GARDEN COURT CHAMBERS HOUSING TEAM

RESPONSE TO "SOLVING DISPUTES IN THE COUNTY COURTS"
Ministry of Justice consultation

Introduction

1. Garden Court Chambers Housing Team specialises in representing tenants and other occupiers of residential property. Members of the Housing Team appear in the County Court every day of the working week. We practice in Courts in London and around the country. We deal with possession actions, disrepair claims, claims in respect of unlawful eviction, tenancy deposit issues, mortgage arrears, homelessness appeals, and other housing-related litigation. Further details of our barristers, experience and expertise are at Appendix 1.

2. We respond to the individual questions put in the consultation paper below. We do not respond to those questions dealing with issues that relate to non-housing specialist areas in the County Court. We confine ourselves to housing-related issues and to issues concerning general practice in the County Court.

3. We do not believe that any reform of civil justice can be considered in isolation from the government's proposals to cut £350 million from the legal aid budget. The cuts fall predominantly in the areas of social welfare law. We responded to the Ministry of Justice consultation on "Reform of Legal Aid in England and Wales". A summary of our response is attached at Appendix 2. We believe that if the Ministry of Justice proceeds with the proposals in the Green Paper "Reform of Legal Aid in England and Wales", then many people who are currently assisted by legal aid to resolve their disputes, and have access to justice, will lose that access to justice. We believe that the proposed cuts to legal aid will result in more litigants in person in the County Court, with consequent greater demands on Court resources. Litigants in person are less likely to try to resolve their disputes proportionately.

4. Overall we agree that litigation should be a last resort. We support the use of pre-action protocols for possession claims based on rent arrears, for possession claims based on mortgage arrears, for housing disrepair claims and (in the High Court) for judicial review claims. We believe that use of these protocols has reduced the number of possession claims brought, and has given potential parties the opportunity to resolve their disputes without Court proceedings. We also support the use of Alternative Dispute Resolution and mediation. We agree that many cases could be resolved by mediation. However, we note that mediation and other ADR is most effective when the parties are represented by lawyers. We believe that public funding should be available for ADR and mediation.

Summary of responses

5. In general, we would make the following points in relation to the overall proposals.

Chapter 2 of the consultation paper "preventing cost escalation"

6. This chapter deals with three separate issues:
   - simplified claims procedure for personal injury and clinical negligence claims: this is not our area of expertise and we do not comment.
   - fixed recoverable costs in other fast track claims; and
   - increasing the small claim and fast track claims limits.

Fixed costs

7. We are opposed to the proposals to introduce fixed recoverable costs. Housing law trials on the fast track can encompass a variety of different issues. They can involve bitter disputes of facts (sometimes lengthy schedules of separate incidents spanning months or years), complicated legal issues and expert evidence. They may also be against private landlords, who can be recalcitrant litigants. Overall it is our view that fast track trials are too diverse for fixed costs to be appropriate.

Increase to the small claims and fast track claims financial threshold

8. We do not agree with these proposals as we believe they will reduce access to justice for individuals. It is our view that claims in excess of £5,000 are very difficult for individuals to litigate without legal advice or representation. If claims in excess of £5,000 are in the small claims track, legal costs will not be recoverable and public funding and conditional fee agreements will not be available. We believe that this will disadvantage individuals seeking to enforce their rights. The fast track financial threshold was increased from £15,000 to £25,000 in April 2010 and we do not consider that there should be a further increase.

9. If the small claims track threshold is to be increased, we believe that increase should not apply to claims for damages arising from unlawful eviction or in breaches of the repairing covenant.

Chapter 3: alternative dispute resolution mechanisms in small claims and other tracked cases

10. We believe that mediation and ADR should be encouraged. However, we are concerned that parties may not be operating on a level playing-field. Businesses, public authorities and private landlords are able either to afford legal advice and representation or to present small claims themselves.

