



Discipline and Appeals Arrangements
CLC's Consultation

Issue date: Monday 21st January 2013

Consultation ends: Friday 19th April 2013

The CLC's Discipline and Appeals Arrangements

Executive Summary

1. In implementing the changes facilitated by the Legal Services Act, one of the CLC's objectives has been to ensure that the same regulatory arrangements and processes apply to those it regulates, whether as an Approved Regulator or as a Licensing Authority.
2. The CLC agree with the Legal Services Board's analysis that appeals from determinations made by the CLC acting as a Licensing Authority should be heard by the First-tier Tribunal, rather than by its Discipline and Appeals Committee.
3. The result is that there is now a mismatch between the appeal arrangements for recognised bodies and licensed conveyancers, on the one hand, and for Alternative Business Structures on the other.
4. The CLC proposes that the appeals and disciplinary jurisdiction of the Discipline and Appeals Committee is transferred to the CLC's Adjudication Panel and that the entitlement to appeal from such determinations is transferred from the High Court to the First-tier Tribunal.
5. The CLC believes that this proposal will result in greater transparency and consistency in the exercise of its appeal arrangements, that the interests of respondents will be safeguarded and that there will be a saving of cost for both respondents and for the CLC.

Responding to this Consultation

You are invited to respond to the questions asked in this Consultation. Please consider the questions posed in the document below and respond via the online link provided at the end of this document. The consultation ends on Friday 19th April 2013.

(Note: Questions 1-3 in the online survey relate to your details).

Introduction

The CLC

1. The Council for Licensed Conveyancers (the CLC) was established under the provisions of the Administration of Justice Act 1985 (AJA) to regulate licensed conveyancers and since 1 January 2010 has been designated an Approved Regulator under the Legal Services Act 2007 (LSA).
2. As set out at section 28 LSA the CLC must, so far as is reasonably practicable, act in a way:
 - (a) which is compatible with the regulatory objectives (set out at s.1 LSA), and
 - (b) which it considers most appropriate for the purpose of meeting those objectives.
3. Further, the CLC must have regard to:
 - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
 - (b) any other principle appearing to it to represent the best regulatory practice.

The purpose of the CLC

4. To set entry standards and regulate the profession of Licensed Conveyancers effectively in order to:
 - secure adequate consumer protection and redress;
 - promote effective competition in the legal services market, and;
 - provide choice for consumers.

Changes in Governance Arrangements

5. Up until 2011 CLC regulatory determinations were made by committee¹. The framework of delegated powers has now been modified so that almost all regulatory determinations are made by a CLC Officer. Any appeal against the determination of a CLC Officer is made to the Adjudication Panel.

About the Discipline and Appeals Committee

6. Under the AJA (and acting as an Approved Regulator) the CLC is required to establish the Discipline and Appeals Committee² (DAC) to hear and determine disciplinary cases referred to it by the Investigating Committee. A Respondent may appeal to the High Court against a disciplinary determination made by the DAC. The DAC also hears appeals against licensing decisions made by the CLC (in respect of which there is no statutory right of appeal).

¹ These included the Investigating Committee, the Conduct and Compliance Committee, the Licence and Practice Committee, the Finance and General Purposes Committee, the Student Registration Appeals Committee

² s.25

7. The DAC panel is appointed by a selection panel itself appointed by the CLC Council³. The Chair and Deputy Chair are senior lawyers. One half of the other members of the panel are licensed conveyancers and the other half non licensed conveyancer members. The DAC sits as a tribunal of three comprising a Chair, a licensed conveyancer and a non licensed conveyancer member. It is advised by a Legal Adviser, also a senior lawyer.
8. Over the last 10 years the number of DAC sittings has varied. Up until early 2011 when the jurisdiction was transferred to the Legal Ombudsman⁴ the DAC determined referrals made to it where CLC practices had failed to comply with a service complaint determination made by the CLC's Investigating Committee.
9. Because relatively few cases are referred to the DAC, the administrative function is dealt with by the CLC. Hearings take place in rooms in Chelmsford.

CLC as a Licensing Authority

10. The CLC was designated as a Licensing Authority authorised to license Alternative Business Structures in October 2011. The LSA provides that the DAC should determine appeals from decisions made by the CLC acting as a Licensing Authority⁵. Following guidance issued by the Legal Services Board, the CLC agreed that appeals from determinations made by the CLC acting as a Licensing Authority are heard by the CLC's Adjudication Panel and then by the General Regulatory Chamber (GRC) of the First-tier Tribunal (rather than by the DAC). These arrangements are now in force.

