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# 'STREAMLINING THE ASSESSMENT OF COMPENSATION: THE DRAFT PROTOCOL'

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1. I have been allocated just 15 minutes to tell you about an initiative which the CPA has working on for some time - the CPA's pre-reference protocol. A draft was sent to the whole membership on 22nd May and again on 2nd July and so I am not going to go through every word, but I am going to show you a few particularly important passages on power point slides, but please bear in mind that I have summarised them slightly to fit them onto the slides and so you should, of course, read the full text.

2. In a nutshell, the objective is to persuade parties to compensation claims to exchange full information about their respective positions and then to discuss them constructively at an early stage before making a reference to the Tribunal. It is hoped that, by this means, the issues which have to be determined by the Tribunal will be narrowed with the result that the cost and length of formal proceedings will be significantly reduced, and that, in some cases, the claims will be completely settled thereby removing the need for a reference to the Tribunal at all.

3. Why does the CPA attach so much importance to this initiative? Those of you who have attended previous CPA events such as the national conferences, law reform lectures, stakeholder events and other such occasions cannot have failed to have heard it said that that a reference to the Tribunal (which is the only formal statutory mechanism for resolving compensation disputes) takes too long and costs too much. In addition, there are concerns that, having regard to the number and scale of projects in progress for which compulsory purchase has been authorised, the queue for the Tribunal could become substantial.

4. I could easily spend my allocated 15 minutes debating to what extent the concerns about cost and delay are justified, but that would not be the best use of the short time available to me. The fact is that the concerns exist and they often influence the conduct of parties in compensation cases. It is, however, worth emphasising that the time required to take a reference through the Tribunal from start to finish, and the cost incurred in doing so, are to a significant extent in the hands of the parties and their experts.

5. Notwithstanding concerns about costs and delay, everyone, as far as I am aware, holds the Tribunal in high regard. The issues are thoroughly examined. The decisions are based upon such of the evidence as proves to be reliable. The written decisions give full reasons and, although not strictly binding as precedents, often provide significant guidance about both valuation and legal issues. It would be extremely unfortunate if pressures to increase speed and reduce cost resulted in procedural or other changes which made the Tribunal process less rigorous. Instead, what we (the professionals) need to do is to make more efficient use of this remarkable resource.

6. The need to make more efficient use of court resources is not confined to compensation for compulsory purchase. One of the techniques adopted to oil the procedural wheels of the High Court is a requirement that parties should have exchanged full details of their respective positions and given each other the opportunity to respond to the other party's position *before* litigation is commenced. The set of rules which embody these procedural mechanisms are referred to as 'protocols'. There are different protocols for different types of claim. By way of example, many of you who practice in planning will have come across the protocol applicable to cases where a party is contemplating judicial review of a decision. So, the CPA's proposal to introduce a protocol for references to the Tribunal follows a well trodden path.

7. The draft which has been sent to you has emerged from a group set up by the CPA under the chairmanship of Colin Cottage to develop the proposed protocol and a number of people with experience of dealing with compensation claims were coopted including myself representing the Planning and Environment Bar Association (PEBA) and a representative of the RICS.

**Scope**

8. It was initially envisaged that the protocol would apply only to claims for compensation for compulsory purchase. However, on further consideration, it was clear that the same considerations which made the protocol desirable for compulsory purchase compensation applied equally to other forms of statutory compensation where the actions of local authorities, utilities and others had created a right to compensation which, if disputed, could be referred to the Tribunal. So, the protocol says:-

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"*This protocol applies to any claim for compensation ... that would, in the absence of agreement between the parties, involve a reference ... under Part 5 of the Upper Tribunal (Lands Chamber) Procure Rules 2010*".

[Summary of paragraph 1.1]

9. Thus, the protocol also applies to claims for compensation not only for compulsory purchase but also, for example, to s.10 claims, to Part 1 claims, to claims arising out of planning decisions like discontinuance and modification orders, for pipe-laying and other works carried out by water companies, electricity wayleaves and so on.

