The New Land Registration Tribunal: Neither Fish nor Fowl?

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Introduction

"Cursed is the man who moves his neighbour's boundary stone" wrote the author of Deuteronomy,[1] acknowledging both the deep-felt human desire to own land and the (sometimes appalling) consequences of being drawn into a dispute over it. Nowhere is that deep-felt desire more obvious than in England and Wales, where every year parties litigate at ruinous expense over pieces of land that objectively have little or no value. Nor is the desire to own small pieces of land a new phenomenon: the Land Registry Act 1862 required exact boundaries to be shown and a person seeking to register their land had to serve notices on adjoining owners. This resulted in so many disputes over small pieces of boundary land that the Land Transfer Act 1875 introduced the general boundaries rule.[2] Nonetheless, since the citizens of England and Wales evidently feel so strongly about ownership of land, the judicial system would be failing if it did not provide an appropriate forum for such disputes properly to be aired.

The motivation to have an efficient land dispute resolution mechanism is clearly palpable and must be viewed as a necessary part of the justice system. This paper evaluates the fairness and efficiency of land dispute resolution in light of recent changes to the framework and forum in which this branch of the law operates, notably the advent of the new Land Registration Division of the First-tier Tribunal, Property Chamber ("the Tribunal"); it examines the opportunities for resolving difficulties that were missed or not taken up; and it proposes significant reforms both to the powers and approach of the Tribunal.

The recent appointment of Professor Elizabeth Cooke as the Salaried Principal Judge of the First-tier Tribunal, Property Chamber (Land Registration) should bring a new approach to the administration of justice in this area. As it presently stands, the new Tribunal noticeably bears the stamp of the Chancery Division of the High Court. By contrast, Tribunal Judge Cooke's experience lies outside the Chancery Division: originally as a solicitor, then as an academic and Law

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[1] Deuteronomy xxvii, 17.

[2] See Lord Hoffmann's commentary in *Alan Wibberley Building Ltd v Insley* [1999] 1 W.L.R. 894; [1999] 2 All E.R. 897 HL at 896.

Commissioner. Her appointment therefore brings with it the potential to create a more tempered perspective on the resolution of land registration disputes. However, the magnitude of the task that confronts her should not be underestimated and, as this paper contends, there are key challenges still facing the judicial system in this respect arising from changes in nomenclature, accidents in legislative drafting, procedural anomalies, a confrontational approach and inherent jurisdictional contradictions.

First, the Tribunal has only recently taken over the functions of the office of Adjudicator to HM Land Registry, an office created essentially to determine whether a land registrar at HM Land Registry should make or remove entries in the Land Register. The jurisdiction was not created as a species of specialist property tribunal nor was it granted the powers necessary for such a tribunal to perform as efficiently as would be desirable. In particular, those who are successful before the Tribunal still have to issue court proceedings if they need to enforce a Tribunal decision. Contrary to some suggestions,[3] the vast increase in cases determined originally by the Adjudicator, and now by the Tribunal, cannot be seen as an indication of its popularity and success. As we argue below, this increase is much more likely to have been caused by the unfortunate statutory provisions that oblige all disputes, unless "groundless", to be referred to the Tribunal.

Equally, the purpose of the Tribunal is opaque. It is not clear whether it is supposed to be the primary vehicle for the resolution of disputes related to registered land or whether its primary focus is to seek to ensure that registrations at the Land Registry are correct. If it is meant to be a land court, then the legislation needs to be revisited. The current framework, like the 1862 Act, tends to create disputes and to oblige people to litigate through the Tribunal when they might otherwise choose not to do so. Further, the current statutory framework has recreated a dichotomy that was removed by the Judicature Acts of the 1870s. A person in whose favour the Tribunal decides may have to commence separate court proceedings to enforce that decision. If, on the other hand, the Tribunal's primary focus is to ensure that the public can be assured that the register is accurate, the adversarial nature of the Tribunal is unfortunate. It would seem much more appropriate to adopt an inquisitorial approach whereby the tribunal judge, a specialist conveyancer, takes steps to establish as best as possible the true position. If it were indeed to move to a more inquisitorial approach, then its power (enjoyed by no other division of the Property Chamber) to award inter-parties' costs should be abandoned. Of course, if (contrary to our contentions in this article) its primary purpose is indeed to provide a specialist forum before which parties conduct property litigation, its powers need to be widened so that it can enforce the decisions that it makes without the parties having to have subsequent recourse to the courts.

