

LAND REGISTRY ADJUDICATION: A BEGINNER'S GUIDE

by

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He is listed as a leading junior in costs as well as for property litigation in both Chambers (“very forceful on his feet but adapts his approach to the situation well”) and Legal 500 (“effective lateral thinker, and very quick to respond to events in court”).

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Of most relevance to today’s event, David is a Deputy Adjudicator to the Land Registry.

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WHO OR WHAT IS THE ADJUDICATOR?

1. The Adjudicator to HM land Registry is a post established under section 107 and Schedule 9 of the LAND REGISTRATION ACT 2002 (“the act”). It is (or rather was) a wholly new position and jurisdiction. Prior to the act, there was a limited provision for disputes on land registration matters to be dealt with by the Solicitor to the Land Registry. However those drafting the act felt that it was better to create a new office and a new jurisdiction which was separate from the Registry in order, at least, to avoid the perception of partiality by officials of the Registry.
2. The Adjudicator is Edward Cousins. He took up his post on 15th September 2003 and the jurisdiction commenced on 13th October 2003. According to Edward Cousins, it was initially envisaged that the role of Adjudicator would be a part time one. This has proved not to be the case as is evidenced by the fact that he is now assisted by over 30 Deputy Adjudicators, three of whom are full time the rest of whom are part time. The Deputies are either practising or former solicitors or barristers with experience in property law.

THE JURISDICTION

3. Essentially the Adjudicator is there to resolve disputes about registered land. As set out in section 108 of the act, there are three aspects to his jurisdiction.
4. The first, and by far and away the most important, jurisdiction is dealing with references from the Land Registry. Under the provisions of the act, there are a large number of different circumstances in which people can make applications to the Registrar. These include applications:
 - (i) for first registration (under sections 3 and 4 of the act);
 - (ii) to lodge or withdraw or cancel a caution against first registration (under sections 15, 17, 18 of the act);
 - (iii) to register a registrable disposition (under section 27);
 - (iv) to enter, remove or cancel a notice (sections 34-6);

- (v) to enter or withdraw a restriction (sections 43 and 47);
- (vi) to register the priority of registered charges (section 48);
- (vii) to determine the exact line of a boundary (section 60);
- (viii) to upgrade title (section 62);
- (ix) to alter or rectify the Register (section 65 and Schedule 4)
- (x) to obtain an official copy (section 67);
- (xi) to obtain an official search (section 70);
- (xii) to enter into a network access agreement (Schedule 5 paragraph 1)
- (xiii) by a squatter to be registered as proprietor (Schedule 6 paragraphs 1 and 2).

The Land Registration Rules 2003 make provision for how each of these applications is to be dealt with by the Registry. There are, for example, a variety of different forms made available and the rules state which ones are to be used in respect of which applications. One needs also to refer to the various Registry practice Guides.

5. Section 73 (1) of the act provides that:

“Subject to subsections (2) and (3), anyone may object to an application to the registrar.”

Section 73 (5) provides:

Where an objection is made under this section, the registrar—

(a) must give notice of the objection to the applicant, and

(b) may not determine the application until the objection has been disposed of.

Again there are various rules which provide for how these objections are to be dealt with. However, unless the Registrar is satisfied that the objection is groundless (see section 73 (6)), section 73 (7) applies. It provides as follows:

“If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer the matter to the adjudicator”.

6. Thus there are a wide variety of different types of dispute resulting from applications to the Land Registry which have to be referred to the Adjudicator. These include, most commonly:
 - (i) Boundary disputes;
 - (ii) Disputes about easements or restrictive covenants;
 - (iii) Disputes about the beneficial ownership of land;
 - (iv) Adverse possession claims.
7. Typically, the Land Registry will have been in correspondence with the parties (the applicant and any objector) and will have attempted to get them to agree. However, if agreement is not possible, then it will prepare a Case Summary and formally refer the matter to the Adjudicator. The Case Summary is a document of (usually) no more than two pages which briefly sets out: the registered title number; the nature and date of the application; the nature of the objection raised and the nature of the dispute. It is a very useful document but is intended only for guidance to the Adjudicator. However, you would be surprised at how much correspondence can be engendered between the parties about the contents of the draft Case Summary.
8. Once the matter is referred, the Adjudicator has to resolve the dispute and then make a substantive decision which will usually be a direction to the Registrar either to give effect to or cancel, in whole or in part, the application made.
9. There are two other and quite separate jurisdictions which the Adjudicator is given under the act. Both of these are original in that they involve applications made directly to the Adjudicator and do not require reference to the Land Registry.
10. The first is that, pursuant to section 108 (2) of the act, the Adjudicator may on application make any order which the High Court could make for the rectification or setting aside of a document which:
 - (a) effects a qualifying disposition of a registered estate or charge,
 - (b) is a contract to make such a disposition, or

(c) effects a transfer of an interest which is the subject of a notice in the register.

