are permitted. Other appeal tribunals that currently do not, or appear not to, permit non-unanimity might argue that the guidance is not relevant to them. Relevant to all is that unanimity requires the resolution of disagreement. Further consideration should be given as to whether forced unanimity is ever appropriate.

Dr Kenneth Mullan is a Social Security and Child Support Commissioner for Northern Ireland.

¹ See, for example, SI 1999 No 991, as amended, reg 53(5).

² See, for example, the Appeals Service Judicial Benchbook.

³ SI 2008 No 2835.

⁴ SI 2008 No 2692.

⁵ www.judiciary.gov.uk/judgments_guidance/practice_directions/tribs.pds.htm

⁶ SI 2008 No 2685.

⁷ See n1 above.

⁸ SI 2008 No 2699, r41; SI 2008 No 2686 r32.

⁹ *Social Security Legislation 2008/2009: Supplement* (2009) Sweet & Maxwell.

¹⁰ At page 403.

¹¹ Section 38 'Majority Decision', para 4.

¹² SI 2005 No 1861, Sched 1, para 28(4), as amended.

¹³ *Ibid* para 30(6).

¹⁴ [2004] IRLR 793.

¹⁵ 2008 Oxford University Press.

¹⁶ [2004] IRLR 456.

¹⁷ www.bailii.org/uk/cases/UKCAT/1994/185_93_0912.html

¹⁸ www.ait.gov.uk

¹⁹ See Mark Hinchliffe, *Tribunals* Spring 2009, pages 12–14.

²⁰ Principles derived from my decision in *C14/08-09(DLA)*.

A CHANCERY THEME WITH VARIATIONS



Nicholas Warren continues this journal's series of articles by newly appointed Presidents of the Upper and First-tier Chambers. Here, he considers the jurisdiction of the Tax and Chancery Chamber of the Upper Tribunal, and his role as its President.

WHAT'S IN A NAME? Juliet would probably not have cared much about the name of a Capulet or Montague system of summary justice. But the name of the Upper Tribunal Chamber dealing with appeals from Sir Stephen's First-tier tax chamber has caused some angst. This is in part a reflection of how the concept of the Chamber has developed.

Development

In early proposals for the creation of the Chamber, it was thought that its only business would be tax – mainly appeals from the First-tier but some first-instance decisions too. It was thought that the main work of the Chamber would be carried out by the full-time and part-time Upper Tribunal judges with little involvement of the judges of the Chancery Division who heard appeals from the Special and General Commissioners.

Further reflection led to the conclusion that the Chancery judges should retain a significant role in tax appeals. The report of the working group on the interface between the courts and the Upper Tribunal, chaired by Lord Justice Stephen Richards and dated 29 July 2008, recommended that all the Chancery judges should play a major role in hearing tax appeals in the Upper Tribunal. It was expected that, generally, they would sit alone, but there might be cases where it would be appropriate for them to sit with another member of the Upper Tribunal having specialist tax expertise. Detailed arrangements would need to be worked out on a pragmatic basis and no doubt

would evolve with experience. This is what has happened. All of the ordinary Chancery judges, four Court of Session judges and two Northern Ireland High Court judges are now able to sit in the Chamber.

Umbrella

Matters then went further. A proposal evolved for the Chamber to become an umbrella for other work having a broadly 'chancery' flavour – charities, financial services, certain pensions regulatory work and certain Land Registry-related work. Returning to names, when the Chamber opened for business on 1 April 2009, its role was exclusively tax. It started life under the banner 'the Finance and Tax Chamber of the Upper Tribunal', the name no doubt being adopted to avoid confusion with the Tax Chamber of the First-tier Tribunal. But this name was not suitable for the expanded

role. And, in spite of some resistance harking back to the clanking chains of Dickens and Bleak House, the name chosen is 'the Tax and Chancery Chamber of the Upper Tribunal' (T&CC). This represents a succinct description of the English, Northern Irish and Welsh work and satisfies the Scots for whom 'Chancery' is inappropriate.

Tax matters

The jurisdiction of the Chamber in respect of tax is primarily appellate. We have jurisdiction to hear first-instance cases (i.e. appeals from decisions of HMRC) if (i) both sides agree and (ii) the Presidents of both the Tax Chamber of the First-tier Tribunal and the T&CC concur.

The jurisdiction of the Chamber in respect of tax is primarily appellate.

I anticipate that this jurisdiction will not be frequently used. It may be appropriate to exercise it where the case raises an important point of law which almost inevitably will find its way to the Court of Appeal or Supreme Court. But I would not envisage its exercise in a case where there are serious disputes of fact. Resolution of that sort of dispute is best left to the Tax Chamber of the First-tier Tribunal. We also have a judicial review jurisdiction under section 15 (England and Wales or Northern Ireland) and section 21 (Scotland) of the Tribunals, Courts and Enforcement Act 2007. It remains to be seen how discretionary transfer of such cases from the High Court or Court of Session develops.