Changes in nomenclature and procedure

It is important to assess the historical position of land registration dispute resolution, as current problems stem from changes in nomenclature and procedure over time. Before the passing of the Land Registration Act 2002 ("the 2002 Act"), any

[3] E.g. Tim Morshead QC, "Adjudications: Jurisdiction, Procedure, Appeals and Reform", Chancery Bar Association Seminar: Land Registration (9 May 2011), para.45. S. Brilliant and M. Michell, *A Practical Guide to Land Registration Proceedings* (London: LexisNexis, 2015), para.1.10 is to the same effect.

question, doubt, dispute, difficulty or complaint regarding the registration of a title was referred to the Solicitor to HM Land Registry ("the Solicitor") or to one of his deputies. In practice these were legally qualified land registrars almost always with a considerable knowledge of practical conveyancing. The Solicitor had the power to require that one of the parties to the dispute should commence proceedings in the Chancery Division and determined the remaining disputes himself, in informal hearings held at the then headquarters of the Land Registry or, occasionally, in provincial courts hired by the Land Registry for the purpose. The number of disputes dealt with by the Solicitor was usually less than 100 per year, and many of those would be compromised before an actual hearing was necessary. When the 2002 Act was being considered, the Law Commission recommended that the function of the Solicitor should be transferred to an independent adjudicator to dispel perceptions regarding independence. As a result, Pt 11 of the 2002 Act (ss.107 to 114) provided for the appointment of the Adjudicator. The opportunity was also taken to accord the Adjudicator the power to order the rectification of documents that effect a qualifying disposition of registered land, a weakness in the previous regime.

After the creation of the office of the Adjudicator the number of disputes rose exponentially, to well in excess of 1,000 per year. In order to cope with this increase, the Adjudicator appointed over 30 deputies, most part-time, resulting in more deputy adjudicators than there were full-time judges in the Chancery Division. Following the reorganisation of tribunals consequent upon the Tribunals, Courts and Enforcement Act 2007, the First-tier Tribunal was created, sub-divided into seven chambers including a "Property Chamber". The Property Chamber is itself sub-divided into three divisions, including the Land Registration Division. By art.4 of the Transfer of Tribunal Functions Order 2013[4] the functions of the Adjudicator were transferred to the First-tier Tribunal and the office of Adjudicator was abolished. The erstwhile Adjudicator became the "principal judge of land registration" and upon his retirement, Tribunal Judge Cooke took on the mantle.

Procedure before the Adjudicator was governed by free-standing rules set out in the Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003[5] (as subsequently amended in 2008).[6] In the Tribunal there is a single set of rules covering all divisions of the Property Chamber, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013[7] ("the Tribunal Rules"). This is not the place to set out a full critique of the new rules,[8] but they are similar to the Civil Procedure Rules 1998, which are primarily designed for adversarial litigation. One point, however, is to be noticed: r.13(1)(c) specifically provides that the Tribunal may make orders for one party to pay the costs of another in a land registration case, whereas in all other cases the power of a tribunal to award costs is restricted to where a person has acted unreasonably or where wasted costs have been incurred.

[4] Transfer of Tribunal Functions Order 2013 (SI 2013/1036).

[5] Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (SI 2003/2171).

[6] Adjudicator to Her Majesty's Land Registry (Practice and Procedure) (Amendment) Rules 2008 (SI 2008/1731).