11. Our clients are tenants and other occupiers of residential properties. They are often amongst the most disadvantaged groups in society. Many

of them are on welfare benefits. A substantial number speak English as a second language or not at all. Some of them have literacy or numeracy difficulties. They cannot afford to pay for legal representation and public funding is not available in the small claims track. Currently the presence of a Judge ensures a fair hearing. We are concerned that parties may engage in mediation or other ADR and be on a profoundly unequal footing. For mediation to be effective, public funding must be available so that the more disadvantaged party can be advised and represented. |t is not part of a mediator's role to advise a party, even less so is it a mediator's role to represent a party. It is the task of a mediator to draw out what the parties are seeking. It is at that stage that parties most need advice.

12. We also consider that mediation is most useful when both parties have had a chance to assess the strengths and weaknesses of their own, and their opponent's, cases. This means that issues should be clearly identified and disclosure should have taken place, in advance of mediation. It also means that parties should be encouraged to seek legal advice before the mediation process, so that they enter into mediation with a clear idea as to what they might achieve from the litigation (and therefore on what terms they may settle).

13. In our experience, mediation and ADR are most effective when either there is ongoing litigation or litigation is contemplated. The possibility of a final determination of the issues by a Judge can concentrate parties' minds.

Chapter 4: enforcement.

14. We do not comment.

Chapter 5: structural reforms.

15. Overall we are in favour of further integration between the High Court and the County Court. However, we believe that judicial review should be retained in the Administrative Court as it requires specialist judges.

Response to Questions

Chapter 2: Fixed recoverable costs

Question 13: Do you agree that a system of fixed recoverable costs should be applied to other fast track claims? If not, please explain why.

16. Response: We do not agree. Fast track trials can range from the simple and straightforward to complicated factual or legal disputes. In our area of experience, we appear at fast track trials concerning possession, breaches of repairing covenants, claims in respect of

unlawful eviction and other issues regarding tenancies or occupiers' rights. A possession trial might involve relatively simple and undisputed facts. Or there might be numerous allegations of anti-social behaviour, all of which might be disputed, which involve detailed cross-examination. Other possession trials involve complex areas of law (for example, whether a false statement induced the grant of a tenancy, whether a tenant enjoys statutory protection etc). Trials concerning breach of repairing covenants can involve factual disputes as to the extent of disrepair, notice, access or damage. There is always expert evidence, usually adduced in written form. Legal issues are invariably involved, concerning the extent of the disrepair and the quantum of damages. In unlawful eviction cases, the factual claim is likely to be vigorously disputed by the landlord. Legal issues will often arise concerning liability and authorities are required on the issue of quantum.

17. In addition, many of the housing-related claims that come to trial are brought against private landlords (as social landlords are more likely to settle in advance in trial). Those private landlords will often be recalcitrant litigants, who have not complied with court orders and are unaware of court procedures. A great deal of time, energy and legal expertise is required in order to conduct the trial appropriately against a litigant in person, who is often aggrieved at having been brought to Court. If the option of pre-action directions being mandatory for landlords and lenders, but non-mandatory for tenants and borrowers, is not acceptable, then we would support non-mandatory directions for both.

18. Overall, it is our view that fast track trials are too diverse for fixed costs to be appropriate.

Question 14: not applicable

Question 15: Do you agree that for all other fast track claims there should be a limit to the pre-trial costs that may be recovered? Please give reasons.

19. Response: No. It is not possible to predict in advance how much legal work will be required for most fast-track trials. There may be difficult legal issues (see answer to question 13 above). There may be difficult opponents: those who can afford to pay high legal costs, or those who are litigants in person and unconcerned about costs. These opponents cannot be relied upon to conduct the litigation proportionately and could make cases uneconomic to run with public funding or under a conditional fee agreement. We frequently come across parties, often well-funded public authorities, who fail to comply with directions so that interim applications are necessary in order to drive forward the litigation. We also encounter opponents who make unnecessary applications, sometimes with the tactic of delaying the litigation.

20. If there were to be fixed recoverable costs, they would need to reflect the different amounts of preparations needed for different trials. We would propose that account is taken of the number of documents in the trial bundle, the legal issues raised in the skeleton argument and the number of witnesses giving evidence. We would also propose that there remains a discretion on the trial Judge to order that the trial costs be assessed rather than fixed, in exceptional cases.