Charity matters

The proposed expansion of function which I have mentioned became policy and is in the course of implementation. On 1 September 2009, the functions of the Charity Tribunal were transferred to the General Regulatory Chamber (GRC). Appeals from the GRC in charity matters were transferred to the T&CC. We also have a first-instance jurisdiction in charity matters; a case can be transferred from the GRC to the T&CC with the concurrence of the Presidents of both Chambers. There is likely to be more scope for the exercise of this power (e.g. in the case of some references to the Tribunal by the Attorney-General) than in the case of tax. And we have a judicial review jurisdiction in the same way as we do with tax.

In April 2010, it is proposed that the functions of the Financial Service and Markets Tribunal and the Pensions Regulator Tribunal will be transferred into the T&CC (not into a chamber of the First-tier Tribunal). The small cadre of judicial and other members who currently sit on FINSMAT and PRT (currently the same individuals for each tribunal) will, it is expected, transfer into the new system and will continue to be available to hear cases.

The judges of the T&CC can sit to hear cases anywhere.

But, in addition, the other judges assigned to the T&CC will be available to hear such cases too; in particular, the resource represented by the Chancery judges will be available, which is not the current position. Allocation of available judges will be a matter for me as President of the T&CC enabling the most suitable judges for the case to be deployed. The future transfer of the functions of the Adjudicator to the Land Registry is still under discussion, with the Government planning to consult later in the year on proposals for whether and how it might move into the two-tier structure.

Devolution

The T&CC has in some areas a UK-wide jurisdiction. HMRC has responsibility for the collection of tax throughout the kingdom. The Tax Chamber of the First-tier Tribunal can hear appeals wherever the taxpayer is located. Similarly, the T&CC has jurisdiction to hear appeals from the Tax Chamber, first-instance cases transferred to it and judicial review applications wherever they originate.

The judges of the T&CC can sit to hear cases anywhere. In practice, Chancery Division judges, Court of Session judges and High Court judges in Northern Ireland will sit only within their own physical jurisdictions, although the Lord President and the Lord Chief Justice of Northern Ireland have kindly indicated that they will not object to my sitting as President of the Chamber. Protocols have been agreed to ensure that Scottish or Northern Irish tribunal judges will hear cases which have a particular local requirement.

The remits of FINSMAT and PRT extend across the whole UK; that will remain the case when the functions of those tribunals are transferred to the T&CC.

Charity is a devolved matter; Scotland has its own legislation. Neither the First-tier nor the

Upper Tribunal has any jurisdiction in relation to Scottish charity matters. Nor do charity matters in Northern Ireland fall within the jurisdiction of the First-tier or the Upper Tribunal.

Administrators

We have a very small, but dedicated, team of administrators who are based in Bedford Square in London. The offices are at the same address as the First-tier Tax Chamber where Sir Stephen reigns. Those staff currently continue to service FINSMAT and PRT before the transfer of their functions to the T&CC, so it is hoped that there should be a seamless transition.

As a small Chamber, we have not yet had to face the same sort of challenges as some other chambers. Our small size enables us to meet

difficulties quickly and, we hope, listen and respond to users' suggestions effectively.

Costs

One of the more difficult areas for us to address – and a difficulty shared by most if not all chambers both of the First-tier Tribunal and the Upper Tribunal – is the question of costs. The question of costs generally is under consideration. More immediate consideration is being given to costs in relation to judicial review dealt with in the Upper Tribunal and in relation to appeals to the T&CC where widely divergent views have been expressed by different stakeholders.

Mr Justice Warren is President of the Tax and Chancery Chamber of the Upper Tribunal.

OBITUARY: SIR HENRY HODGE

AS THE Summer 2009 issue went to print, we heard the sad news that Henry Hodge had died. There have been many obituaries and comments about him, all warm in their praise. We agree with everything that they say but we wanted to add a few words of our own to record the contribution that Henry made to the world of tribunals and the support he gave to JSB initiatives, in his capacities as President of the Asylum and Immigration Tribunal and as a member of the JSB's Equal Treatment Advisory Committee.

Henry's background as a practising solicitor made him acutely aware of the need for efficiency and sound management, and of the benefits of change. He needed no convincing of the merits of the now totally accepted competences scheme. Rather, he could never understand why it had not been developed earlier, especially as its performance indicators suggested that they might form the foundation of an appraisal scheme. Indeed, it was he who, at a seminar for Presidents

in 2002, asked when the JSB was going to prepare a tribunals appraisal scheme so that they did not all develop their own. That suggestion, coming from someone with his experience and background, was the stimulus that the JSB needed to develop its model scheme.

Henry contributed to several of the JSB's management courses for Resident and Designated Judges and Tribunal Presidents and he advised on the content of the courses, rightly suggesting the value of a session on leadership. Never easy to run because of its novelty and the reservations of some delegates who believed that management was not a part of a judge's responsibilities – even if they had been appointed to be managers – Henry's presentation on how he ran his own jurisdiction never failed to impress even the most doubtful colleague.

Henry is sorely missed. His openness, imagination and humour lightened and enlivened meetings, so often ensuring their successful outcome.

EVOLUTION RATHER THAN REVOLUTION



Kris Gledhill considers the differences that the overriding objective might make to the way in which judges of the First-tier Tribunal exercise their discretion, and compares the language to that used in the rules for the civil courts.