[7] Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169)—minor amendments made by the Tribunal Procedure (Amendment No. 3) Rules 2014 (SI 2014/2128).

[8] They contain oddities; for example, by r.12(1) only the respondent may apply for security for costs, but r.28(3)(c) says that it is for the Tribunal to decide which of the parties is to be the applicant and which is to be the respondent.

Difficulties with the present position

Part 11 of the 2002 Act, drafted primarily to make the functions hitherto carried out by the Solicitor independent of the Land Registry,[9] has had the unexpected consequence that the caseload has increased so much that it has been necessary to create an entire division of the First-tier Tribunal. If it could be shown that this substantial increase was as a result of disputes (which would otherwise have been litigated in other forums) now being heard in the Tribunal; or that these disputes were being dealt with more speedily or more cheaply, there might be less cause for alarm. However, the evidence for any of the above is not readily forthcoming and the growing inference is that the unforeseen effect of s.73 of the 2002 Act, like the Land Registry Act 1862, has been to create extra disputes. The impact of the Tribunal Rules, coupled with the way that they are being applied in practice, means that the determination of those disputes is seldom cheaper or particularly quicker than going to court.[10]

The statutory framework

The 2002 Act provides that most dealings in land are now required to be registered at the Land Registry, and s.6 places upon the responsible estate owner a duty to apply to the Chief Land Registrar for registration. Section 73 of the 2002 Act, headed "Objections", provides that, subject to certain provisions, "anyone may object to an application to the registrar" and that the application cannot be determined until the objection has been disposed of, unless the registrar is satisfied that the objection is groundless.[11] Section 73(7) provides that "[i]f it is not possible to dispose by agreement of an objection … the registrar must refer the matter to the First-tier Tribunal". "Groundless" is an extremely low threshold.[12] For many years now the courts have employed the "real prospect of success" test[13]; and that would appear to be a more appropriate standard by which objections should be initially assessed. Allowing objectors to advance objections which whilst not "groundless" nevertheless have "no real prospect of success" inevitably means that costs will be unnecessarily incurred both by objectors (because nobody is telling them that they are wasting their time) and by applicants (because they are having to address points that cannot succeed).

Such a low initial threshold could be justified if objections were limited to those who sought to advance some interest adverse to the applicant seeking registration. This could be on the basis that although the objection as currently formed seemed to be weak, as the objector was seeking to advance some contrary interest of his or her own, it was not appropriate to rule that objection out at an early stage. However, in *Mann v Dingley* the Chancery Division determined that s.73(1) meant that there was no requirement for an objector to have any private law standing[14];

[9] See Harpum C & Bignell J, *Registered Land: Law and Practice Under the Land Registration Act 2002*, 1st edn (London: Jordans, 2004), Ch.34.

[10] For example, in *Purslow v Lindsay* Ref/2011/0365 (permission to appeal refused by Henderson J on 14 March 2013) the dispute concerned an alleged right of way over a piece of land whose value was almost certainly less than £1,000, but the adverse costs order exceeded £40,000.

[11] LRA 2002 s.73(6).

[12] K. Harrington, "Adjudication in a new landscape" (2013) 24 K.L.J. 316, 334.

[13] See CPR 13.3, 24.2 and 52.3.

[14] *Mann v Dingley* [2011] EWLandRA 2010/0582 at [85].

and in *Walker v Burton*[15] the Court of Appeal (at [31]) did not take the opportunity to dissent from this conclusion.

Therefore the current situation is that when O buys unregistered Blackacre, he is statutorily obliged to apply to the Land Registry to register himself as proprietor. The same statute allows anyone to raise an objection to that application and, if they do, unless that objection can be dismissed as "groundless", the matter must be referred to the Tribunal. We suspect that few, when they buy their new house, realise that they are at risk of incurring a substantial cost because somebody who asserts no interest in that house nevertheless has the right to object to the application.