21. The system of summary and detailed assessment ensures that lawyers can only recover fees which have been proportionately incurred and we believe that the system of assessment works well.

22. The Jackson review rightly recognised the complexity of the substantive law in housing (Review of Civil Litigation costs: Final Report, chapter 26, paras 2.1 – 2.9). Unless housing law were to be simplified (and there are no current government proposals to do so), it would be unfair to adopt fixed recoverable costs.

Question 16: Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

23. Response: we partially agree. On the whole, the pre-action protocols for possession on the grounds of rent or mortgage arrears and for disrepair claims work well. We consider that compliance should be made mandatory for landlords and lenders, but not for tenants or borrowers. In our experience, it is landlords and lenders who fail to comply with pre-action protocols, particularly in respect of disrepair claims. Furthermore, landlords and lenders are acting in a commercial context, whereas tenants and borrowers are individuals, who may not be receiving legal advice or representation. It would be wrong for sanctions to apply to tenants and borrowers.

24. Mandatory directions would require meaningful sanctions for non-compliance. Where there has been non-compliance by a landlord or lender, the claim should be struck out The current discretionary power at CPR 3.4(2)(c) to strike out the statement of claim should be re-drafted so as to provide for automatic striking out in those circumstances.

Question 17: If you answer to Q16 is yes, should mandatory pre-action directions apply to all claims with a value of up to (i) £100,000 or (ii) some other figure (please state with reasons)?

25. Response: we have no strong views in relation to this issue. In our experience, housing cases do not generally reach values of up to £100,000.

Question 18: Do you agree that mandatory pre-action directions should include a compulsory settlement stage? If not, please explain why.

26. Response: We agree that this would be appropriate in some cases such as disrepair and illegal eviction claims, where the only remedy sought is for damages. We note, as stated above, that in our experience it is landlords rather than tenants who fail to comply with the steps required under pre-action protocols. A compulsory settlement stage would force landlords to engage with issues raised by tenants. However, for the settlement to be successful (in that all parties feel that they have been treated fairly and justly), the issues between the parties need to have been identified in advance, and disclosure needs to have taken place. We believe that settlement negotiations are most successful when a party is aware of the strengths and weaknesses of his or her own case, and of the litigation risk (including the costs risk) involved if the case does not settle. We would support pre-action directions which require early identification of the issues, early disclosure and subsequently compulsory attempts at settlement. We also believe that public funding should be available throughout that process.

Question 19: If your answer to Q18 is yes, should a prescribed ADR process be specified? If so, what should it be?

27. Response: We have a strong preference for mediation as against compulsory arbitration. Mediation is, in our experience, generally successful. We prefer it to arbitration since it operates by consent and does not involve an adjudication. We repeat that for mediation or other ADR to be effective, public funding should be available so that the parties have the benefit of legal representation, or at least legal advice, and are on an equal footing. Arbitration involves a determination of the parties' claims. In our opinion, this is best left to a trial Judge.

Question 20: Do you consider that there should be a system of fixed recoverable costs for different stages of the dispute resolution regime? If not, please explain why.

28. Response: overall we do not agree. As set out above, we believe that ADR should take place after identification of the issues, disclosure and an opportunity to assess objectively the strength and weaknesses of each party's case. We do not consider that an average or normal amount can be specified. Each case is different and involves different amounts of work. Again, we point to the system of assessment as providing a mechanism to ensure that costs are only incurred proportionately.

29. However, we do feel that fixed recoverable costs would be appropriate for claims for possession brought by lenders, unless those claims are defended. These claims are similar, routine and straightforward. At

present, borrowers have unlimited costs exposure. It would be appropriate to limit that exposure.

Question 21: Do you consider that fixed recoverable costs should be (i) for different types of dispute or (ii) based on the monetary value of the claim? If not, how should this operate?