For these purposes of subsection a “qualifying disposition” is either a registrable disposition, or a disposition which creates an interest which may be the subject of a notice in the register. Thus under this power the Adjudicator can rectify or set aside, for example: a transfer of registered land; the grant of a legal estate (such as a registrable lease); a deed creating a restrictive covenant or a contract to make any of these dispositions.

11. The final jurisdiction is that of hearing appeals under paragraph 4 of Schedule 5 of the act by persons (likely to be either solicitors or licensed conveyancers) aggrieved by a decision to grant or terminate a network access agreement. This jurisdiction may come into its own (if that is an appropriate phrase) when the system of electronic conveyancing is fully up and running. In order to access the electronic network a solicitor or licensed conveyancer will have to enter into a network access agreement. The Registrar has the power both to set the terms of any such agreement and to terminate it. Any appeal from such a decision is to the Adjudicator.

12. For the remainder of this talk I will concentrate on the reference procedure under section 73 (7) as this is the jurisdiction which you are most likely to encounter. Further, when I refer to “the Adjudicator” hereafter, I am referring to the office and not to Edward Cousins personally.

THE VOLUME OF WORK

13. The number of cases heard by the Adjudicator is increasing. There were somewhere between 1700 and 1800 matters referred to the Adjudicator in the last 12 months. Between January and September of this year some 500 matters were listed for hearing and some 289 cases were actually heard.

14. By way of comparison, in 2007 (the latest year for which figures are available) some 3534 claims in total were issued out of the Chancery Division in London of which 924 were property claims. Taking all courts in England and Wales, the statistics show that, in 2007, there were some 284,381 claims for possession of land actually issued of which only 3% (some 13,241) were actually defended.

15. In summary, therefore, the volume of cases being heard by the Adjudicator is by no means insignificant when compared to the volume of similar cases being heard in the civil court system. For reasons which I shall subsequently explain, I believe that the number of cases before the Adjudicator is likely to increase.

GEOGRAPHY

16. The Office of the Adjudicator is situated at Victory House on Kingsway in central London. That is where the listing and support staff are based and where the Adjudicator and the full time Deputies have their offices. It is also where all the decisions taken without a hearing are made and where correspondence with the Adjudicator should be sent. There are two permanent hearing rooms there. However actual hearings take place throughout the country. Although the Adjudicator has no permanent base outside London, every effort is made to ensure that the hearing of a reference (or an application in a reference) takes place in the vicinity of the land in dispute. Hearings generally take place in the Tribunal centre nearest to the site with hearing rooms being booked on an ad hoc basis to accommodate individual references.

PROCEDURE ON A REFERENCE

17. Procedure before the Adjudicator is governed by The Adjudicator to HM Land Registry (Practice and Procedure) Rules 2003 (as amended by The Adjudicator to HM Land Registry (Practice and Procedure) (Amendment) Rules 2008). I'll call these "the rules".

18. There are in the rules, as we'll see, many concepts with which the court litigator will be very familiar. Indeed, whilst there are many tribunals which strive to engender an air of informality and "touchy feely" familiarity, procedure before the Adjudicator has, to members of the Bar in any event, a comforting degree of adversarial formality. There are nevertheless some differences.

19. In particular there is a comforting familiarity in rule 3 of the rules which rule is headed "The overriding objective" and states:

"(1) The overriding objective of these Rules is to enable the adjudicator to deal with matters justly.

(2) Dealing with a matter justly includes, so far as is practicable–

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the matter in ways that are proportionate–

(i) to the value of the land or other interests involved;

(ii) to the importance of the matter;

(iii) to the complexity of the issues in the matter; and

(iv) to the financial position of each party; and

(d) ensuring that the matter is dealt with expeditiously and fairly.