A REQUIREMENT in the procedural rules for the different chambers of the First-tier and Upper Tribunals is the need to secure the overriding objective of dealing with cases fairly and justly. This article explains the origin of this language and suggests what it might mean in practice.

Background

The Civil Procedure Rules 1998 (CPR) came into effect in April 1999. They open with Part 1, on the overriding objective, ‘enabling the court to deal with cases justly’ (r1.1(1)). What amounts to ‘justly’ is given further partial definition in rule 1.1(2), namely that it includes (which means that it is not limited to) ensuring that so far as practicable the parties are on an equal footing; that expense is saved; that the case is dealt with proportionately in light of the money involved, the importance of the case, the complexity of the issues and the financial position of the parties; that the case is dealt with expeditiously and fairly; and that it takes an appropriate amount of the court’s resources (bearing in mind other cases).

The mechanics of this overriding objective are spelled out in three further rules: rule 1.2 requires the court to ‘seek to give effect to’ it when exercising a power in the rules or interpreting a rule; rule 1.3 requires the parties to help the court in this task; and rule 1.4 requires active case management by courts to further it. Lord Justice Laws noted¹ that the CPR ‘involve a conceptual shift in the idea of justice, so that economy and

proportionality are not merely desirable aims but are defining features of justice itself. And it is not merely aspiration; it is law.’ But what does describing something as ‘law’ mean in practice? For example, what is the effect of the overriding objective being breached? Does it provide a ground of appeal? If it can be seen that it has not been secured in advance of a final judgment, does a case have to stop or is there some other consequence?

It is worth noting that the CPR approach – setting out a basic statement of principle and imposing duties on the court and parties – has flourished, both in domestic law and in foreign jurisdictions. So, the Criminal Procedure Rules 2005 (SI 2005 No 384) contain an overriding objective that ‘criminal cases be dealt with justly’ (r1.1(1)).

The scheme has also been adopted in the procedural code of some other common law jurisdictions, as far apart as Jamaica and the Eastern Caribbean and Vanuatu, and New Zealand has introduced revised High Court Rules which set out as the objective in rule 1.2: ‘The objective of these rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.’

Tribunal Procedure Rules (TPR)

In this context, it would have been a surprise had the new rules not adopted a similar format. In fact, Parliament in effect mandated that there be an overriding objective. Section 22(4) of the Tribunals Courts and Enforcement Act 2007

It is worth noting that the CPR approach . . . has flourished, both in domestic law and in foreign jurisdictions.

gives guidance as to the principles to be reflected in the TPR: they are to be phrased ‘with a view to securing . . . (a) that . . . justice is done, (b) that the tribunal system is accessible and fair, (c) that proceedings are handled quickly and efficiently, (d) that the rules are both simple and simply expressed’; and paragraph (e) refers to case management powers being conferred.

The full text of the overriding objective was reproduced on page 2 of the summer 2009 issue of this journal. The same language can be found in the rules promulgated for the First-tier Tribunal, namely the rules for the Health, Education and Social Care Chamber², the Social Entitlement Chamber³, the War Pensions and Armed Forces Compensation Chamber⁴, the Tax Chamber⁵, the General Regulatory Chamber⁶, and also the Upper Tribunal⁷.

Comparison with CPR

In the first place, the basic aim in the TPR is phrased as dealing with cases ‘fairly and justly’ whereas the CPR refers only to ‘justly’. It is difficult to suggest that this makes any difference: at most, ‘fairly’ refers to the need for fair procedures to be followed whereas ‘justly’ refers to the substantive decision. But courts have to apply the rules of natural justice and operate fairly in any event. Moreover, the CPR also indicates expressly that dealing with a case fairly is part of the definition of what is just: see rule 1.1(2)(d). Secondly, the TPR includes a partial definition of what amounts to ‘fairly and justly’, just as the CPR partially defines what amounts to ‘justly’: various factors are listed, but in a non-exclusive way, which means that other factors may be relevant: see rule 2(2) of the different rules listed above.

Equal footing

Thirdly, some of the features expressly mentioned in the TPR as relevant are similar to those mentioned in the CPR. There are also some variations, but this is due to differences between the jurisdictions being exercised. So included in the CPR but not mentioned in the

TPR is the need to put the parties on an equal footing. This reflects the fact that litigation in the civil courts remains an essentially adversarial matter in which the role of the court is to adjudicate between the competing parties.

Tribunals often deal with matters involving the relationship between the citizen and the state. Although the presence of a branch of the executive as a party in the tribunal setting means that the need to ensure that the parties are on an equal footing is not necessarily absent, it is often thought that a different ethical approach applies to those representing the state, namely the presentation of arguments in a more neutral than adversarial manner. Moreover, the absence of an express reference to ensuring that the parties are on an equal footing does not prevent a tribunal seeking to secure it if necessary to deal with a case justly and fairly.

There is some case law from the European Court of Human Rights that suggests that special procedural steps might have to be taken in order to compensate for any disadvantages a vulnerable party might face.⁸ This helps to explain the TPR’s express reference to ensuring that the parties can participate fully, avoiding formality and encouraging flexibility: but if the facts require steps to ensure an equal footing as well as full participation, that can be secured under the rubric of achieving the overriding objective.