30. Response: we do not agree with fixed recoverable costs. However, if they are to be introduced, we believe that assessment by reference to the monetary value of the claim is inappropriate. We regularly appear in cases that do not have direct monetary value for our client (possession on the grounds of anti-social behaviour, injunctions for urgent repairs to be carried out or for re-admission after an illegal eviction and homelessness appeals). All these cases involve either protracted disputes of facts (possession anti-social behaviour claims, disrepair claims) or complex legal issues (notably homelessness appeals) or both. They are as important - or even more important - to our clients than the recovery of a debt of £100,000 would be to someone who had means.

31. Fixed recoverable costs, if they are to be introduced, should take account of:
    - the extent of documentary evidence;
    - the number of witnesses;
    - the number of issues between the parties;
    - the extent to which there is legal argument; and
    - the importance of the issue at stake to the parties.

    We consider that no fixed costs should apply until all this information is available which would necessarily be at, or close to, trial.

Question 22: Do you agree that the behaviour detailed in the Pre-Action Protocol for Rent Arrears and the Mortgage Pre-Action protocol, could be made mandatory? If not please explain why.

32. Response: we believe that it should be mandatory for landlords and lenders, and not for tenants and borrowers. We believe that pre-action protocols are useful tools in all areas of litigation but we fail to see how vulnerable parties can be forced to engage. We believe that it should be compulsory for landlords (including private landlords) to use the pre-action protocols before commencing possession proceedings. However, we do not see how tenants could be penalised if they fail to respond to the landlord's request. Financial penalties would clearly be inappropriate for a group which is already in debt and it would be unfair and unjust to make a possession order or even make one more likely if a vulnerable tenant failed to engage in a settlement stage. Furthermore, it is the most vulnerable tenants who are likely to have got themselves into rent arrears, to have failed to respond to any early approaches by the landlord and to be facing possession proceedings. The same point applies to possession claims brought by lenders against borrowers.

33. We do not believe that tenants or borrowers should be penalised for failing to respond to landlords or lenders who invoke the relevant protocols. Any such penalty would mean that, in effect, a possession order would be made against the tenant or borrower without scrutiny of the merits, but simply as a result of the failure to comply with the relevant protocol. This is wholly inappropriate when the issue concerns a person's home.

34. A useful amendment to the pre-action protocol would require landlords to make personal contact with tenants or at least to have attempted to do so in advance of commencing proceedings.

Question 23: If your answer to Q22 is yes, should there be different procedures depending on the type of case? Please explain how this should operate.

35. Response: Non-compliance with mandatory pre-action protocols and/or directions should result in automatic striking out where the non-compliance is by landlords or lenders. See answer to question 16 above.

Question 24: We make no response.

Increase in small claims limit

Question 25: Do you agree that the small claims financial threshold should be increased? If not, please explain why.

36. Response: we do not agree. We understand that for businesses, an increase in the small claims limit so that they can conduct cases (particularly debt-recovery cases) themselves and not risk legal costs would be welcome. However, our clients are individuals and most of them are very vulnerable individuals. They may speak English as a second language, or not at all. They often struggle with literacy and numeracy, and with the completion of forms or understanding Court processes. A claim for damages for disrepair, or unlawful eviction, rarely exceeds £15,000. However, those cases involve complex legal and factual issues (as already set out above). Our clients should not be prevented from pursuing their legal remedies against a defaulting landlord because the system is too difficult to understand, and they cannot obtain public funding because of the no-costs rule in small claims cases.

Question 26: Not applicable.

Question 27: do you agree that the small claims financial threshold for housing disrepair should remain at the current limit of £1,000?

37. Response: Yes we do. The lower threshold only applies to disrepair claims where the tenant is seeking an injunction against the landlord, in order to compel the landlord to act lawfully and carry out repairs. The

tenant is therefore seeking a remedy that does not have a monetary value. As already set out, disrepair claims are complex. They involve expert evidence, disputes of facts, complicated relationships between different causes of action and there is a large body of case-law, on liability and on quantum. In our experience, tenants are often unable or unwilling to represent themselves and do not pursue disrepair claims when they are small claims.

