Address to compulsory Purchase Association Annual Conference

Making the Lands Chamber more accessible

10 July 2019

1. It is a pleasure and a privilege to be asked to speak at the Association's annual conference today. Thank you for the invitation.
2. The assessment of compensation for compulsory purchase and injurious affection was of course one of the core jurisdiction of the old Lands Tribunal from its foundation in 1950. It remains a core part of the Tribunal's work today, although we have been repackaged as the Upper Tribunal (Lands Chamber).
3. The ambition of the Tribunals Courts and Enforcement Act 2007 was to create a unified tribunals structure into which the great range of specialist tribunals could be gathered. This would enable the provision of a common set of rules, a coherent structure of appeals and governance, and a framework for leadership, training and judicial career development which would improve the quality of dispute resolution across a wide variety of complex subjects from pensions entitlement to employment rights, and from housing standards to taxation.
4. The Lands Tribunal acceded to the new structure in 2010 and its specialist jurisdictions have expanded. The Localism Act 2011 gave the Lands Chamber power to determine appeals against certificates of appropriate alternative development issued under section 17 of the Land Compensation Act 1961. The Housing and Planning Act 2016 created a new regime of civil penalties imposed by local housing authorities to deter "rogue landlords" with a route of appeal to the Property Chamber and onward to the Lands Chamber. The Riot Damage Act 2016 has

conferred jurisdiction on the Lands Chamber to determine compensation for property damage caused by civil unrest. The new Electronic Communications Code introduced in 2017 took jurisdiction away from the County Court and gave it to the Lands Chamber in disputes over the compulsory acquisition of rights to install electronic communications apparatus.

5. Some of these new jurisdictions are keeping the Tribunal very busy. Since the inception of the new Electronic Communications Code in December 2017 the Tribunal has received 77 references under the Code, and issued decisions after contested hearings in 9 cases; in the same period we have issued 10 decisions in references for compensation for compulsory purchase or injurious affection. The importance of our compensation jurisdictions is far from being eclipsed, although it is fair to say that the Tribunal has experienced a lull in compensation references after peaks created by the 2012 Olympics and Crossrail. Members of the Association will be pleased to hear that the lull appears to be coming to an end. As anyone who came through Euston station on their way here today will have noticed, work has already begun on the HS2 project which will give rise to thousands of claims for compensation. A number of HS2 claims have already been received by the Tribunal, starting with blight claims but more recently including some very substantial claims concerning property in the vicinity of Euston station itself. But many much more modest claims will also arise, concerning the homes of private individuals and the property of small businesses.

6. With that expectation in mind it is timely to ask how accessible the Lands Chamber is, especially to those with more modest claims. An article in the Financial Times in February this year described the process of obtaining compensation for land taken

for HS2 as “long and expensive”. An article in the Guardian on 19 May said that the roll out of 5G telecommunications infrastructure was stalled by a backlog of cases in the Tribunal. The same suggestion was made by the Times the following day.

7. As far as delay or backlog is concerned these reports are what the President of the United States would call “fake news”.

8. Taking HS2 as an example, one of the earliest of the HS2 cases received so far was *Anixter Ltd v Secretary of State for Transport* [2018] UKUT 0405 (LC) which concerned a claim for compensation arising out of a notice of entry given on in December 2018 which was referred to the Tribunal on 16 April 2018. A hearing to determine the validity of the claimant’s counternotice was held on 27 November and the Tribunal gave its decision 3 December 2018, less than 12 months after the notice of entry and less than 8 months after the reference to the Tribunal.

9. The decision in the *Anixter* case was on a preliminary issue, and did not involve expert evidence or a lengthy hearing, both of which are liable to extend the time required to determine a disputed reference. But much more substantial cases, including those involving complex expert evidence, are capable of being managed by the Tribunal to a contested hearing within a reasonable period. A very substantial reference concerning the value of a hotel adjoining Euston station in which the parties are tens of millions of pounds apart was received by the Tribunal in September 2018; directions were given at a case management hearing in December, including directions for six expert witnesses and a hearing of 8 days; that hearing is listed to commence on 11 November this year, fourteen months after the reference was commenced. The trial of representative Part 1 claims from amongst 190

references arising from the expansion of Southend Airport is due to take place in June next year, the references having been made in March this year.