(3) The adjudicator must seek to give effect to the overriding objective when

he–

(a) exercises any power given to him by these Rules; or

(b) interprets these Rules.

(4) The parties are required to help the adjudicator to further the overriding objective”

20. When a matter is referred, the first step will be that the file (such as it is) will be put before the Adjudicator. This will be done without specific reference or notice to the applicant or the objector. The file will include copies of: the application; the objections; the Case Summary; any relevant correspondence. The Adjudicator will decide which party is formally to be the Applicant and which the Respondent in the reference. In addition the Adjudicator will decide whether he will determine the matter or whether he will direct that the parties issue court proceedings.

21. By section 110 of the act:

“(1) In proceedings on a reference under [section 73\(7\)](#), the adjudicator may, instead of deciding a matter himself, direct a party to the proceedings to commence proceedings within a specified time in the court for the purpose of obtaining the court's decision on the matter.

(2) Rules may make provision about the reference under subsection (1) of matters to the court and may, in particular, make provision about-

(a) adjournment of the proceedings before the adjudicator pending the outcome of the proceedings before the court, and
(b) the powers of the adjudicator in the event of failure to comply with a direction under subsection (1).”

22. There are no fixed rules about what types of dispute the Adjudicator will hear and which he won't. Generally, if the reference involves a pure property law matter such as a boundary dispute or adverse possession claim, then the reference will be accepted. If however, the matter is a “quasi-matrimonial” dispute as to the existence and extent of a beneficial interest in a home formerly shared by the applicant and objector, then, depending on whether the view is taken that any other form of relief may be required, the Adjudicator may well direct that one party or the other issues court proceedings.

23. If it turns out either that proceedings have been issued, or that one or other party asserts that they are just about to issue proceedings, then a direction under section 110 will almost certainly be given.

24. Even if such a direction is made, the Adjudicator cannot actually force the party to issue proceedings. However the reference will be stayed until the outcome of the court proceedings. If no proceedings are issued, then the sanction for failure to comply is that the Adjudicator will direct the Registrar either to allow or dismiss the application made to the Registry (depending upon who was ordered to commence the proceedings).

25. If the reference is accepted (i.e. if no direction for the commencement of court proceedings is made) then a direction will be given for the sequential filing of a Statement of Case by each party. This document is the Adjudicator's equivalent of the pleadings before a court.

26. The contents of a Statement of Case are governed by rules 12-14 of the rules.

27. By rule 14, a Statement of Case must:

- (i) Be in writing; and
- (ii) Be verified by a Statement of Truth; and
- (iii) State the name and address of the party who is serving it; and
- (iv) State the facts on which that party relies; and
- (v) The names of the witnesses which the party intends to call;

28. By rules 12 and 13, along with their Statement of Case, each part must serve copies of any documents in their possession or control which are:

- (i) Central to that party's case; or
- (ii) Will be required by the Adjudicator or any other party in order properly to understand that party's Statement of Case.

Thus, unlike court proceedings, the rules provide for a degree of disclosure to be made at the same time as "pleadings".

29. There is thus a degree of flexibility as to the contents of the Statement of Case.

30. My own view, when drafting, is to make them perhaps slightly longer than I would Particulars of Claim in court proceedings and, in particular, specifically to set out the propositions of law and cases on which I will rely. One has to disclose the documents along with the Statement, so one might as well allude to them. Further, one frequently encounters litigants in person in front of the Adjudicator and my own view is that the tribunal will appreciate a party who is legally represented putting forward and explaining its case in detail at the earliest possible stage.

31. The standard direction is for the Applicant to file and serve his Statement of Case within 28 days and for the Respondent to file and serve his Statement of Case within 28 days of receipt of the Applicant's Statement.

32. Once the Statements of Case have been filed, the Adjudicator will issue further directions.

33. However by rule 27 (2) it is provided that:

“Within 28 days after service of the respondent's statement of case under [rule 13](#) or the lodging of an objection under [rule 18](#), each party must—

(a) serve on the adjudicator and each of the other parties a list, which complies with [rule 47](#), of all documents in that party's possession or control which—

(i) that party intends to rely upon in the proceedings;

(ii) adversely affect that party's own case;

(iii) adversely affect another party's case; or

(iv) support another party's case; and

(b) send to the adjudicator copies of all documents in the list served under sub-paragraph (a).