Proportionality

The CPR notes that ‘saving expense’ is a component of being just; the TPR simply refers to the need for proportionality in relation to anticipated costs. This different emphasis presumably reflects the major concern behind the CPR that the costs of litigation prevented people from accessing the courts unless they were very wealthy or had legal aid. As tribunals regulate public law issues, too great an emphasis on saving money could be seen as a bar to tribunals effectively regulating the state, and so the test of proportionality is more appropriate.

A more general proportionality test is mentioned in both the CPR and the TPR: the importance of the case, the complexity of the issues and the resources of the parties feature in both. The CPR also refers to the amount of money involved, which is not mentioned directly in the TPR, as money will not always be in issue. When it is, the amount involved, including any effects on other citizens with a similar claim – if the case is a test case – can no doubt be a feature of the importance of the case.

Avoiding delay

The CPR’s reference to the need for expedition is in a modified form in the TPR, which mentions the need to avoid delay so long as that is compatible with the proper consideration of the issues. Again this is understandable given the public law role of tribunals and the need to avoid any suggestion that scrutiny of the executive is undermined by a lack of thoroughness.

An express feature in the TPR that does not appear in the CPR is the need to make effective use of the special expertise of the tribunal, which again reflects the special features of the tribunal jurisdiction.

Making effective use of this special expertise may also imply a need to allot an appropriate share of judicial resources, which in turn must take into account the effect on other cases. This is an express factor in the CPR but not in the TPR. The failure to mention it expressly may be to avoid any impression that any inadequacy of resources available to the tribunal can be taken into account by it in deciding to give less thorough consideration to a case than is merited.

Case management

The CPR and TPR have similar mechanics for giving effect to the overriding objective. Case management powers are available to the tribunal in deciding on the conduct of the case, and the parties have to assist in this process. As

to the obligation imposed on the tribunal, the rules of natural justice were designed to ensure fairness, and so a rule requiring the tribunal to secure that objective should not reflect any change in approach. Nor is the emphasis on judicial case management novel, because it was part of case law, e.g. the Mental Health Tribunal Rules 1983 did not have a section headed ‘case management powers’ or a duty to achieve justice in the exercise of such powers, but there were such powers (relating to listing and the making of directions)⁹ which had to be so used.

The duty of the parties to cooperate with securing the overriding objective is phrased slightly differently in the two sets of rules. The CPR require the parties to cooperate ‘with

each other in the conduct of proceedings’, whereas the TPR simply refer to the need to help further the overriding objective. But if this entails cooperation between the parties, then that is what must be done. To give an example, an adversarial tactic might be not to point out gaps in evidence in advance in the hope that advantage can be taken of that at a hearing. If the overriding objective

suggests that an adjournment would be granted to allow additional evidence because that would be necessary to deal with the case justly, then a party who noticed the gap in advance but did not point it out could be the one criticized for not helping to secure the overriding objective.

Wales

The mental health functions of the HESC Chamber are mirrored by the separate Mental Health Review Tribunal for Wales. Its procedural rules¹⁰ contain an overriding objective that the tribunal be enabled ‘to deal with cases fairly, justly, efficiently and expeditiously’ (r3(1)). Missing from the express language of these rules, when compared with the TPR, is the need to deal with cases in a manner

The duty of the parties to cooperate with securing the overriding objective is phrased slightly differently in the two sets of rules.

proportionate to the importance of the case, complexity of the issues, costs and resources, although the express list is non-exclusive. What is also missing from the mechanics of the Welsh rules is an express requirement on the parties to cooperate.

There is, of course, no reason why the rules in Wales should be identical. The statutory basis for the rule-making power is different, being the Mental Health Act 1983 rather than the 2007 Act, which does introduce some additional powers¹¹. Having said that, there is no obvious reason why two bodies exercising the same statutory powers as to the merits of the decision¹² should operate under different regimes. It is also to be noted that the Mental Health Review Tribunal for Wales has an appeal route to the Upper Tribunal, and that this is by way of delegated legislation¹³, which inserted section 78A into the 1983 Act. Since this delegated legislation was used to make significant procedural changes, such as altering the appeal routes, it could easily have made changes to ensure that the procedural framework was identical.

What difference does it make?

In summary, the TPR require that the chambers of the Tribunal secure a just result and do so in a manner that follows the requirements of a fair procedure: but the predecessor bodies had a similar obligation. Accordingly, an initial reaction might be that the reference to an overriding objective merely makes express in the procedural rules what was previously express in the case law. But can it have been the intention of Parliament or the Rule Committee to effect no change in substance? Rather than a radical change, the inclusion of the overriding objective is an example of a trend in the way that statute law is structured, making use of statements of principle to guide exercises of discretion.

A conclusion that the overriding objective is more of a restatement than a change in substance also provides an answer to questions such as what is the remedy for a breach of the overriding objective? Rights to appeal or review will still turn on the question of whether there was a lawful exercise of a discretion, including whether it compromised the fairness of the process or led to a result that was not just, but the language of the challenge might be that there was a failure to secure the overriding objective.

