

WHO HAS JURISDICTION AND UNDER WHAT CIRCUMSTANCES?

Oliver Radley-Gardner

Falcon Chambers

2nd November 2020

1. This paper deals with one of life's big questions: "why are we here?", albeit the "here" refers to one or more of the County Court, the First Tier Tribunal and the Upper Tribunal (Lands Chamber), and sometimes two of them at the same time.
2. The content of this paper can therefore be filed under "boring but important". It will hopefully be so anodyne that it won't provoke the high level of divisive controversy that was provoked by my (recently unpublished) paper on why code disputes provoke a high level of divisive controversy.

Dispute Avoidance

3. So, what do we do with Code disputes? I suppose the first thing to say is "try not to get into one in the first place". This may seem an odd sentiment from a barrister who conducts code cases, but there are too many of them, and they are too hotly contested. The cold fact is that the cases have in many cases involved unnecessary cost and expense, and generated entirely the wrong proportion of heat:light. That may simply be due to the fact that we are still in the first flush of code cases, but it is disconcerting to see the same points being argued again and again.
4. The undeterred are referred to the rules of litigation contained in the new Practice Direction for the Upper Tribunal.¹ In particular (at 14.8),

"Pre-reference engagement between the parties is strongly encouraged in all cases, but it is particularly important in those Code cases where the Tribunal is itself subject to strict time limits and in which it will expect a high degree of cooperation from and

¹ <https://www.judiciary.uk/wp-content/uploads/2020/10/19-Oct-20-SPT-Practice-Directions-UT-Lands-Chamber-002.pdf>

between the parties. Parties who are unable to agree on a Code matter should seek to narrow their differences and identify the issues which divide them before the dispute is referred to the Tribunal”.

5. Once the button is pressed on Code proceedings in the Upper Tribunal, things move apace. First hearings are listed in a few weeks and disputes about new installations are dealt with in six months.² As the Practice Direction reminds us (at 14.7):

“Regulation 3 of the Electronic Communications and Wireless Telegraphy Regulations 2011 requires that certain Code disputes must be decided within 6 months of being referred. The scope of this requirement is not yet fully established but it includes disputes where new rights are sought over land on which there is currently no electronic communications apparatus”.

6. It is worth pausing there to note that a failure of cooperation is not a victimless crime – it risks placing the Tribunal in breach of its own duties. When one stands back and looks at the sheer volume of Code cases on top of the Tribunal’s other functions, it is not hard to detect why the Tribunal is keen to police compliance and ensure cooperation.
7. Tying the threads of pre-action engagement and the three month rule together, it is worth also noting that (at 14.13) in view of the statutory duty to make a decision within the six month rule imposed on the Tribunal, once the button on litigation is pressed, the Tribunal *“will not grant a stay for ADR in a Code dispute which must be determined within 6 months”*. That does not prevent ADR in parallel, of course.
8. The costs of those disputes are no lower than for any other civil litigation, except that they are perhaps incurred more quickly and doubtless in many cases then become a barrier to settlement.
9. So before the barricades are put up, and the lawyers’ letters asserting each side’s unequivocal correctness are expensively whittled to a sharp point, consider dialogue and discussion. We now have an emerging picture around consideration and

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compensation, and a crystallising position around key terms. It ought now to be possible for proper advice to be given about where a particular case is likely to end up, more or less.

10. If that is not done, and if instead litigation is treated as a game, then evidence of a failure to engage will at least afford some costs protection to the innocent party. The cases under the Code are littered with evidence of poor behaviour which has attracted judicial sanction, from costs sanctions to the Upper Tribunal refusing to allow the transgressing party to dispute terms.
11. The grisly outcome of some of the cases where something have gone awry can be studied in an article I have written online.³ Regrettably, the article needs updating.