Appeals to the First-tier Tribunal

11. The First-tier Tribunal was established by the Tribunals, Courts and Enforcement Act 2007⁶. Appeals will be made to the General Regulatory Chamber of the First-tier Tribunal. The tribunal is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure cases are dealt with in the interest of justice and to minimise the parties' costs. The composition of a tribunal is a matter for the Senior President of Tribunals to decide, and may include non legal members with suitable expertise or experience in the issues in an appeal in addition to Tribunal Judiciary.
12. The General Regulatory Chamber operates under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 which provide flexibility for dealing with individual cases. Rule 2 of the General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the tribunal judge wide case management powers in order to achieve these objectives.

³ See Discipline and Appeals Committee Rules 2009 at http://www.clc-uk.org/pdf_files/regulatory_arrangements/other/CLC_DAC_Rules_2009.pdf

⁴ The Legal Ombudsman started to accept service complaints in October 2010

⁵ s.80

⁶ Further information about the Tribunal is at <http://www.justice.gov.uk/about/hmcts>

Onward appeal from the tribunal

13. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

Effect of the Changes

14. Because it is authorised as both an Approved Regulator and as a Licensing Authority, the CLC is now operating two parallel regulatory regimes. The CLC's aim has been to minimise the distinctions between these regulatory regimes on the basis that
- the CLC's statutory duty remains the same whether it is acting as an Approved Regulator or as a Licensing Authority;
 - the interests of consumers remain the same;
 - the regulatory arrangements are the same; and
 - the CLC's approach to regulation remains the same.

However, there remains a significant discrepancy in the exercise of disciplinary and appeals functions.

15. This is most clearly apparent in the enforcement powers which are exercisable. Where the respondent is:
- a Recognised Body or Licensed Conveyancer (so the CLC is acting as an Approved Regulator) the maximum penalty which can be imposed is £50,000 if the determination is made by the Adjudication Panel, and £1 million if it is made by the Discipline and Appeals Committee; or
 - a Licensed Body (or ABS) (so the CLC is acting as a Licensing Authority) the maximum penalty which can be imposed by the Adjudication Panel is £250 million (and £150 million if the disciplinary proceedings are against an individual manager or employee).
16. If this were the only imbalance it could be corrected by a change in the CLC's Enforcement Policy (and supporting rules). However, there is also a structural imbalance, best illustrated at Table 1.

Options

17. On initial consideration, following the changes made to the appeal arrangements for ABS, the most obvious solution appeared to be for the DAC to be replaced by the First-tier Tribunal so that the First-tier Tribunal would hear all appeals and disciplinary matters relating to recognised bodies and licensed conveyancers. The effect of such a change would be to continue the mismatch between the appeal processes relating to ABS and those relating to recognised bodies and licensed conveyancers.

	CLC acting as an Approved Regulator		CLC acting as a Licensing Authority
Nature of Entity	Recognised Body/Licensed Conveyancer		Alternative Business Structure
	Current Arrangements in force	Arrangements proposed in this Consultation Paper (not in force)	Current Arrangements in force
Determination (members appointed by the CLC)	Adjudication Panel £50,000	<i>Adjudication Panel</i> <i>£250M/£150M</i>	Adjudication Panel £250M/£150M
	Discipline and Appeals Committee £1million	<i>Review Panel*</i>	Review Panel*
Appeal (the CLC has no influence on the appointment of judges to the courts or tribunals)	High Court	<i>General Regulatory Chamber (GRC)</i>	GRC
Further appeal	no right of onward appeal [‘the decision of the High Court on an appeal shall be final’ (s.26(8) AJA)]	<i>Upper Chamber</i>	Upper Chamber

Table 1

* there is a right of review by the Review Panel where the Adjudication Panel has made a first instance decision. If the Adjudication Panel has determined an appeal from a determination made by a CLC Officer, then there is no entitlement to refer the matter to the Review Panel, though any entitlement to appeal from the Adjudication Panel to the GRC will remain unaffected,

18. There would in fact be greater consistency of process if the jurisdiction of the DAC were to be transferred to the Adjudication Panel and for the jurisdiction of the High Court to be transferred to the First-tier Tribunal.

Question 4:

Do you agree our analysis of the mismatch between the appeal jurisdiction where the CLC is acting as a Licensing Authority and where it is acting as an Approved Regulator?

19. There are complications with this proposal: the Adjudication Panel has already taken over the disciplinary functions of the Investigating Committee⁷ which permit it to carry out a preliminary investigation to determine whether there is a disciplinary case to answer and also to impose a fine (currently up to £50,000). The respondent is entitled to appeal the disciplinary decision of the Investigating Committee (now exercised by the Adjudication Panel) to the DAC and then on to the High Court. The transfer of the DAC's jurisdiction to the Adjudication Panel would arguably mean that the Respondent is deprived of one statutory tier of appeal.
20. The Adjudication Panel Rules 2011⁸ provide at rule 13.3 that any determination made by the Adjudication Panel at first instance (ie it is not determining an appeal made against a determination made by a CLC Officer) may be appealed first to the Review Panel before an appeal is made to the First-tier Tribunal. The Review Panel comprises a Chair and members of the Adjudication Panel who were not on the panel which made the determination which is the subject of appeal. It is proposed that the Review Panel assumes a similar role where a Respondent recognised body or licensed conveyancer appeals against a disciplinary determination made by the Adjudication Panel. Entitlement to appeal to the First-tier Tribunal would remain unaffected.