**The objective**

10. The objective of the protocol is expressed in broad terms:-

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*Before a reference is made, the claimant and the compensating authority must have:*

*(1) Exchanged sufficient information to understand each other's positions;*

*(2) Discussed each other's positions thoroughly and constructively;*

*(3) Sought to narrow the issues that the Tribunal would have to determine if a reference were made; and*

*(4) Considered the use of ADR to avoid a reference, or to determine at least some of the issues which the Tribunal would otherwise have to determine.*

[Summary of paragraph 1.3]

11. So, the protocol does not tell you how to quantify a claim, nor how to respond to one. It tells you the steps which should be followed *before* resorting to the formal procedure of litigation by means of making a reference to the Tribunal.

**How are the objectives to be achieved?**

12. The protocol is not prescriptive as to how the objectives should be attained. It is recognised that every case is different and how the parties go about achieving the objectives in any particular case should be left to their good sense. The closest that the protocol gets to giving specific advice is this:

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> *Parties to a claim are expected to:*
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> *(1) discuss each other's positions constructively with the objective of agreeing as much as possible and identifying as precisely as possible the issues which cannot be agreed;*
> *(2) ensure that at appropriate points each parties' position is clearly set out in writing;*
> *(3) regularly review their own positions, and to communicate any change in those positions to the other party promptly and in writing;*
> *(4) consider at all stages whether alternative dispute resolution would assist in resolving either the whole claim or specific issues within the claim; and*
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> *(5) disclose sufficient information to enable the other party to understand properly the substance of the party's position, the evidence available to support it and any other material information relevant to the Compensation Claim.*
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> [Summary of paragraph 2.3]

13. As I have already said, the protocol tells you the steps which should be followed before resorting to the formal procedure of a reference to the Tribunal. In a case in which all the steps in the last slide have been followed, but, notwithstanding, an overall settlement has not been achieved, the parties will be close to the stage at which a reference may be made. The protocol then says this:

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*Before making a Reference, the party intending to make the reference should contact the other party in writing in order to:*

*(1) notify the other party of its intention to make a reference;*

*(2) summarise the matters agreed between the parties;*

*(3) summarise the outstanding issues in dispute between the parties;*

*(4) provide the other party with an opportunity to respond to the outstanding issues.*

[Summary of paragraph 4.1]

**14.** These extracts from the draft protocol contain the essence of what parties are expected to do before a reference is made. In addition, the protocol has a special message for compensating authorities.

**Compensating Authorities**

15. In all cases to which the protocol will apply, compensation is being claimed for an involuntary acquisition or some other action imposed upon a landowner under statutory authority in the public interest. The compensating authority is therefore in a special position and the CPA takes the view that they should inform claimants what they should do to pursue their claims. Consequently, the protocol says this to compensating authorities:

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*"... a compensating authority should ensure that ... the claimant has been provided with adequate information about:*

*(1) the relevant procedure for making a claim .... communicated in a way that is readily understandable by someone without experience of the relevant process;*

*(2) the availability of professional advice to assist a claimant in making a claim;*

*(3) whether, how and when any professional fees that may be incurred by a claimant in relation to a claim will be reimbursed;*

(4) *the importance of maintaining appropriate records to substantiate a claim; and*

(5) *the existence of this protocol and the RICS Professional Statement: 'Surveyors advising in respect of compulsory purchase and statutory compensation'"*

[Summary of paragraph 2.1]

16. In many cases, the compensating authority will have taken valuation and other advice before taking the action giving rise the claim and so may well be aware of relevant factual information (such as comparables). So the protocol says this to compensating authorities:

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*A compensating authority is encouraged at an early stage:*

*(1) to provide information or valuation evidence available to it potentially relevant to a claim if possible before the claim is made; and*

*(2) provide their valuation to assist with the constructive dialogue between the parties.*

[Summary of paragraph 2.2]

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**ALTERNATIVE DISPUTE RESOLUTION**

17. The protocol urges parties to give due consideration to using ADR. ADR was the subject of an illuminating paper by Craig Howell-Williams at last year's conference and so I am not going to spend much time on it now. I would just point out that it could well have a role in resolving one or more specific issues within a claim as distinct from the claim as a whole.