Cooperation

But what of the duty of the parties to cooperate: isn't that a new feature? In his major academic treatise on the CPR, *Zuckerman on Civil Procedure, Principles of Practice*¹⁴, Prof Zuckerman notes that:

'Before the CPR, parties . . . were free to treat any approach from an opponent with disdain.'

'The duty to cooperate with each other is one of the most significant cultural changes brought about by the CPR. Before the CPR, parties had no comparable duty . . . [T]hey were free to treat any approach from an opponent with disdain.'

In contrast, the new regime requires reasonable requests for matters such as disclosure to be responded to without the need to wait for a court order. Clearly, a significant aim of the CPR was a change of ethos: but does this mean a change in the law? And how does this apply in the different, public law jurisdiction of the TPR? It may be that encouragement to recognise the new ethos will be secured by a different approach to ancillary matters such as costs. Section 29 of the 2007 Act makes it clear that the tribunal has extensive powers in relation to costs, although it is to be noted that section 29(3) indicates that the question of costs is subject to any provision in the relevant TPR.¹⁵ This will no doubt be the main method of ensuring that there is conduct that meets the requirement to cooperate with the overriding objective. So while the imposition of the duty to cooperate may be significant in relation

to ancillary matters, it is not something that changes the content of what is considered just and fair. A recalcitrant party was never in any good position to contest the fairness of a decision reached in difficult circumstances brought about because of his or her obstinacy, and that has not changed by virtue of the overriding obligation.

Nothing here should be taken as a criticism of the inclusion of the overriding objective or its content: any provision designed to ensure that the task of securing justice and fairness is not just a theoretical aim but a practical reality is to be applauded. But, since that is such an obvious desire of any procedural regime, any claim that new provisions will transform this practical goal will lead the obvious question of why it was not done long before. In truth, the express statement of

the overriding objective is a matter of evolutionary progress rather than revolutionary change.

Kris Gledhill is a member of the Auckland University Law School.

¹ In the preface to the Civil Court Service (Jordans, 1st Ed).

² SI 2008 No 2699.

³ SI 2008 No 2685.

⁴ SI 2008 No 2686.

⁵ SI 2009 No 273.

⁶ SI 2009 No 1976.

⁷ SI 2008 No 2698.

⁸ See *Megyeri v Germany* (1992) 15 EHR 584.

⁹ See *R (B) v MHRT* [2003] Mental Health Law Reports 19.

¹⁰ SI 2008 No 2705.

¹¹ For example, the power to seek a review of a decision.

¹² 1983 Act ss72 and 73.

¹³ SI 2008 No 2833.

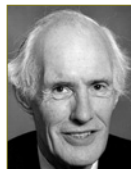
¹⁴ Sweet and Maxwell 2006, at p41.

¹⁵ See, for example, SI 2008 No 2699, r10(1) and (2).

RETIREMENT OF LORD NEWTON

TONY NEWTON stepped down as chair of the Administrative Justice and Tribunals Council (AJTC) on 1 September 2009. He was replaced by Richard Thomas, as we reported in the last issue. Tony had been in post for almost 10 years, as chair of the Council on Tribunals (CoT) from October 1999 and then in the same role from November 2007, when the CoT was replaced by the AJTC. During the whole of that time, Tony was a great friend and supporter of the JSB's tribunal initiatives, and to this journal.

The CoT, and the AJTC, have always had much wider agendas than the JSB. The JSB's emphasis has always been on judicial skills and the development of high standards of training. Tony's commitment to and enthusiasm for the tribunal system, in particular for the experience of users, gave immeasurable support and encouragement to the JSB as it developed its competences, training, appraisal, mentoring and evaluation frameworks.



In part that was because those frameworks complemented the CoT's own framework of standards. Equally, though, Tony had established an excellent working relationship with Mr Justice, now Lord Justice, Jeremy Sullivan, the then chair of the JSB's Tribunals Committee. Jeremy was invariably invited to make a contribution to the CoT annual conference, which had grown into a valuable event for hearing about the Council's initiatives and also a place to meet key colleagues in the tribunals world. For his part, Tony attended the JSB's seminars and contributed to discussions, directly or through colleagues, as JSB projects developed.

More recently, he has participated in the JSB's wider role as a member of its Advisory Council. That mutual trust was particularly valuable as the tribunals world changed, Tony's commitment to tribunal reform having been instrumental in getting the Government to take it seriously and bring those changes about.

WHAT IS THE RISK OF FUTURE HARM?



Hilton Leslie (left) and *Julia Long* describe the legal framework under which the recently established Independent Safeguarding Authority makes decisions on whether to bar an individual from working with children or vulnerable adults.



Following the murder of two young children by a school caretaker in Soham in 2002, an inquiry by Sir Michael Bichard highlighted a number of weaknesses in recruitment practices for employing people to work with children. The inquiry's 31 recommendations led to the Safeguarding Vulnerable Groups Act 2006.