10. As for the new Electronic Communications Code, press reports of a substantial backlog of cases in the Tribunal are also far from the truth. The legislation, which is now Schedule 3A of the Communications Act 2003, includes a requirement (reflecting an EU Directive) that applications for rights to install new telecommunications equipment must be determined within 6 months. Because of that statutory duty the Tribunal assigns all new Code cases to the special procedure. Each new case is seen by a Judge, who gives case management directions for the exchange of statements of case, usually within 24 or 48 hours of arrival. A case management hearing usually takes place within 6 or 7 weeks at which interim relief is sometimes given, including rights of access for surveys. Often the parties will propose directions which mean the cmh can be dispensed with, or dealt with by telephone. In almost every case directions for a final hearing (or any necessary preliminary issue), and a date for that hearing, will have been given within 7 weeks. All cases involving proposed new sites are determined within six months. The 77 new Code cases received since its introduction in January 2018 have all been managed in this way. 35 of those cases have so far been determined or settled by agreement, and the remainder are listed for hearing (including the initial case management hearings).

11. In short, the suggested “backlog” is illusory; cases are being listed straight away and heard as soon as they are ready for determination. Most cases are dealt with within 70 weeks. Claims allocated to the simplified procedure are listed for hearing about three months ahead and as soon as the parties have exchanged their statements of

case. The Tribunal's judicial complement has recently been increased. Judge Elizabeth Cooke was recently appointed to be a full-time Upper Tribunal judge in the Lands Chamber, a new post. She has had a distinguished career, having been Professor of Law at Reading University, and then served for seven years as a Law Commissioner, before becoming principal judge of the Land Registration Division of the Property Chamber. We are currently recruiting two new Surveyor Members. We have the resources we need to meet the demands on the Lands Chamber.

12. I am not making these points out of pique and I hope they do not come across as over sensitive. I am aware that the Tribunal has in the past had a reputation for being slow, but our current approach to case management is designed to ensure that all cases are heard as soon as they are ready to be determined. My motivation in using this platform to correct inaccurate press reports about delays in the Tribunal is that if they gain currency, and if there is a widespread impression that the resolution of disputes through the Tribunal is liable to take years, that expectation may act as a deterrent to people wishing to bring claims to the Tribunal and create an obstacle to justice.

13. The resources available to the Tribunal, and the time it takes to have disputes resolved in the Tribunal are of course only part of the picture. The other critical consideration for parties wishing to bring a claim is the cost of doing so. The high cost of litigation is not a problem unique to the Tribunal, and in some respects the Tribunal provides a less hostile costs environment for claimants for compensation than the courts. As the Court of Appeal determined in *Purfleet Farms v SoS for Transport [2002] EWCA Civ 1430* and as the Tribunal's Practice Direction makes clear, the costs incurred by a claimant in establishing the amount of compensation to

which they are entitled following the compulsory acquisition of their land are treated by the Tribunal as part of the expense imposed on them by the acquisition, which they should in principle be entitled to recover from the acquiring authority.

14. One important step to promote access to justice has already been taken by the Association by the publication of its Land Compensation Claims Protocol, encouraging early engagement by compensating authorities and claimants, the fullest exchange of relevant information, advice on the need to keep proper records, and a structured approach to resolving as many aspects of a dispute as possible before referring what remains to the Tribunal. The Tribunal strongly supports the use of the Protocol because of the contribution we believe it can make to achieving early settlements and reducing the cost of dispute resolution.

15. Another suggestion which has been circulating for a number of years has been to assign lower value compensation cases to the First-tier Tribunal, either to the Property Chamber or to a new "land compensation chamber". That option was considered by the Law Commission in 2003 (*Land, Valuation and Housing Tribunals: The Future* (Law Com No 281) and rejected on the basis that most of the compensation work of the Lands Tribunal was legally and factually complex (para 4.10) and that it was necessary to retain its existing structure to ensure that difficult and specialised first instance cases were heard by those with the experience and ability to do so (para 4.11). Those remain good reasons why assigning smaller compensation claims to a first-tier tribunal would be problematic.

16. Although we expect an increase in compensation cases as a result of HS2, the number is likely to remain quite modest, even in a very busy year, and only a small proportion could be expected to proceed to a hearing rather than being settled by

agreement: in 2018 only 11 compensation cases were decided by the Tribunal, and only 14 in 2017, although many more were received and settled. Even if that number doubled or trebled, the regular exposure required to develop and maintain expertise would simply not be available to the judges and members of the Property Chamber spread around the country.