The Old Code

12. There are still some Old Code cases out there. Under the transitional provisions of the Digital Economy Act 2017 (“DEA”), Schedule 2, paragraph 20 notices under the Old Code (the redevelopment break right, in effect) was preserved if the kit had been installed by the date the relevant parts of the DEA came into force (28th December 2017). Paragraph 21 notices were preserved to the extent that they had been served before that date, though with the passage of time they are encountered with increasing rarity.
13. As before, those notices must be litigated in the County Court, as directed by the Old Code. The only limited exception to that may be if the Upper Tribunal is seized of a case relating to a transitional agreement and an application is made with regards to that transitional agreement under (for example) Part 5 of the New Code. In such a case, the Tribunal may be (and has at one CMC expressed itself to be) ready to deal with whether the agreement has already been killed under the Old Code in order for the Upper Tribunal to determine its own jurisdiction under the New Code.
14. Some old statutory entitlements to compensation are also covered by the Old Code, and must be litigated in the County Court and not the Tribunal, a small trap for those who

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naturally assume that the Tribunal is “home” for all matters electronic: see *Elite Embroidery Ltd v Virgin Media Ltd* [2018] UKUT 364 (LC).

The New Code

Where to Begin?

15. Code disputes under the New Code must be commenced in the Upper Tribunal as the designated “Court” for the purposes of the New Code. The Electronic Communications Code (Jurisdiction) Regulations provide that a “relevant dispute” must be *commenced* in the Upper Tribunal, or the Lands Tribunal in Scotland (regulation 4). However, if commenced in the Upper Tribunal,
 - a. then under in accordance with rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the matter may (as envisaged by the Jurisdiction Regulation at 3a) transfer the matter to the First Tier Tribunal, or
 - b. the Upper Tribunal may transfer the matter to the First Tier Tribunal, or to the County Court under regulation 5.

16. I would make a particular reference to paragraph 14.15 of the Practice Direction:

“Although the First-tier Tribunal has jurisdiction to determine Code disputes, such disputes may not currently be commenced in the First-tier Tribunal (disputes about Code rights in residential buildings under the proposed Part 4A of the Code may soon become an exception to this rule). The Tribunal may transfer any Code reference to the First-tier Tribunal for hearing. Parties who agree that their dispute should be determined in the First-tier Tribunal may apply for transfer to be considered”.

17. The reference to the proposed Part 4A is to the proposed reform to insert an ability for operators to access common parts of residential buildings where a tenant requires a connection. It remains under discussion.⁴ It may be that as a *corpus* of guidance builds up for the First Tier Tribunal to follow, and if the caseload is maintained, that transfer is regarded as a way of dealing with simpler claims, like claims for multi-skilled visits (MSVs) under paragraph 26 (though at the moment the Tribunal is dealing with interim

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rights claims at the case management hearing: see Practice Direction at paragraph 14.12.

18. All New Code proceedings are captured by that. As the Practice Direction explains,

“[t]hese include proceedings for the imposition, termination or modification of agreements to which the Code applies, and proceedings for the removal or alteration of electronic communications apparatus” (at 14.2).

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19. The Upper Tribunal hears cases in areas other than the Code, restrictive covenant being one of them. That area can throw up issues that relate to both the Upper Tribunal’s modification jurisdiction, but also the Court’s declaratory jurisdiction as to who is bound by the covenant (or what the covenants mean), which Parliament in its wisdom allocated to two separate jurisdictions. Thankfully, the Tribunal has devised a procedural work-around so that the twain can meet: double hatting. The same is true of the First Tier Tribunal in some cases.

20. Any judge of the Upper Tribunal is treated as a judge of the County Court: section 5 (2) (n) and (o), County Courts Act 1984. Assume, for example, that there is an Old Code notice (say under paragraph 20 where the factual issues are less clear cut than under a paragraph 21 notice) in play in a case relating to the New Code. Or assume that there is doubt as to whether an agreement is a transitional 1954 Act protected agreement or a “subsisting agreement” under the New Code by reason of Schedule 2 to the DEA. How do the parties cover the bases?

21. They do so not by transferring their case from one jurisdiction to another, but by inhabiting both at once under the double hatting process. What is it and how do you do it?:

- a. There is no “transfer” of the County Court matter to the Upper Tribunal. The proceedings in the County Court always remained County Court proceedings. The Upper Tribunal proceedings remain Upper Tribunal proceedings;
- b. The parties should, at the earliest opportunity, make a request of the designated senior civil judge in the County Court to write to the Upper Tribunal so as to

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invite the Upper Tribunal to sit in its capacity as a County Court to hear the matter;

