



Bar Council response to the Civil Justice Council's Property Disputes Working Group discussion paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Civil Justice Council's (CJC's) Property Disputes Working Group discussion paper.¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council recognises that the present distribution of jurisdiction between the First-tier Tribunal and the County Court is complicated and gives rise to confusion and frustration on the part of users. The Bar Council welcomes the CJC's initiative to consider ways of rationalising and improving the present positions.
5. The Bar Council considers that proposals for the better use of judicial and administrative resources must be assessed against the following four overriding principles:
 - a. The proposals should not have any adverse effect on access to justice
 - b. There must be clarity for litigants as to how the proposals will affect their case
 - c. The proposals, including those for any pilot scheme, must be procedurally robust, and

¹ Civil Justice Council (2015) Property Disputes Working Group discussion paper. Received by email 22 December 2015.

- d. The proposals must be capable of being applied efficiently throughout England and Wales (to the extent that they are intended to ultimately apply to all geographic areas).

Access to Justice

6. The Bar Council considers it fundamental that any proposed changes should not affect litigants' access to justice. Access to justice can be affected as a matter of a quantifiable restriction of the litigant's access to the court or tribunal, for example through fees considerations or geography, or as a matter of apparent restriction on access to justice, through access being made more difficult for litigants as a result of complex or confusing procedure.

7. Many of the jurisdictional areas the Working Group has considered in its Discussion Paper (for example those concerning leasehold disputes and mobile homes) often involve litigants of modest and/or limited means.

8. As the Discussion Paper recognises the fees and costs regime of the First-tier tribunal and the County Court are very different. Fees in the First-tier Tribunal are significantly lower than in the County Court. In the First-tier Tribunal a party that has not conducted the litigation unreasonably will ordinarily have no liability for another side's costs. In the County Court the losing party is expected to pay both sides costs.

9. The lower fee regime and narrower costs jurisdiction in the First-tier Tribunal are important for ensuring that those wishing to seek the First-tier Tribunal's determination of a dispute are not put off by the money they must find to start proceedings or the risk of adverse cost orders.

10. The Bar Council considers that the existing statutory powers to transfer claims from the County Court to the First-tier Tribunal (under section 176A Commonhold and Leasehold Reform Act 2002 and section 231B Housing Act 2004) but not vice versa promotes access to justice.

11. The Bar Council considers it vital that any proposals for reform preserve the present financial arrangements for litigants bringing claims in the First-tier Tribunal.

Clarity for Litigants

12. It is the Bar Council's view that it is of paramount importance that the CJC have in mind the position of litigants in person within the jurisdictions of the County Court and the First-tier Tribunal when developing any new approach. Many of the parties appearing before the First-tier Tribunal are unrepresented either through choice or because they cannot afford representation. Often non-lawyer representatives appear in the First-tier Tribunal. It is important that the proposals do not give rise to uncertainty or confusion, especially to unrepresented parties.

13. The proposals in the Discussion Paper risk causing uncertainty or confusion for users at two levels.

14. Firstly, the Civil Procedure Rules (CPR), and the body of case law interpreting and explaining them, are more complicated than the First-tier Tribunal (Property Chamber) Rules 2013. This may itself have an adverse impact on access to justice.

15. Secondly, any assimilation of the two tribunals' jurisdictions will give rise to uncertainty as to when and how new case management powers will be exercised.

16. The problems of uncertainty will not only face those without representation. Where a case is being conducted by a non-legal expert (for example a valuer or surveyor) it is not likely that they will have the necessary familiarity with the CPR to be able to assist their clients to the same extent as they can under the First-tier Tribunal procedural rules.

17. Further, represented parties expecting to conduct proceedings under the County Court's costs regime may have a sense of grievance if their proceedings become subject to the more relaxed regime of the First-tier Tribunal.

18. Although these problems can be mitigated by rules and guidance, the challenge of producing rules that are clear and achieve fairness and certainty in these already overly technical areas is clear. The challenge will also have to meet the fact that litigants in person require clearer and less 'legalistic' guidance. It is the Bar Council's view that while this hurdle is not insurmountable, it is significant.

Procedural Robustness

19. Both the First-tier Tribunal and the County Court are creations of statute. It is obviously essential that proposals for rationalisation fall within the powers and jurisdictions conferred by Parliament.

20. The Bar Council doubts that the equivalence of First-tier Tribunal Judges and County Court judges described in paragraph 20 of the Discussion Paper is sufficient to confer the procedural powers proposed in paragraph 22 of the Discussion Paper. Parliament has legislated in this area (see paragraph 9 above) and the powers conferred do not appear to be wide enough to confer the case management powers proposed.

21. The Discussion Paper does not explain how the pilot exercise will be conducted. Unless the exercise is to rely on the consent of the parties, thought must be given to the extent to which amended legislation is needed.