Further rule 27 (4) provides that:

(4) In addition to any other requirement in these rules to disclose or provide copies of documents, in relation to any document referred to in [the Statement of Case and disclosure list] each party must—

(a) permit any other party to inspect and take copies on reasonable notice and at a reasonable time and place; and

(b) provide a copy if requested by another party on payment by such other party of reasonable copying costs.

Thus there are provisions for automatic disclosure and inspection once the “pleadings” are closed.

34. There are in addition provisions in the rules allowing the Adjudicator to make many of the directions regularly encountered under the CPR such as:

- (i) Consolidation of proceedings (rule 22);
- (ii) Addition or substitution of parties (rule 24);
- (iii) Further information and supplementary Statements (rule 25);
- (iv) Witness statements (rule 26);
- (v) Specific disclosure (rule 27 (6));
- (vi) A direction for the hearing of preliminary issues (rule 31);
- (vii) The grant of summary judgement (or “summary disposal” as it is referred to in rule 32A);
- (viii) For expert evidence (rule 49).
- (ix) To vary or set aside any directions already made (rule 54);
- (x) To mete out sanctions for failure to comply with directions (rule 55);
- (xi) To give directions and make orders of his own motion (albeit only after given notice to both parties) (rule 51).

35. The power of “summary disposal” was first introduced by the 2008 rules. It closely mirrors the terms of CPR Part 24 in that summary disposal will be granted (to either party) only where

*“(a) the adjudicator considers that the applicant or respondent has no real prospect of succeeding in the proceedings or on the issue; and
(b) there is no other compelling reason why the proceedings or issue should not be disposed of summarily.”*

36. In addition, by rule 48 the Adjudicator can hear evidence on oath and (by rules 28 and 48 (2)) he has the same power to compel the giving of evidence as does a civil court.

37. By rule 51 the parties can make applications to the Adjudicator. There is no specific format however any application must be in writing and:

- (i) state the name of the person applying or on whose behalf the application is made;
- (ii) be addressed to the adjudicator;
- (iii) state the nature of the application;
- (iv) state the reason or reasons for the application.

Most interim orders are made without a hearing on a consideration of the file by the Adjudicator. Orders and directions have to be in writing (rule 21).

38. A direction for the service of witness statements with statements of truth will almost invariably be given.

39. So far as the hearing is concerned, as I have stated, this may be in London but will usually be at a venue as near as possible to the site of the land in dispute. This will usually be the nearest local Tribunal Centre.

40. The hearing will almost invariably be preceded by a site visit. Indeed by rule 30 of the rules the Adjudicator has the power to compel parties to allow him to enter and inspect any property for the purposes of allowing him to determine the reference.

41. Although there is a degree of flexibility permitted, the hearing of a reference will usually be conducted in a manner which will be very familiar to litigators in the civil

courts. The hearings are adversarial in nature. Parties have the right to be legally represented if they so choose (rule 35). Normally an opening will be allowed. Evidence will then be lead under oath and witnesses will be cross examined. There will normally be closing submissions. There is specific provision in rule 39 for substantive decision to be given orally following the hearing. However, substantive orders have to be recorded in writing (rule 40), and thus decisions will normally be reserved and handed down subsequently in writing.

42. Two other matters of procedure are worth discussing: costs and appeals.

Costs

43. The Adjudicator has the power to award costs in terms which are very similar to those in the CPR. By rule 42 it is thus provided that:

(2) The adjudicator may, on the application of a party or of his own motion, make an order as to costs.

(3) In deciding what order as to costs (if any) to make, the adjudicator must have regard to all the circumstances.

There is a similar flexibility to the range of costs orders which can be made. By rule 42 (4) it is provided that:

“An order as to costs may, without limitation—

(a) require a party to pay the whole or a part of the costs of another party and-

(i) specify a fixed sum or proportion to be paid; or

(ii) specify that costs from or until a certain date are to be paid;

(b) if the adjudicator considers it impracticable to make an order in respect of the relevant part of a party's costs under paragraph (a), specify that costs relating to a distinct part of the proceedings are to be paid;

(c) specify an amount to be paid on account before costs are agreed or assessed; or

(d) specify the time within which costs are to be paid.