The Act introduced the Vetting and Barring Scheme, whose aim is to reduce the incidence of harm to children and vulnerable adults by helping to ensure that:

- Employers benefit from an improved vetting service for those who work with children and/or vulnerable adults.
- Those who are known to be unsuitable are barred from working with children and/or vulnerable adults at the earliest possible opportunity.

The Criminal Records Bureau continues to be responsible for applications and monitoring, while a new body – the Independent Safeguarding Authority (ISA) – is responsible for decision-making and the maintenance of two barred lists for working with children and vulnerable adults.

The legislation

The ISA has the power under the Act to include a person in either its children's or adults' barred lists:

- Automatically, with or without the right to make representations.
- On the grounds of behaviour, with the right to make representations ('relevant conduct').

- On the grounds of an anticipated future 'risk of harm', with the right to make representations.

In automatic barring cases, which follow the commission of serious sexual or violent offences, the ISA checks whether the criteria are met and acts accordingly. In discretionary decisions, the ISA must ascertain whether certain criteria are met and, if they are, whether it proposes to bar, in which case it must seek representations from the referred party. Having received representations, the ISA must ask whether it remains satisfied that the relevant criteria are met, and if it still believes that it is appropriate to bar, it must do so.

Discretionary barring decisions are not formulaic and require a number of difficult judgements. This has been a major challenge for the ISA. The majority of barring decisions are made by the ISA's trained caseworkers. With this in mind, the ISA has designed a universal five-stage barring decision-making process that reflects the legislative phases and delivers greater consistency and transparency in decision-making, as well as allowing for better targeting of specialist resources and internal quality assurance systems.

Stages

Stage 1 is purely a sifting process. Judgements must be made about which cases the ISA really needs to look at. Stages 2 and 3 are the 'engine room' of the process, where everything necessary is done before the ISA decides whether it is 'minded to bar'. Stages 4 and 5 are concerned with seeking representations from the individual and their impact once received.

Gathering evidence

In Stage 2 the ISA gathers relevant evidence and makes findings of fact in relation to the primary allegations applying the civil standard of proof. The ISA will not go behind convictions or cautions, and can adopt findings of fact made by certain listed bodies, but otherwise must make its own findings.

There is, of course, no scientific formula to help judge whether the balance of probabilities is satisfied. Caseworkers are required to carry out a rigorous analysis of the evidence and to set this out cogently. There are escalation mechanisms for difficult cases.

Stage 2 establishes which of the discretionary barring powers are potentially relevant, but the ISA will not yet be ready to make a decision. During Stage 3, the findings of fact and relevant evidence are subject to a risk assessment, after which the ISA decides whether it is appropriate to bar.

Risk assessment

The risk assessment follows a structured method which is the most reliable in assessing future risk. This process is itself a complex decision-making tool involving a number of steps. Essentially, it seeks to enable defensible decisions in relation to three questions fundamental to the issue of barring:

- 1 What is the level of presenting risk of future harm that an individual poses?
- 2 Does the level of risk initially indicate that barring is an appropriate response?
- 3 If so, is it appropriate to include the individual in one or both barred lists?

To assess the level of risk that an individual presents, caseworkers analyse the case material in relation to the presence, or indeed absence, of proscribed risk factors across four fields which, in very general terms, relate to:

- 1 An individual's harm-related interests.
- 2 The degree to which they espouse any harm-endorsing attitudes.
- 3 The extent to which they engage with effective pro-social influences.
- 4 Their general level of stability and self-control.

All these fields comprise 'clusters' of risk factors for future harm. So, for example, within the first field, caseworkers will assess the extent to which the ISA can defensibly conclude the presence of any significant sexual interest that has contributed to harmful behaviour. They will also assess the material in relation to how

far it speaks to the presence of an 'intense interest in violence' or indeed any other interest in the full range of harm that is relevant to ISA decision-making, such as financial harm and acts of omission and neglect.

All these risk factors are to a greater or lesser extent predictive of repeat harm.

All these risk factors are to a greater or lesser extent predictive of repeat harm. Without establishing that 'relevant conduct' has in fact happened, many of the risk factors could not be defensibly assessed. All risk factors are also assessed according to strict criteria relating to the degree to which they are concerning.

It is only once caseworkers have assessed the presence or absence of all risk factors across the four fields that they are in a position to make an assessment of the level of future risk presented by the individual, based upon the range and severity of the risk factors identified. Guidance is followed on considering whether those individuals who demonstrate a greater range of concerning risk factors merit barring on one or both lists.

Which list?

The decision relating to the particular list on which to include an individual is not based simply on past incidents, but on the pattern

of risk factors, including assessing a series of scenarios involving access to children or a range of vulnerable adults on their likelihood to aggravate or mitigate an individual's risk given the presenting pattern.

There is a considerable degree of 'crossover' among sex offenders, so that a significant proportion of child-sex offenders will admit to having thought about or perpetrated sex offences against adults and vice versa. It would therefore be potentially dangerous to make the simplistic assumption that individuals that have harmed children, for example, only pose a risk to that group.

Substantive decision

Stage 3 concludes with the substantive decision on whether it is appropriate to bar, which is taken after considering all the circumstances of the case, including the outcome of the risk assessment. The essence of 'appropriateness' is whether barring is a proportionate response to the risks. A range of factors, not all of which are necessarily risk-related, are relevant in assessing proportionality. There will be exceptional cases where it is reasonable to take public confidence considerations into account.