22. Other procedural issues that must be clarified are the need to ensure that both tribunals are seized of the dispute (a point recognised in paragraph 23(d) of the Discussion Paper) and the differing routes of appeal between the First-tier Tribunal and the County Court (a point identified in paragraph 6 of the Discussion Paper).

Nationwide applicability

23. There is a concern that the proposal put forward, while workable in London or Cambridge, may not be readily transferrable to the remainder of the country. There are currently 173 County Court hearing centres in England and Wales. This can be contrasted to the five First-tier Tribunal (Property Chamber) regional offices. These geographic concerns are on two bases: (i) expertise of the court or tribunal and (ii) enforceability of decisions.

24. The advantage of the First-tier Tribunal (as identified in paragraph 5 of the Discussion Paper) is that there are expert panel members who can deal with questions of valuation, housing conditions and disrepair, agricultural issues and environmental health. A County Court judge cannot readily deal with these questions and issues within the same expertise and skill. If the intention of the proposal is that County Court judges would be able to reconstitute themselves as a tribunal in an appropriate case (as suggested in paragraph 21 of the Discussion Paper) then there will need to be adequate provision for the expert wing members necessary to attend at the relevant County Court centre. The current proposal does not account for or consider the practical and logistical issues involved in terms of listing and travel to ensure that litigants have their cases heard by the correct tribunal.

25. The second issue in relation to the applicability of the decisions throughout England (and Wales) relates to the availability of all remedies in both jurisdictions (as anticipated in paragraphs 7 and 21 of the Discussion Paper). The issue of remedies is discussed in more detail below. In order to enforce any decision bailiffs and other Court officers are usually required in addition to the order of the Court. If First-tier Tribunal judges are to be able to grant remedies beyond determinations or declarations, then there should also be the appropriate resources to enforce those remedies. As a matter of pure practicality the physical transfer of papers and orders from one office to another may slow down and complicate enforcement. It is hoped that the pilot scheme would flag any such challenge. However, the Working Group is asked to note that as the Eastern regional office is in the same building as the Cambridge County Court, it may not offer a useful pilot in relation to this particular issue.

Discussion paper questions

Question 1 – At paragraph 15 of the discussion paper, three broad options are given. These are:

- a) to do nothing, and continue with the existing system**
- b) by using flexible judicial deployment, to modify and extend the powers of the judges of the tribunal and the county court to move between those roles when hearing such cases.**
- c) to establish a new housing court or tribunal to deal with all matters concerning housing and property.**

Which of these options would you favour and, briefly, why?

26. The Bar Council is broadly supportive of option (b), but this is subject to the overriding principals set out above.

Question 2 – Are there jurisdictional areas not identified in the paper where flexible deployment might be used?

27. The Bar Council is aware that the Chancery Bar Association and Property Bar Association have both been consulted in relation to the proposal put forward. We therefore do not consider it necessary to answer this question, which relates primarily to matters of substantive law, but hope to assist the Working Group by focusing on ‘higher level’ issues that affect all litigants.

Question 3 – During the course of its discussions, the group considered that the following areas of dispute should remain within the jurisdiction of the county court. Do you agree with that assessment, and if not, why not?

- a) Claims for possession in relation to both mortgages and tenancy agreements
- b) Unlawful eviction
- c) Business Tenancy renewals under Landlord and Tenant Act 1954

Are there other areas that you believe should remain the sole preserve of the County Court? Please give reasons.

28. It is agreed that matters relating to possession should remain within the sole preserve of the County Court. Where there are fundamental questions of a person’s right to their home or business this should, in our view, be determined by the Court. There are also questions of enforcement which mean that the County Court is best placed to deal with these issues. It is further agreed that unlawful evictions should remain the sole preserve of the County Court on the same basis.

29. In relation to business tenancy renewals, it is noted that different considerations would apply to opposed hearings, where the same possession issues noted above arise, and unopposed tenancy renewals, which settle in the vast majority of cases. In terms of the later, the status quo is obviously that the directions of the court act as a backdrop to negotiations and are often used to keep those negotiations on track and moving forwards. It is the Bar Council’s view that the current status quo works, and also that it would be inappropriate to transfer such cases to the First-tier Tribunal (Property Chamber) which deals with residential and agricultural cases.

Question 4 – A number of practical issues are identified in the paper which will need resolution. These include:

- (a) Costs shifting – this is an area where the powers of the court and some parts of the Property Chamber differ How large a hurdle is this likely to be, in your view, in the flexible deployment of a judge between the two jurisdictions when hearing an individual case? Might it prove a barrier – perceived or otherwise - to accessible justice for litigants in mixed cases? Are there possible solutions to that?