- c. This request should be made as soon as possible and ideally before any CMC in the County Court proceedings;
- d. The parties should not assume that the County Court will be familiar with this administrative procedure, and may need to explain the process;
- e. It is for the parties before the County Court to justify the request and any request made of the Upper Tribunal will not necessarily be acceded to by the Upper Tribunal.
- f. Where a County Court matter is being heard by the Upper Tribunal at the same time as a reference before the Upper Tribunal:
 - (i) It is inappropriate to consolidate the proceedings because the County Court matter always remains a County Court matter;
 - (ii) This becomes evident when it is appreciated that the routes for appeal are different, with the County Court matter being appealed to the High Court and the Upper Tribunal matter being appealed to the Court of Appeal.
 - (iii) “double hatted” proceedings ought, therefore, to be directed to be heard together and tried at the same time, with directions being given in each action (albeit the directions may be identical).

22. As was explained in *Avon Ground Rents Limited v Child* [2018] UKUT 204 (LC) by Holgate J and HHJ Hodge QC, who both sat as judges of the county court the Upper Tribunal

“[42] It is important to appreciate that the statutory provisions which permit the flexible deployment of FTT judges as judges of the County Court do not affect the substantive statutory provisions which govern the respective jurisdictions of the County Court and the FTT, nor do they alter the procedural rules which govern proceedings in those two bodies. There are significant differences between them. Procedure in the County Court is governed by the CPR while procedure in the FTT is governed by the FTT Rules. The FTT has no power to enter a money judgment or otherwise require one party to make a payment to another but simply declares what the parties' rights are and leaves questions of enforcement to the County Court....

[45] Different rules govern the time for appealing, the procedure for seeking permission to appeal, and the destination of the appeal, depending upon whether it is sought to appeal a decision of the FTT or the County Court. It is therefore essential that where a judge acts on the same occasion both as a judge of the FTT and as a judge of the County

Court, that judge is very clear in his or her own mind as to which "hat" is being worn in relation to each aspect of the decision-making process, and that he or she maintains and articulates a clear distinction at all times between the discrete functions and roles being performed....”.

Legal Metamorphosis

23. A similar process may be identified from the recent decision in *Vodafone v Hanover Capital Limited* [2020] EW Misc 18(CC), the first case to determine whether and how paragraph 24 valuation under the new Code impinge on valuations under s34 of the Landlord and Tenant Act 1954. In that case, the Upper Tribunal agreed to sit as the County Court for the purposes of determining that rent, by co-operation between the Tribunal and the Manchester County Court, following the above steps albeit without the resulting double-hatting- the Upper Tribunal hat could remain on the shelf on that occasion. It is just that a County Court, looking remarkably like the Upper Tribunal, materialised before the parties.

Assessors

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50. CPR r.35.15 provides that:

35.15

(1) This rule applies where the court appoints one or more persons under section 70 of the Senior Courts Act 1981 or section 63 of the County Courts Act 1984 as an assessor.

(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.

(3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –

(a) prepare a report for the court on any matter at issue in the proceedings; and

(b) attend the whole or any part of the trial to advise the court on any such matter.

(4) If an assessor prepares a report for the court before the trial has begun –

(a) the court will send a copy to each of the parties; and

(b) the parties may use it at trial.

(5) The remuneration to be paid to an assessor is to be determined by the court and will form part of the costs of the proceedings.

(6) The court may order any party to deposit in the court office a specified sum in respect of an assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.

(7) Paragraphs (5) and (6) do not apply where the remuneration of the assessor is to be paid out of money provided by Parliament.

51. PD35.10 then states:

10.1. An assessor may be appointed to assist the court under rule 35.15. Not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

10.2. Where any person has been proposed for appointment as an assessor, any party may object to that person either personally or in respect of that person's qualification.

10.3. Any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in paragraph 10.1 and will be taken into account by the court in deciding whether or not to make the appointment.

10.4. Copies of any report prepared by the assessor will be sent to each of the parties, but the assessor will not give oral evidence or be open to cross-examination or questioning.

52. I will refer to only two authorities to illuminate how this works in practice. In essence, the Court of Appeal stated in *Owners of the Ship Bow Spring v Owners of the Ship Manzanillo II* [2005] 1 W.L.R. 144 that the assessor is not a decision maker but an adviser to the Court. As such, that advice is required to be exposed to the parties for comment.