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**COMPLIANCE**

18. The steps required by the protocol do not represent a radical departure from how many of you handle compensation claims now.

19. The protocol does require you to recognise that, in this context, negotiation and litigation are not wholly separate activities with different rules of conduct. The object of negotiation is, obviously, to settle a claim at a figure which both parties can accept. But, if a claim cannot be settled, and if ADR is either not used or is unsuccessful, then issues remaining in dispute must be resolved by litigation in the Tribunal. So it makes complete sense to conduct the negotiations in such a way that, if a reference to the Tribunal becomes necessary, the discussions will have so far as possible facilitated the litigation process.

20. For this reason, in addition to encouraging early disclosure of relevant information, the protocol does require a more structured approach to negotiations than may have been followed previously and emphasises the importance of recording progress in writing.

21. The protocol does not lay down a rigid timetable for the steps recommended. Again, it is recognised that each case is different. However, parties to a claim might be wise at the outset to agree a timetable between themselves, even if it proves necessary to amend it later.

22. You may be wondering how the protocol is going to be enforced and whether there will be any sanctions for non-compliance. The pre-action protocols in the High Court are embedded within the Court's practice directions and so the consequences of non-compliance may result in directions by the Court or even cost sanctions. In relation to compensation disputes, although the CPA understands that the Tribunal supports the introduction of a pre-reference protocol in principle, the Tribunal has not yet published one as part of its own rules or practice directions and it is not known whether or when it will do so. The CPA has taken the view that it should prepare its own protocol in the hope that, in due course, the Tribunal might adopt it (with or without amendments). The CPA has no proposal to impose sanctions for non-compliance; indeed, it would not itself be in a position to do so. The primary encouragement to compliance is the obvious good sense of the recommended approach.

23. Unless and until the Tribunal adopts it, we cannot expect the Tribunal to enforce it directly. Nevertheless the approach recommended by the protocol dovetails with the approach that the Tribunal appears to have been taking in recent years to encourage parties at an early stage to narrow the areas of dispute which the Tribunal has to determine. Thus, when a reference is made, it is now the practice of the Tribunal to direct the experts to meet *before* they write their reports in order to identify the issues on which they agree and disagree with summary reasons for any disagreement. If the protocol has been followed, it should be a relatively straightforward task to comply with such directions and then the experts can concentrate in their reports on the issues remaining in dispute. If, however, one party makes a reference without first following the protocol, it would be open to the other party to apply to the Tribunal for directions that would achieve a similar effect. For example, a party could apply for a stay of the reference until the parties have exchanged information on which they intend to rely. If additional costs have been incurred as a result of a party's failure to put all his cards on the table before the reference was made, there may be grounds for reflecting those extra costs in any costs award.

24. By way of illustration to the Tribunal's approach, I recently came across one of its decisions which contained the following instructive paragraph:

> "*The absence of a greater level of agreement on technical issue was disappointing. Two experts were called on each side to give evidence of considerable complexity on engineering ...issues, but no joint statement was produced by these experts....It ought to have been possible for the experts to have offered the Tribunal much more assistance by recording in summary form those matters on which they agreed and those on which they disagreed, with a brief explanation for their disagreement. The Tribunal is entitled to expect such assistance from expert witnesses and, when it is not forthcoming, to question whether one of more expert truly understands their duties to the Tribunal*".

25. Following the protocol will go a long way towards avoiding this sort of criticism.

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**THE NEXT STEPS**

26. The draft protocol has been published to the membership for consultation with a closing date of 31st July. Subject to any amendments which may be considered appropriate to reflect any responses to consultation, the CPA has decided that the membership should vote on the question whether the draft should be adopted. For my part, I commend the initiative to you and I hope that you will vote in favour. A good 'turn-out' is important; please don't omit to vote!