(b) Procedural Rules: the county court and the tribunal operate under two distinct sets of rules of procedure. Again, how large a hurdle is this likely to be, in your view, in the flexible deployment of a judge between the two jurisdictions when hearing a case? And how might that hurdle be overcome?

(c) Remedies: the remedies available to the county court and the tribunal differ, for example in the power of the court to award damages and to make orders for specific performance. Again, might the mixture of such powers be a benefit – or instead prove a barrier – perceived or otherwise - to accessible justice for litigants in cases of this kind? And are there solutions to that?

30. In relation to costs shifting there is clearly a difficulty that will arise where a case commences in the County Court and then moves to the First-tier Tribunal. Any prior costs orders in the County Court should follow the CPR; however, it will be unclear whether those costs can still be recovered in the First-tier Tribunal, and if so on what basis.

31. The current statutory framework ensures that there will only ever be a 'shift downwards' in terms of costs; i.e. that a party's potential liability will decrease when a case is transferred to the First-tier Tribunal. We query what would happen if a case was transferred or re-transferred to the County Court. Would costs be dealt with for each part of the case on the basis of the particular jurisdiction? How would such costs be divided up? At what stage would costs determinations need to be made? How could earlier costs be determined (on a costs shifting basis) without taking note of the final determination of the case?

32. There is a concern that issues in relation to costs will give rise to access to justice issues, as noted above. The expectation of a litigating party that they will recover their costs, or alternatively that the parties will bear their own costs, will have a serious and at times determining influence on whether a party decides to bring a claim. We are concerned that if the costs issues are not adequately addressed there would be a reduction in the number of meritorious claims brought and determined. We do not consider that a reduction in the number of claims for a reduction's sake is an adequate approach to justice. Parties must feel that they can access a Judge or Tribunal to determine their case if such a determination has become necessary (through ADR not working or because a determination is needed to pursue a remedy such as forfeiture). Costs should not have a freezing effect on necessary litigation.

33. There will also need to be a consideration for how contractual provisions will be given effect. Almost all long residential leases contain provision for the recovery of costs (albeit that the precise wording of those provisions may vary). It would be wrong for the Courts to retroactively affect the operation of such provisions; however, it is also noted that there are current limits of the recovery of such costs under section 20C of the Landlord and Tenant Act 1985.

34. Given the above considerations, it is our view that the costs issues noted will constitute a barrier to the accessibility of justice for litigants.

35. We further note (as set out above) that when considering costs the Working Group should also bear in mind the fees of the County Court and First-tier Tribunal (for issue and hearings). These fees are currently higher in the County Court (ranging between £35 to £10,000 for issue and £25 to £1,090 for a hearing) than in the First-tier Tribunal (ranging between £0 to £440 for issue and £0 to £194 for a hearing). The different level of fees will also be a consideration that litigants will bear in mind when issuing a claim; the discrepancy in relation to hearing fees in particular may cause a litigant to feel that their expectations have not been met for example if the case is transferred to the County Court from the First-tier Tribunal. This potential uncertainty in relation to later costs may present a barrier to the perceived accessibility of justice.

36. In relation to procedural rules, this is likely to be a perceived hurdle rather than an actual hurdle. This is a hurdle that could be overcome with clear rules and guidance. The difficulty would be the sheer numbers of litigants in the Court and Tribunal who are not represented. The current procedural rules, in particular the CPR, can already confuse litigants in person. This can lead to delays in cases either while judges have to explain the rules, or alternatively by litigants not complying with directions through misunderstanding rather than intentional intransigence. For the flexible deployment of the judiciary to operate in the way intended by the proposal there would have to be incredibly active and on-going case management throughout a case. While such case management is to be encouraged, it would, of necessity, take up court, judicial, management and administrative time.

37. There is also a concern that while a trained legal professional may be able to understand a judge or tribunal judge 'changing hats' during a case, this procedural difference may be less easy to understand for those who are not familiar with legal process. It should be borne in mind that the majority of litigants will only find themselves in Court or at the Tribunal on a single occasion in their lives. They will not be familiar with the court or tribunal or how they operate. Justice should not only be done but should be seen to be done. A confusing and overly legalistic approach may impeded a litigant's ability to engage with the legal process in a meaningful way.

38. In relation to remedies, the availability of a mixture of remedies to both the County Court and First-tier Tribunal (Property Chamber) would clearly be beneficial. This alone would reduce the multiplicity of applications and actions that currently have to be made by litigants to deal with all issues arising in their cases.

39. There is a concern, however, in relation to the practicalities of enforcement. A remedy is only a true remedy for a successful litigant if it is capable of enforcement. As noted above, not all of the First-tier Tribunal regional offices are located in the same building as County Courts with enforcement officers. A clear and practicable solution needs to be arrived at for ensuring that cases can be easily transferred to the relevant enforcement officers as necessary.