44. By rule 42 (5), the Adjudicator can either assess the costs summarily or order a detailed assessment.

45. The general rule applied in the courts, that the “loser pays” is also applied by the Adjudicator. The position is thus in marked contrast to that which prevails in many other tribunals, such as for example the LVT, where generally no costs are awarded either way no matter what the outcome.

Appeals

46. By section 111 of the act, an appeal from any decision of the Adjudicator is to the High Court. The appeal is a statutory appeal and is assigned to the Chancery Division. Permission is required either from the Adjudicator or the High Court.

ADJUDICATION: PROS AND CONS

47. I'll start with the advantages of the jurisdiction as I see it.

48. The first advantage is the nature of the tribunal itself.

49. Judges generally hate property disputes between neighbours. One does not have to look very far in the law reports to see examples of this judicial loathing:

"To hear those words, "a boundary dispute," is to fill a judge even of the most stalwart and amiable disposition with deep foreboding since disputes between neighbours tend always to compel, as this one did, some unreasonable and extravagant display of unneighbourly behaviour which profits no one but the lawyers" (Ward LJ)

"Boundary disputes are a particularly painful form of litigation. Feelings run high and disproportionate amounts of money are spent. Claims to small and valueless pieces of land are pressed with the zeal of Fortinbras's army." (Lord Hoffmann)

"This case is also a very sad one for it evidences a regrettable and surely unnecessary falling out between neighbours who had lived as neighbours in apparent amity for very many years, sorting out questions of mutual concern regarding the pursuers' access to their property...by sensible arrangements without recourse to the law" (Lord Scott)

Quotes from: ALAN WIBBERLEY V INSLEY [1998] 1 WLR 881 (at 882) [1999] 1 WLR 894 (at 895) and MONCRIEFF V JAMIESON [2007] 1 WLR 2620 (at

paragraph 45). No doubt we can all recall examples of cases in which the Judge has arrived in court and made it very clear that he was unwilling to hear the case, telling the parties to go away and settle.

50. The Adjudicator is set up to deal with that very type of dispute which civil Judges dislike so much and are so unwilling to hear. Hopefully, parties to an adjudication will have a tribunal who is both experienced in the relevant area of law and willing properly to hear and determine their case. As Lord Rodger pointed out in the MONCRIEFF case (at paragraph 66):

“Your Lordships have variously described it as an “unfortunate case”, as a “sad one” and as an “unfortunate matter”. The parties are, however, adults and the dispute between them is genuine. Since the point at issue is difficult, it is not surprising that they have been unable to resolve it for themselves. In these circumstances they have simply chosen to exercise their right to have it resolved by the courts... As a judge, I would not describe the resulting situation as sad or unfortunate: after all, courts exist and judges are paid to resolve such disputes, which are indeed the life-blood of the common law.”

Quite!

51. Secondly, as I have already pointed out, the procedure in front of the Adjudicator is formal and very similar to large parts of the CPR. Parties can be represented and costs recovered.

52. This, in my view, will become of increasing importance. It is quite clear that Judges at the highest level of the judiciary have grave concerns about what they see as the mounting costs of civil litigation. The former Master of the Rolls asked Lord Justice Jackson to produce a report on the topic. His preliminary report came out in May 2009. The impression I had and still have is that he sees fixed recoverable costs (such as currently applicable on the CPR Fast Track) as a convenient method of reducing costs. He has since asked the Chancery Bar Association to attempt to compile a costs matrix for Chancery work on the Fast Track. Again the impression I have is that he sees property disputes between neighbours as the very type of litigation which should normally be allocated to the

Fast Track. For myself, I foresee grave difficulties if many boundary or easement disputes are shoe-horned into the Fast Track regime. These disputes may not involve vast sums of money, but they matter a great deal to the individual litigants and frequently involve complex issues of fact and law with expert evidence on both sides.

53. There are no proposals however to alter the procedural regime in front of the Adjudicator. There is no Fast Track there!