Those who dismiss this as so theoretical as to be irrelevant need only read *Walker v Burton*, where a registered proprietor, part of whose title appears to have been mistakenly registered, was locked in ruinously expensive litigation with objectors who asserted no contrary title. We venture to suggest that if "anyone" had been interpreted as meaning "anyone who asserts some contrary interest" and "groundless" had been replaced with "no real prospect of success", many disputes like *Walker v Burton* would not have taken up any time either of the Court of Appeal or of the Tribunal, and the parties would have avoided considerable expense, not to mention the anxiety that usually accompanies litigation.

The Tribunal Rules and their implementation

It is particularly unhelpful in what are often highly antagonistic and personal disputes, that the Tribunal Rules are drafted in terms of confrontation. They speak of "parties" rather than "participants" and of formal documents such as a "statement of case". It is also unfortunate that the less formal approach of the Solicitor was not more generally adopted into the Tribunal Rules. If the objective is to ensure that the Register is correct, it must at least be doubtful whether the adversarial procedure created by the Tribunal Rules is the best vehicle for achieving this result. After all, in adversarial litigation the function of the judge is essentially to determine which parts of the cases advanced by the respective parties are more likely to be correct. Whilst some judicial questioning may be permissible, excessive questioning is objectionable and likely to result in a re-hearing before a different judge.[16] There is only a limited ability for the Tribunal to make its own enquiries and to arrive at a conclusion entirely different from the case being advanced by either party.

Despite this, the Tribunal Rules are only the framework under which disputes fall to be decided. If Tribunal judges are prepared to apply them flexibly, the confrontational approach that they invite may be mitigated. It is perhaps too early to say how the Tribunal will apply the Tribunal Rules, but experience from the days of the Adjudicator is not necessarily encouraging. Thus, in *Silkstone v Tatnall*[17] the Silkstones claimed a right of way over Mr Tatnall's land by prescription and lodged a unilateral notice at the Land Registry. Mr Tatnall applied to cancel the notice; the registrar gave notice of this application to the Silkstones who, in turn,

[15] *Walker v Burton* [2013] EWCA Civ 1228; [2014] 1 P. & C.R. 9.

[16] See *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281; [2006] H.L.R. 33.

[17] *Silkstone v Tatnall* [2010] EWHC 1627 (Ch); [2010] 3 E.G.L.R. 25. Approved on appeal: *Silkstone v Tatnall* [2011] EWCA Civ 801; [2012] 1 W.L.R. 400—by the time the matter got to the Court of Appeal the original parties had resolved their differences and the matter was taken to the Land Registry to clarify the law.

objected to the cancellation. This meant that a dispute had arisen, so the matter had to be referred to the Adjudicator. During the proceedings, the Silkstones, who were acting in person, wrote to the Adjudicator requesting disclosure relating to an alternative way of supporting the claim to a right of way, based on s.62 of the Law of Property Act 1925 as opposed to prescription. This application was dismissed on the grounds that no case under s.62 had been pleaded by the Silkstones. This is not the only occasion when the Adjudicator took a pleading point against a party.[18] Today, pleading points have much less force in civil litigation, and we suggest that they should have no place at all in tribunal justice, particularly with litigants in person.

Silkstone v Tatnall is concerning for another reason. A few days before the hearing, the Silkstones discovered that they had difficulties with some of the oral evidence they wished to call. They therefore sent a fax to the deputy adjudicator stating that they wished to withdraw their case, indicating that they reserved the right to commence court proceedings in due course, if appropriate. When this was refused, they repeated their application on the first day of the substantive hearing. Again it was refused, and the deputy adjudicator proceeded, in the absence of the Silkstones and their witnesses, to determine the substantive point against them. Their appeal was dismissed by Floyd J, and a second appeal by the Land Registry was also dismissed.[19]

Whilst the decision may have been correct on its facts, the precedent set by *Silkstone v Tatnall* can only be described as unfortunate. If the Tribunal is supposed to be the primary land court, the decision could be justified on the ground that a party that has not got its case in order by the hearing date will generally fail. However, there is an important distinction: in normal litigation (subject to rules about limitation) it is generally for the parties to determine whether and when proceedings are commenced. But the 2002 Act compels the reference to the Tribunal at a time where neither party has necessarily had time to get its case in order; and once a matter is referred to it, the Tribunal dictates the pace. If, however, the point of a reference to the Tribunal is so that the public can have confidence that the Land Register correctly records appropriate rights, it is difficult to see that this was achieved.