40. There is also a reservation in relation to injunctions. We do not consider it appropriate for Tribunal judges to be considering matters of contempt or committal proceedings for the enforcement of injunctions. We would encourage the Working Group to give special consideration to this issue. One of the key weaknesses of the range of remedies currently

available in the First-tier Tribunal is that the Tribunal judge cannot order a party (either landlord or tenant) to comply with the provisions in the lease. While we would therefore welcome the addition of specific enforcement and injunctions to the Tribunal's range of remedies as a matter of practicality, we are concerned as to the further implications and how those shall be dealt with. The Working Group is also asked to bear in mind that, as far as we are aware, the training currently given to County Court judges and to First-tier Tribunal members is not the same and would have to be altered so that all judges were able to deal with the different remedies available.

41. A further concern in relation to the remedies available is the effect that these will have on the losing party, or the party who is found to be in debt. By way of example, at the current time a tenant can apply to the First-tier Tribunal for a determination as to the reasonableness of their service charges. The sensible approach by any landlord in response to such an application (were the Tribunal to have the same powers as the County Court) would be to seek an order that those service charges were payable. This would then result in a County Court Judgment (or similar) against the tenant. At the current time a tenant can make an application simply for a determination without putting themselves at risk of a CCJ and the credit rating implications that this brings. If a tenant thought there was a risk that a money judgment might be made against them this would have a real bearing on their decision as to whether to challenge those service charges or not. This could cause a significant hurdle to tenants seeking service charge determinations.

Question 5 – Are there any other issues raised by the discussion paper to which you wish to respond? In particular:

(a) Are there any other benefits in making changes in the way landlord and tenant, property and housing disputes are resolved in the court and the tribunal that you wish to note?

(b) Are there further impacts of any of the suggested options that you wish to highlight?

(c) Are there other practical steps that you would wish to see in streamlining the procedure by which such cases are heard?

42. A clear benefit of making changes in the way landlord and tenant, property and housing disputes are determined is that it will reduce and avoid repeat applications, which consequently may be seen as a waste of time for litigants. That said, all County Court hearing centres and Tribunals would have to adopt a clear and consistent approach towards transfer for the proposal to be workable.

43. A further impact to note is the effect on listing. At the current time cases are listed in both the County Court and the First-tier Tribunal (Property Chamber) in the knowledge that some of those cases listed may not go ahead as the case may settle. Given the geographical points noted above (at paragraph 23), if a case 'became' a tribunal case but was sitting in the County Court then one would assume any expert panel members (valuers, assessors,

surveyors) would need to travel to the County Court for the case to be heard. If that case then settled there would not necessarily be a similar case at that hearing centre to justify or require the attendance of the expert panel members. We would therefore query the benefit of such cases not being dealt with at the Tribunal, and therefore whether there would be any benefit to the County Court being able to retain discretion in such cases.

44. There is also a concern as to the expertise of the County Court judges. The Central London County Court is, as far as we are aware, the only county court hearing centre to have a specialist Chancery List. Most County Court judges have to deal with a multiplicity of claims; including family cases, personal injury disputes, contractual claims, and real property and landlord and tenant disputes. Those County Court judges will not necessarily have the expertise to deal with those matters which are usually referred to the First-tier Tribunal, and anecdotally County Court judges are enthusiastic to transfer such cases for this very reason. Even when cases are retained by the County Court, this will often be on the basis that counsel can assist in explaining the relevant law and technical aspects as necessary. There is a danger that inexperienced judges retaining cases and unrepresented litigants in person appearing on their own account will result in cases not being determined on an appropriate legal basis; this would seriously undermine the standing of the justice system in these cases. The benefit of the First-tier Tribunal (Property Chamber) retaining its position as a specialist tribunal is that it encourages judges to refer cases to it, rather than seeking to retain cases.

45. The final impact that we note is the effect on appeals. There is no proposal to alter the jurisdiction of the Upper Tribunal or the High Court. There could therefore be cases where an appeal arises but the jurisdiction of the case for the purposes of appeal has to be split. This would be an unsatisfactory situation for any party and would lead to increased costs and uncertainty. The Bar Council would encourage the Working Group to develop a clearer view as to how appeals would be dealt with.

46. Other than those indicated above, there are no other practical steps that the Bar Council can identify on the basis of the current proposal. We would be happy to comment further once the issues in relation to costs, procedure, remedies, listing and appeals have been more fully formed.

Question 6 – Would you be available to attend a workshop on Friday, 5 February 2016?

47. If it would be useful, a barrister and a member of the Bar Council's policy team would be able to attend a workshop on Friday 5 February 2016.

**Bar Council
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