53. This was further expanded in *The Global Mariner* [2005] 1 Lloyd's Rep 699 at [14], where Gross J explained that

[16]: *"The aim is to strike the right (and proportionate) balance between the desirable goal of transparency on the one hand and the need to curb the cost and delay inherent in the 'ping pong' of post-hearing exchanges on the other" [...]*

"(i) The range of topics on which advice might be sought from the Assessors should be canvassed with counsel by, latest, the stage of final submissions.

(ii) Ordinarily, the questions asked of the Assessors by the Judge should not stray outside the range previously discussed with counsel; should they do so, however, there are safeguards contained in (iii) and (iv) below.

(iii) The questions ultimately put by the Judge, together with the answers given by the Assessors, should be disclosed to counsel before any draft judgment is handed down.

(iv) Counsel should thereafter be given the opportunity to make submissions to the Judge, as to whether the advice given by the Assessors should be followed. Ordinarily, any such submissions should be in writing; but if there is good reason for doing so, an application could be made for an oral hearing. The Judge will consider any such submissions before finalising his judgment.

(v) Generally speaking, the interests of proportionality and finality will make it unnecessary to repeat the procedure after the Judge and the Assessors have had the opportunity of considering the parties' submissions and any suggested further or revised questions. Accordingly, unless the Judge in his discretion thinks it appropriate to disclose them to counsel before the judgment is finalised, any further or revised answers will simply be recorded in the judgment, together with the Judge's decision as to whether or not to accept the Assessors' advice and his reasons for doing so".

54. I would note that in a Code case where the Upper Tribunal is sitting as the County Court, and the valuer member is transformed into a CPR Part 15 assessor, there can be

little scope for debate about stages (i) – (iii), entailing as they do well defined questions of statutory interpretation.

Conclusion

55. So, there we are. Boring but important. I did warn you.

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- 10.3. Any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in paragraph 10.1 and will be taken into account by the court in deciding whether or not to make the appointment.*
- 10.4. Copies of any report prepared by the assessor will be sent to each of the parties, but the assessor will not give oral evidence or be open to cross-examination or questioning.*

57. I will refer to only two authorities to illuminate how this works in practice. In essence, the Court of Appeal stated in *Owners of the Ship Bow Spring v Owners of the Ship Manzanillo II* [2005] 1 W.L.R. 144 that the assessor is not a decision maker but an adviser to the Court. As such, that advice is required to be exposed to the parties for comment.

58. This was further expanded in *The Global Mariner* [2005] 1 Lloyd's Rep 699 at [14], where Gross J explained that

[16]: *"The aim is to strike the right (and proportionate) balance between the desirable goal of transparency on the one hand and the need to curb the cost and delay inherent in the 'ping pong' of post-hearing exchanges on the other" [...]*

"(i) The range of topics on which advice might be sought from the Assessors should be canvassed with counsel by, latest, the stage of final submissions.

(ii) Ordinarily, the questions asked of the Assessors by the Judge should not stray outside the range previously discussed with counsel; should they do so, however, there are safeguards contained in (iii) and (iv) below.

(iii) The questions ultimately put by the Judge, together with the answers given by the Assessors, should be disclosed to counsel before any draft judgment is handed down.

(iv) Counsel should thereafter be given the opportunity to make submissions to the Judge, as to whether the advice given by the Assessors should be followed. Ordinarily, any such submissions should be in writing; but if there is good reason for doing so, an application could be made for an oral hearing. The Judge will consider any such submissions before finalising his judgment.

(v) Generally speaking, the interests of proportionality and finality will make it unnecessary to repeat the procedure after the Judge and the Assessors have had the opportunity of considering the parties' submissions and any suggested further or revised questions. Accordingly, unless the Judge in his discretion thinks it appropriate to disclose them to counsel before the judgment is finalised, any further or revised answers will simply be recorded in the judgment, together with the Judge's decision as to whether or not to accept the Assessors' advice and his reasons for doing so".

59. I would note that in a Code case where the Upper Tribunal is sitting as the County Court, and the valuer member is transformed into a CPR Part 15 assessor, there can be

little scope for debate about stages (i) – (iii), entailing as they do well defined questions of statutory interpretation.

Conclusion

60. So, there we are. Boring but important. I did warn you.

Oliver Radley-Gardner