Question 5:

Do you agree our proposal for aligning the disciplinary jurisdictions of the CLC where it is acting as an Approved Regulator or as a Licensing Authority?

21. Up until March 2009 the maximum fine the DAC could award was £3,000 per allegation. Between 2000 and 2009 in one matter the total fine imposed by the DAC was £8,250 (covering a number of different allegations). Since 2009 when the maximum award was increased to £1 million, the maximum fine awarded has been £2,500.
22. Following the principal of parity as between the Approved Regulator and Licensing Authority jurisdiction it follows that the maximum fine which can be awarded against a licensed conveyancer, or manager or employee of a recognised body, should be increased from £1 million to £150 million and for a recognised body from £1 million to £250 million. This does not mean that the level of fines imposed will be increased since there will continue to be an overriding requirement for the amount of the fine imposed to be fair and proportionate. Relevant factors in determining the level of fine will include the

⁷ at s.24 and s.24A and in schedule 6 AJA

⁸ http://www.clc-uk.org/pdf_files/regulatory_arrangements/other/CLC_Adjudication%20Panel%20No%20%20Rules_2011.pdf

nature of the disciplinary offence, the consequences to other persons of that offence, the benefits the respondent has accrued as a result of commission of the disciplinary offence and the effect the commission of that disciplinary offence has on the reputation of the profession.

Question 6:

Do you agree that the maximum fine which can be awarded against a licensed conveyancer, or a manager of employee of a recognised body should be increased to £150 million, and against a recognised body to £250 million?

23. The principal advantages to the CLC if the DAC jurisdiction is transferred to the Adjudication Panel would be consistency of process (see paragraphs 14-18 above) and a saving in costs. The CLC would not need to have a lengthy and expensive periodic recruitment campaign for the DAC, which meets relatively infrequently, as well as for the Adjudication Panel.
24. Since 2000 only one licensed conveyancer has exercised his entitlement to appeal against a determination of the DAC to the High Court. On one level it could be argued that this is evidence that the CLC profession is largely compliant and that the DAC has made fair and proportionate determinations which have been accepted by the respondents. On the other hand, it could be argued that whilst the CLC has explained in writing to respondents their entitlement to appeal in practice there have been barriers preventing appeals which have merit from being made: since appeals are rare the procedure for making appeals to the High Court is unclear, the legal costs of making an appeal are significant and there is a risk that the respondent will be ordered to pay the CLC's costs if the appeal is unsuccessful.
25. The CLC has identified no detriment to the respondent if the appeal is to the First-tier Tribunal, rather than to the High Court. The process for appealing against an ABS determination made by the Adjudication Panel is clearly set out on the Tribunals Service's website⁹. Links are given to the relevant forms. Whilst there is no bar against a respondent being legally represented, it is understood that the expectation is that a respondent will not usually be legally represented. There is less procedural formality and costs are awarded against a party only if the Tribunal considers that a party has acted unreasonably or where it is satisfied costs have been 'wasted'¹⁰.
26. There is no requirement for the respondent to obtain permission before appealing to the First-tier Tribunal (as is currently the case in respect of the High Court), though the respondent in the First-tier Tribunal is entitled to appeal on a point of law, whereas in the High Court the decision of the judge on an appeal is final.
27. Arguably, the CLC will incur additional costs if appeals are made to the First-tier Tribunal as opposed to the High Court because it will contribute to the costs of the Tribunal Service determined by reference to the number of cases referred to the First-tier Tribunal. Such cost should, however, be more than off set by the legal costs the CLC is likely to save by not having to arrange for independent legal representation before the First-tier Tribunal.

⁹ <http://www.justice.gov.uk/tribunals/alternative-business-structures>

¹⁰ as defined at s.29 Tribunals, Courts and Enforcement Act 2007

28. For the avoidance of doubt, the jurisdiction of the High Court in supervising the exercise of the CLC's powers of intervention under schedules 5 and 6 AJA remain unaffected by these proposals.

Question 7:

Do you agree our analysis of the effect of the changes we propose?

Question 8:

Are you able to identify any detriment to respondents which we have not mentioned?

Question 9:

Are you satisfied with the proposed procedures for appeals? If not, why not?

Question 10:

(Asked on behalf of the Tribunal Procedure Committee) Do you consider that the General Regulatory Chamber Rules will suit the handling of appeals against designations and the associated circumstances? If not, why not?

Question 11:

We welcome any comments that you wish to make on the proposals as a whole.

Please click on [this link](#) to respond to this consultation.

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