There was, initially, a body of opinion that the role of the Adjudicator was effectively to decide whether an applicant had an interest that should be registered. Thus in *Croatia v Serbia*[20] the Chancery Division, on appeal from the Adjudicator, determined that Croatia's claim was arguable and not fanciful and therefore capable of being protected by registration. However, in *Jayasinghe v Liyanage*[21] the court took a different approach. The appellant applied to register a restriction on the grounds that she had provided the original funds for the purchase and paid the mortgage. The deputy adjudicator conducted a two-day trial which included cross-examination of the appellant, the respondent and a witness and found that the appellant had not made any contribution to the purchase price. The appellant

[18] See *Gordon v Chatfield* unreported 16 June 2007, Ref/2005/1543.

[19] *Silkstone v Tatnall* is not the only case where an adjudicator has refused to release a matter. In *Mann v Dingley* [2011] EWLandRA 2010/0582 County Court proceedings had been issued, but the deputy adjudicator refused to stay the application to him on the basis that he was a "specialist tribunal".

[20] *Croatia v Serbia* [2009] EWHC 1559 (Ch); [2010] Ch. 200.

[21] *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch); [2010] 1 E.G.L.R. 61.

appealed to the Chancery Division on the grounds that the deputy adjudicator was not entitled to undertake a trial of the issue of whether she had a beneficial interest in the property. Rather, he should simply have determined if she had an arguable case and then registered the restriction pending a full determination of her claim by a competent court. Briggs J dismissed her appeal, stating (at [18]):

> "the adjudicator is given a broad discretion, on a reference under section 73(7), whether to decide 'a matter' himself or to require it to be decided in a competent court, and it is equally plain from the panoply of procedural powers given to the adjudicator under the Practice and Procedure Rules that a decision to decide a matter himself may properly involve a trial, rather than just a summary review directed merely to the question of whether an asserted claim is reasonably arguable."

Adjudicators have since held court-style hearings over several days to determine disputed matters, such as the size of a party's beneficial interest or the extent of a right gained by prescription.

This would seem to be removed somewhat from the function of determining whether a land registrar should make an entry in the Land Register. We would argue that, as a generalisation, tribunal judges are not the best placed to make decisions of this nature. However, in *Wilkinson v Farmer*[22] Mummery LJ said (at [25]):

> "The Deputy Adjudicator was the fact-finding tribunal. Adjudicators to HM Land Registry and the Deputies have relevant expertise. Although they might sometimes get things wrong, they are usually more experienced and expert at deciding this kind of question than appellate courts are. A measure of weighed deference should be accorded to the findings and conclusions in their reasoned decisions."

Whilst this statement sounds impressive, it does not really withstand scrutiny. What experience relevant to conveyancing do the majority of the tribunal judges possess? How many personal searches have they carried out? How many completions have they taken part in? If, on the other hand, the deference is to them as the fact-finding tribunal, as a general rule tribunal judges have far less experience of assessing the truthfulness of witnesses than High Court or circuit judges, and the Court of Appeal does not accord them any "weighed deference". Equally, it would be most surprising if the Court of Appeal were to defer to tribunal judges on matters of law. In reality it would seem that the Tribunal is a poor forum for the determination of factual disputes and that such disputes ought, as of course, to be referred to the courts.