'Minded to bar'

If the ISA is 'minded to bar' on one or both lists, a letter is sent to the individual with the aim of providing an effective but not unduly complex summary of what the ISA proposes to do, why, and what the person must do – namely, provide representations. Copies of the documents upon which the ISA is basing its decision are sent with the letter.

The response to the letter determines what happens in Stage 4. If no representations are received, or the representations do not substantively address the findings or reasons set

out in the letter, the individual is barred. Where the representations genuinely raise doubts, the caseworker must re-do Stage 2 or 3 (or both) as appropriate. Finally, in Stage 5 the individual receives notification from the ISA of its final decision, with reasons.

Appeals and reviews

Under section 4 of the 2006 Act, decisions are subject to appeal directly to the Administrative Appeals Chamber of the Upper Tribunal on the grounds of an error of law or finding of fact. The retention of the 'appropriateness' assessment to the exclusive discretion of the ISA is a new, and for some controversial, feature of this scheme. At the heart of the debate is the policy question of who, ultimately, is best placed to make barring decisions – a court or an independent body of experts. Parliament has expressed favour for the latter in section 4(3) of the Act, the effect of which is to create a review jurisdiction only. Legal argument may focus on whether the European Convention of Human Rights demands otherwise.

At the heart of the debate is the policy question of who, ultimately, is best placed to make barring decisions – a court or an independent body of experts.

A barred person has the right to apply for a review after a prescribed 'minimum barred period'. In general terms this is one year if he or she was under 18 when barred, five years if he or she was between 18 and 25, and 10 years if 25 or older. An application for a review may only be made with the ISA's permission. The 'test' is whether the person's circumstances have changed sufficiently to warrant a full review. This right to apply for a review is in favour of the individual; it does not affect the inherent power of the ISA to review a barring decision on its own initiative in exceptional circumstances, for example where it becomes aware of information that shows that a barring decision is probably wrong.

Hilton Leslie is the ISA's legal adviser.
Julia Long is its specialist case adviser.

CONSISTENT AND COHERENT

Libby Arfon-Jones describes the recent recommendations of the Tribunals Judiciary Welfare and Appraisal Group, and why appraisal is an important part of a welfare strategy.



AS WELL AS being a mechanism for support and a means of identifying both individual and general training needs, appraisal is an objective and transparent method of providing relevant and up-to-date information on judicial competence and performance. As such, it will play an important role when chamber presidents consider cross-ticketing and cross-assignment of judicial colleagues.

An updated set of appraisal standards for tribunals has been drafted in conjunction with the JSB, against which all appraisals should be measured. They are supplemented by a set of appraiser competences, defining what a good appraiser should aim to achieve and encouraging a common approach to the role. The proposed new standards and competences are now subject to a period of consultation, with the aim of finalisation at the end of 2009.

A new seminar will familiarise experienced appraisers with the new competences and enable them to discuss and practise aspects of the appraisal process – writing the report and the provision of feedback to appraisees having been identified as the most challenging.

Further recommendations of the Group include:

- Mandatory induction training for appraisers and refresher training every three years – preferably multi-jurisdictional – to promote consistency, and the exchange of ideas, experience and best practice across jurisdictions.
- A first appraisal for new appointees after a year, or a sufficient number of sittings to be meaningful, with at least a three-year cycle thereafter.
- An initial appraisal where a tribunal judge is ticketed or assigned into another jurisdiction,

regardless of whether or not there has been a recent appraisal in another jurisdiction.

- A minimum of two written decisions should be considered by the appraiser when reviewing the standard of decision-recording.
- Two possible outcomes for an appraisal – ‘satisfactory’ and ‘developmental needs identified’.
- That proper budgetary provision is made for appropriate administrative support to facilitate the process and to provide effective record-keeping.
- Though currently aspirational, that all tribunal judges should be appraised on the same criteria – salaried and fee-paid, legal and non-legal – with a clear dispute resolution mechanism in place.
- There should be greater clarity on the processes relating to illness or stress and performance issues.
- All salaried judges should have an annual or biennial interview with the judge with pastoral responsibility, with fee-paid judges being invited to complete a questionnaire and offered an interview on request.

Libby Arfon-Jones is a Deputy President of the Asylum and Immigration Tribunal and a member of the Tribunals Judiciary Welfare and Appraisal Group, which advises the Senior President on his statutory duties relating to welfare.

Where to find tribunal case law

The easiest location for the developing jurisprudence in most tribunals is the website of the British and Irish Legal Information Institute. Go to www.bailii.org and scroll down to the list of reported tribunal decisions.

AN INDEPENDENT ROLE

Edward Cousins and *Robert Abbey* describe the nature of some of the disputes referred to the Adjudicator to Her Majesty's Land Registry and the unforeseen workload that has resulted.

THE ADJUDICATOR to Her Majesty's Land Registry is a comparatively new post created by the Land Registration Act 2002. The Adjudicator is an independent statutory judicial office-holder appointed by the Lord Chancellor, whose role is to deal with contested applications that cannot be resolved by agreement between the parties.