38. The importance of the remedy sought to the tenant is often not related to the cost of the works, or the likely quantum of the claim. A leaking water-pipe, for example, can cause dampness problems and huge discomfort for a tenant yet may be very cheap to repair. Allocating disrepair claims to the small claims track on the basis of the cost of repairs, or even likely quantum of the claim, does not take into account the importance of the issue to the tenant (which is usually why the tenant has brought proceedings). Raising the limit above £1,000 would, in our view, leave a disadvantaged group without any real redress against their landlords' breaches of covenant.

39. We believe that tenants should be able to obtain legal representation – often publicly funded – so that they can enforce breaches of covenant committed by the landlord and be confident that they (or the Legal Services Commission) will recover costs.

40. It is proposed that damages claims in housing disrepair claims are to be removed from the scope of public funding on the basis that they can be dealt with by way of conditional fee agreements. This can obviously not occur if they are on the small claims track

41. If the small claims limit is to be increased, there should be a specific exception for damages claims in housing disrepair cases as there already is in relation to illegal eviction claims (CPR 26.7), personal injury claims (CPR 26.6(1)(a)) and housing disrepair claims where an order for works is sought, (CPR 26..6(1)(b)). We would suggest that this could be done by amendment to CPR 26.6.(1)(b) so that housing disrepair claims are only on the small claims track if (i) the only remedy sought is damages and (ii) those damages are likely to be less than £1000.

42. Where housing disrepair claims are in the fast-track, we would support qualified one-way costs shifting in housing disrepair claims. We believe that the arguments in favour of qualified one-way costs shifting for personal injury claims apply equally to disrepair claims. We note that in his final report Jackson LJ stated that there was a strong case for saying that non-legally aided claimants in housing disrepair cases should benefit from qualified one way costs shifting (Review of Civil Litigation costs: Final Report, chapter 26, para 4.4).

Question 28: not applicable.

Question 29: do you agree that the fast track financial threshold of £25,000 should be increased? If not, please explain why.

43. Response: we do not agree. The threshold has only recently been increased from £15,000 (in April 2010). Claims that are worth more than £25,000 are not suitable for the streamlined fast track procedure.

Question 30: not applicable.

Alternative dispute resolution

Questions 31 and 32: not applicable.

Question 33: Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not please explain why.

44. Response: in principle we support attempts to incentivise parties to mediate. However, we are concerned at the potential in-balance between the parties. Businesses, landlords and local authorities will have either in-house expertise in the areas of law and civil procedure, or at least the confidence and the skills to engage with the process. Our individual clients rarely have either the knowledge or the skills required to present their cases and represent their own interests. We believe that mediation is successful when the parties are on a level playing-field and that often requires parties to be able to bring their lawyers to mediation, or at least to have obtained legal advice in advance as to the merits of their claim.

Questions 34 – 37: we have no opinion.

Question 38: Do you agree that parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper? Please give reasons.

45. Response: in principle we agree. However, we are concerned that some of our clients – who may have difficulties with literacy or speak English as a second language – may not be able to express themselves as well on the telephone as face-to-face, and equally may not be able to convey the whole of their claim on paper. Parties should have the right to elect for face-to-face hearings without having to provide reasons or justification. In this context, we note the recent decision of the Court of Appeal in Makisi & others v Birmingham City Council[1] where it held that the right to make oral representations in the relevant Regulations required the local housing authority to offer the applicant an oral hearing, rather than conducting the hearing on the telephone.

1 [2011] EWCA Civ 355, CA

Question 39: Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

46. Response: it would be useful for parties to have information so as to encourage them to engage in mediation or other ADR. We are not sure that an additional compulsory stage in the litigation – requiring parties to attend an information session – would be proportionate or assist the litigation. We would support information as to mediation being sent to each party as a matter of course during the pre-trial process. We are concerned that an additional compulsory stage would result in further costs being accrued.

Questions 40-42: we do not respond.

Questions 43: do you agree that provisions required by the EU Mediation Directive should be similarly provided for domestic cases? If not, please explain why.

Question 44: what provisions should be provided and why?

41. Response to Questions 43 and 44: we do agree that written settlements negotiated at mediation should be made enforceable and that mediators and provider organisations should be protected from being compelled to give evidence. We also agree that limitation periods should not run during the mediation process, so that mediation cannot be used as a method of delaying a claim.