The Tribunal's powers

Another area of concern is that the Tribunal can only make decisions; it has no real power to enforce those decisions. This is an inevitable consequence of the fact that the Tribunal, whilst independent, is merely deciding what the land registrar should enter on a title. If the decision is that Blackacre belongs to O, then the land

[22] *Wilkinson v Farmer* [2010] EWCA Civ 1148; [2010] N.P.C. 105.

registrar will record O as the registered proprietor. However, if S is still squatting on part of the registered land, O will have to go to the County Court to get an order for possession. Furthermore, the Tribunal proceedings will not have stopped time running, so if O has not issued protective proceedings, S may well be able to add the time spent in the Tribunal proceedings.[23] It is most undesirable that O is required to undertake a two-stage process, particularly where S may not be in a financial position to pay O's legal costs. Additionally, many land disputes are settled by negotiation or mediation, which is normally encapsulated in a Tomlin order, but there is no ready way of enforcing such an order through the Tribunal.

Proposed reform

Our analysis concludes that the present system should not be allowed to continue: it is dragging people unwillingly into expensive litigation through a tribunal which can, at best, provide only part of the solution. There are, we suggest, a number of steps that could be taken that would substantially improve the present position.

First, if an application to the Land Registry is disputed, there should not be an automatic reference of that dispute to the Tribunal. The land registrar should formally notify the parties that he or she cannot complete the registration (or that part of it that is disputed) and leave the parties a choice how to take the matter forward. The position would be similar to where probate of a will is disputed (and the estate of a disputed will often includes land) and a caveator appears to a warning. There is then a stalemate and, absent a judicial decision, no probate can be granted. In matters concerning detailed questions on the priority of mortgages parties might still choose the Tribunal. On the other hand, where cross-examination of witnesses is required and the remedy sought includes orders for possession or injunctions, they would go to the court.

Secondly, if (as we contend) the Tribunal is primarily aimed at ensuring entries in the register are correct, it is much more likely to achieve this result if it is inquisitorial rather than adversarial. Whilst it is not within the scope of this article to consider the development of tribunals,[24] it seems of relatively recent origin (perhaps particularly since the advent of industrial tribunals in the 1970s) that tribunals have been so adversarial in their nature. A procedure whereby the relevant documents are submitted to the tribunal judge together with short submissions and coupled with a power for the tribunal judge to make requisitions of the parties is more likely to arrive at the correct result. This may mean that the Tribunal is restricted to dealing only with applications on paper; and if it is necessary to call witnesses and have them cross-examined, then the matter will have to be referred to the court. However, there is no indication that Parliament, by enacting Pt 11 of the 2002 Act, thought it was thereby creating a new land court as the principal arbiter of decisions relating to registered land and thereby creating a further distinction between the owners of registered and unregistered land. Parliament clearly considered that it was merely removing the function of the Solicitor and not substantially enhancing that function.

[23] This may not be short—in *Silkstone v Tatnall* the matter had been referred to the Adjudicator on 18 June 2008 and the hearing was on 2–3 June 2009.

[24] See, for example, C. Stebbings, *Legal Foundations of Tribunals in Nineteenth Century England* (Cambridge: Cambridge University Press, 2006).

Thirdly, r.13 of the Tribunal Rules should be amended to remove the power of the Tribunal to award costs in a land registration case (other than wasted costs). The applicant is forced by statute to apply to register his or her title and the Tribunal is simply part of the registration process. No costs order should be made against parties, unless it can be shown that a party was wholly unreasonable in persisting with his or her application or objection. Indeed, if, as we suggest, the matter were to be reshaped to be inquisitorial rather than adversarial, this reform would follow as a matter of course.

These changes would have the potential for creating a fairer and more efficient resolution of Land Registration disputes. The evolution of land registration disputes must be one that takes on lessons from its own past experience and utilises experience of those previously outside the Tribunal. The new appointment of Tribunal Judge Cooke is a valuable opportunity to look afresh at this jurisdiction and to take steps to substantially improve its future.