54. Further, the pre-trial directions are made by the Adjudicator-i.e. by the people who will actually hear the case. In compiling the response to the Jackson report on behalf of the Property Bar Association and the Chancery Bar Association one frequently came across the complaint from practitioners that directions were made by District Judges who were insufficiently familiar with the case and had insufficient time properly to read into the case and understand the issues. This was contrasted with the procedure in the TCC or the Commercial Court where the directions are given by the Judges themselves. As I have described above, directions for the conduct of references to the Adjudicator are made by the Adjudicator on paper following a careful review of the file. They are in my view thus more likely to be appropriate and to save time and costs for the parties.

55. I think however that costs and timing are neutral in the sense that I think that the conduct of a reference in front of the Adjudicator is only marginally quicker and cheaper than the conduct of an equivalent dispute in the County Court.

56. Of course, the Adjudicator is limited to hearing disputes about registered land. However as most land in this country is now registered, this does not strike me as such a disadvantage.

57. The principal disadvantage however is the fact that the Adjudicator is trammelled by being a creature of statute. He can only determine those disputes which are referred to him by the Land Registry. He has neither the same flexibility to

determine any relevant dispute nor the same remedial flexibility of the High Court or County Court Judge. This can manifest itself in a number of ways and I'll give a number of examples. What is also clear is that the Adjudicator will struggle to give a purposive interpretation to the act and the rules and to find a method by which the actual disputes between the parties can be resolved by him with minimum waste of time and cost.

58. Firstly, one frequently has references in which the issue is a dispute over the beneficial interest in land. A party applies to register a restriction on the title on the basis that the registered proprietor holds the beneficial interest in the land on trust for him. The registered proprietor objects and the dispute is referred to the Adjudicator. All the Adjudicator can do is to find whether the applicant does or does not have a beneficial interest in the property and direct the Registrar accordingly. He cannot technically ascertain the extent of that beneficial interest nor can he make an order for sale. However, if such a dispute does come before the Adjudicator, any ruling as to the quantum of any beneficial interest will be binding as between the parties and allow them, if they so wish, to apply to court on the basis of a *res iudicata*.

59. One also frequently has owners applying to alter the filed plans of their own and their neighbour's titles. There is generally an underlying boundary dispute and the application is made in the mistaken belief that, by altering the plans, this dispute will be resolved. Parties also frequently hope to take advantage of the indemnity which is provided by the Registry in the event that mistakes in the register have caused loss to a registered proprietor. However of course, section 60 (1) and (2) of the act apply the general boundaries rule and thus the filed plans do not demarcate exact boundaries. Thus technically, the alteration of the filed plans will not resolve the boundary dispute. There is provision for the determination of an exact boundary line by section 60(3). However the Land Registry Rules require a surveyors plan to an accuracy of 10 millimetres and parties frequently cannot or will not make such an application. Again, when faced with this type of situation, the Adjudicator will generally determine the boundary dispute on the basis that his

ruling will be binding on both parties who will then be able properly to demarcate the boundary and resolve any remaining differences.

60. I've also had a case where the parties have actually applied for a determined boundary and obtained a decision from the Adjudicator on the basis of the correct interpretation of a transfer. However, what no one had told the Adjudicator was that one of the parties had, subsequent to the date of the reference but before the hearing, made a further application to the Land Registry to register the tract of land in dispute by reason of adverse possession and an alternative application to register a prescriptive right of way over the land. These applications had been stayed by the Registry on the basis that there was already a reference and a pending Adjudication. The Adjudicator had thus not made any determinations on these issues.

61. Finally, an example from a case I had very recently. A party had applied to register itself with possessory title of a particular tract of land. The application was made on the basis of the transitional provisions in paragraph 18 to Schedule 12 of the act. In other words the application was made on the basis that it had acquired its title by 12 years adverse possession prior to 13th October 2003 and thus the more restrictive provisions in Schedule 6 to the act did not apply. The registered proprietor had objected and the matter had been referred to the Adjudicator. However, in its Statement of Case, the applicant had pleaded an alternative claim under Schedule 6 on the basis of proprietary estoppel. The Respondent had objected on the basis that the Adjudicator had no jurisdiction to hear that claim as the reference was based on a Schedule 12 application and the proper Land Registry procedure had not been complied with. The Adjudicator agreed with the Respondent, but stated that the Applicant could make a fresh application in the correct form to the Land Registry and, following the inevitable objection, that matter would be referred to the Adjudicator and directed to be heard at the same time as the existing reference.

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