Chapter 4: enforcement. We do not comment.

Chapter 5: structural reforms.

Question 64: Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts? If not please explain why.

42. Response: we do agree. We have experience of applying for freezing orders in the High Court related to ongoing County Court proceedings (where the opposing party appears to be disposing of assets). It would be proportionate for an application for a freezing order to be made within the existing proceedings to which it relates.

We do not respond to the other questions in chapters 5 or 6.

Appendix 1

The Housing Team has a reputation for excellence in this field and is highly ranked for Social Housing work in the independent directories:

"Best known for representing tenants, Garden Court is home to a wealth of intelligent and passionate barristers who are 'extremely committed to their work and always willing to go that extra mile.' Clients appreciate the set's strength and depth in a range of disciplines, such as immigration and civil liberties, which naturally complements its housing expertise. The full spectrum of housing law is catered for here, particularly homelessness, unlawful eviction and disrepair issues."
Chambers UK - The Bar: A Client's Guide 2011

"Garden Court Chambers has a large specialist housing law team that is particularly committed to representing tenants, other occupiers and the homeless."
The Legal 500, 2010 Edition

The Housing Team produces a free weekly *Housing Law E-Bulletin* for over 1000 subscribers and contributes articles and case reports to professional publications such as *Legal Action*.

Members of the team have also written or co-written the following important practitioner text books: *Defending Possession Proceedings* (LAG); *Repairs: Tenants' Rights* (LAG); *Remedies for Disrepair and Other Building Defects* (Sweet & Maxwell*), Support for Asylum Seekers* (LAG), *Using the Housing Act 2004* (Jordans), *Housing Allocation and Homelessness* (Jordans), the *Housing Law Handbook* (Law Society), *The Homelessness Act 2002: A Special Bulletin* (Jordans) and *Housing and the Human Rights Act: A Special Bulletin* (Jordans).

Between them the members of the Housing Team have decades of experience of dealing with the sharp end of issues relating to social housing. The team comprises:

Barrister	**Year of Call**
David Watkinson	1972
James Bowen	1979
Jan Luba QC	1980
Stephen Cottle	1984
Beatrice Prevatt	1985
Marc Willers	1987
Bethan Harris	1990
Edward Fitzpatrick	1990
Stephen Knafler QC	1993
Liz Davies	1994
Michael Paget	1995
Adrian Marshall Williams	1998

Adrian Berry	1998
Alex Offer	1998
Catherine O'Donnell	2000
Marina Sergides	2000
Desmond Rutledge	2001
Tim Baldwin	2001
Maya Naidoo	2002
Irena Sabic	2002
John Beckley	2003
Stephen Marsh	2005
Shu Shin Luh	2006
Deirdre Malone	2006
Alex Grigg	2007
David Renton	2008
Claire McGregor	2009

For more details about our work or our services contact:

Phil Bampfylde
Senior Clerk – Housing Team
Garden Court Chambers
57-60 Lincoln's Inn Fields
London WC2A 3LJ
DX: 34 Chancery Lane
Tel: 0207 993 7600
Fax: 0207 993 7700
www.gardencourtchambers.co.uk
philb@gclaw.co.uk

Appendix 2

Summary of Garden Court Housing Team Response to consultation on reform of legal aid in England and Wales

Although we appreciate that in England and Wales we are all facing difficulties with the state of public finances we note that in Scotland and Northern Ireland there are no similar proposals to radically reform the provision of Legal Aid for housing and other matters. We believe the proposals set out in respect of Housing issues in the consultation paper are fundamentally flawed and will be highly damaging to the interest of clients in need of such assistance and to wider society. Consequentially we do not support the proposals set out in Chapter 4 and 7 of the Consultation Paper for our reasons given above.

We note that it is a fundamental issue that citizens should have a roof over their head which is suitable, affordable and decent. We note that one of the cornerstones of democracy in a civilised society is the right of an individual to be able to challenge decisions and enforce their rights irrespective of their means. Sadly, the reforms proposed in this Consultation Paper seriously undermine those principles.

Housing Team
Garden Court Chambers
London