Article 6

Article 6.1 of the European Convention on Human Rights provides for a fair and public hearing in civil cases. Before the creation of the Adjudicator, his functions were performed by the Solicitor to HM Land Registry, who was seen as insufficiently independent of the Land Registry. Apart from its independence, the principal benefit of adjudication is that it obviates the need for expensive High Court or county court proceedings.

Thus, the Adjudicator deals with disputed land registration applications referred by Land Registrars to the Land Registry. The Adjudicator has also been given a new original jurisdiction dealing with applications for rectification or setting aside of certain documents in the case of registered land. In due course, he will also deal with appeals by conveyancing practitioners against decisions of the Chief Land Registrar in relation to agreements allowing solicitors electronic access to the Land Registry for the purposes of e-conveyancing.

Types

The types of cases referred to the Adjudicator cover the following topics:

- Adverse possession – squatters' claims.
- Boundary disputes.
- Trusts or beneficial interests claims, usually from a non-owning spouse or partner.

- Charging orders – claims against a registered title by a creditor of the registered proprietor.
- Disputes regarding easements and rights of way.
- Forgery and fraud disputes.
- Mortgage and charge disputes.
- Alteration – or rectification, described below.
- Trustee in bankruptcy cases.

Deputies

The Adjudicator has appointed three full-time Deputy Adjudicators and 30 part-time Deputy Adjudicators, authorised to undertake any or all of his functions. All are either barristers or solicitors and specialists in land law.

The Adjudicator can either determine applications made or matters referred to him from the papers submitted, or hold a hearing. His determination is enforceable as an order of the court. This means that a court can deal with non-compliance as contempt. Hearings are held in public unless the Adjudicator is satisfied that it is just and reasonable to exclude the public.

Rules

Rules regulating practice and procedure cover:

- When hearings are to be held.
- Requiring persons to attend hearings to give evidence or to produce documents.
- The form in which decisions are to be given.
- Payment of costs.
- Wasted costs orders.

The Adjudicator can direct a party to the proceedings before him to commence proceedings in court within a specified time and can refer the whole proceedings or specific issues to court. Currently, a right of appeal from an Adjudicator's decision lies to the High Court.

The workload is substantial and there are currently approximately 1,900 active cases.

Rectification

Interestingly, there have been fewer than 30 rectification cases each year, the largest total being 28 such cases in 2007 and again in 2008. This is surprising as rectification can be both cheaper and quicker than the conventional route through the courts. The power is the same as that exercised by the High Court. Unless the Adjudicator rejects the application on the basis that it is ‘groundless’, he will take steps to prepare and conduct full hearings to consider rectification.

Rectification cases can include examples of failures of legal practice, such as where a local authority sold a property under the right to buy scheme as a freehold when it should have been a leasehold title. There have also been errors as to the extent of land being transferred, such as a coal cellar excluded from a property even though access was only available through the subject property, and some frightening examples of gross errors, such as selling two properties when intending only to sell one.

Wide range

Adverse possession forms a substantial proportion of the Adjudicator’s workload. There are numerous causes for these kinds of claims made by squatters. These include poor conveyancing practice such as bad plans, the property not being described properly in the drafting of conveyancing deeds and mistaken conveyancing, such as a mistake of fact when the same land is dealt with twice.

The next area of importance is boundary disputes, which follow on from adverse

possession claims in also occurring for reasons such as poor plans, poor descriptions and duplicate conveyancing. It is a sad reflection upon the nature of society today that many of these cases involve tiny areas of land and yet the parties to the dispute are prepared to incur substantial legal bills and costs that are out of all proportion to the actual value of the land in dispute.

Trusts or beneficial interest claims also produce a large volume of referrals to the Adjudicator. In most cases they arise out of an application to register a protective entry (called a restriction) where a non-owning partner asserts an interest by virtue of contributions made to the other partner’s property. The problem for the Adjudicator in these cases is that he can only order a protective registration and cannot make orders for sale and other ancillary orders. For this reason many of these cases are referred by him to court.

Growth

This tribunal jurisdiction has grown substantially since its inception, giving rise to an unforeseen workload that has made the appointment of many part-time and full-time Deputies necessary. The nature of the disputes referred to the Adjudicator highlights many apparent deficiencies in legal practice and similarly highlights the failures of conveyancers to properly protect their client’s interests. The Adjudicator is seen as independent but that he has limited powers in what he can do for parties before him such as non-owning spouses where he cannot make property vesting orders.

Edward Cousins is the Adjudicator to HM Land Registry and Professor Robert Abbey is a Deputy Adjudicator.

The number of disputes referred to the Adjudicator by the Land Registry:

- 2004 – 1,298*
- 2005 – 1,906*
- 2006 – 1,736*
- 2007 – 1,631*
- 2008 – 1,744*
- 2009 – 640*

(2009 to 15 May and equivalent to an annual total of 1,700/1,750)

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- 1 To provide articles to help those who sit on tribunals to maintain high standards of adjudication while remaining sensitive to the needs of those appearing before them.
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