17. Since the time taken to resolve compensation disputes is largely taken up by pre-reference discussions and then the time the parties require to prepare for the hearing, there is no reason to think a first-tier tribunal would be any quicker than the Lands Chamber. Costs are not generally awarded against the unsuccessful party in the first-tier. Moving to a forum where there is no costs shifting would be liable to jeopardise the availability of competent representation in smaller claims and would mean that a party who wished to call an expert witness or rely on legal representation might have to pay for it out of their compensation. Neither of these seem to be desirable outcomes.

18. In this technical legal field in which expert evidence is usually required to bring successful claims, the proposal to create a first-tier jurisdiction in compensation cases risks exacerbating, and not ameliorating, the inequality of arms between compensating authorities and claimants of modest means which it seeks to address.

19. It is often said that a disincentive to the pursuit of smaller claims for compensation is created by section 4 of the Land Compensation Act 1961. This provides, as you will all know, that if a claimant fails to secure compensation which is greater than an acquiring authority's offer, the claimant will not recover their own costs and will have to pay the authority's costs (which may sometimes exceed the value of the

compensation awarded). This rule is inflexible and limits the scope for the Tribunal to exercise its wide discretion.

20. Acquiring authorities are sometimes said, anecdotally, to pressurise claimants into accepting unfair compensation by making "take it or leave it offers". If so, section 4 of the 1961 Act may be the source of the problem, as it creates a risk of a claimant being significantly worse off by pursuing a claim than by accepting a low offer. A claimant who is professionally represented should be able to make their own assessment of the adequacy of any offer received, but they may still wish to build in a wide margin for error, especially in smaller claims, with the result that the compensation they secure could be lower than the true value of the land taken.

21. If there is evidence that section 4 of the 1961 Act creates a disproportionate deterrent to the pursuit of meritorious claims and is being inappropriately exploited by acquiring authorities, the abolition of the rule may be called for. That is a matter on which the Association is well placed to gather that evidence and seek to persuade.

22. But my original intention was to consider how access to justice could be improved within the framework which already exists, rather than by wholesale reform. Anyone who waits for reform of the sensitive subject of compensation may find themselves waiting for some time. In the meantime, I suggest that, when it comes to the issue of controlling costs, or the risk of adverse costs orders, the Tribunal's own procedural rules represent an under-explored resource.

23. Section 29(2) of the Tribunals Courts and Enforcement Act 2007 provides that, subject to procedural rules, the Tribunal has "full power to determine by whom and to what extent the costs are to be paid". Since 2013 the Lands Chamber's rules have

permitted costs capping and one-way costs shifting. Costs capping involves a limit being placed on the maximum sum which may be recovered by one party against the other. One-way costs shifting allows the Tribunal to direct that costs will not be awarded against one party irrespective of the outcome of the claim.

24. In August 2014 the Lands Chamber made a costs-capping order for the first time. The order limited the costs which a couple whose house was adversely affected by the upgrading of the West Coast main line would have to pay to Network Rail if their claim for compensation was unsuccessful. The limit imposed was £15,000. The case was *Dickinson v Network Rail Infrastructure Ltd* [2014] UKUT 372 (LC).

25. A second cost capping order was also made in 2014, in *Johnston v TAG Farnborough Airport Ltd* [2014] UKUT 490 (LC). That claim was brought by 279 homeowners whose homes were affected by the expansion of an airport, each of whom was guaranteed that their liability for costs would not exceed £4,000 for a hearing which eventually lasted 4 weeks.

26. It is striking that since 2014 there has been no further application to the Tribunal for a costs-capping order. Nor, as far as I am aware, has there ever been any further application for a costs protection order involving one-way costs shifting after the refusal by the Tribunal to make such an order in the *Dickinson* case on the grounds that it was unnecessary on the facts and unfair to the compensating authority.

27. The under-utilised powers of the Tribunal to make costs protection orders are in striking contrast to the position in the High Court, where the Administrative Court routinely grants costs protection to applicants for judicial review in environmental claims which engage the *Aarhus* Convention. The details are to be found in CPR 45.41 and will be familiar to some of you. A claimant who brings an unsuccessful

claim for judicial review as an individual in an environmental case will not be ordered to pay more than £5,000 to the public authority; costs awarded against a claimant who brings an unsuccessful claim in another capacity (for example in connection with a business) will be limited to £10,000. If such a claim is successful the amount which a defendant will be ordered to pay is limited to £35,000.

28. In *Dickinson,* Sir Keith Lindblom, the Tribunal's President, discussed the practice of making protective costs orders in *Aarhus* Convention claims as a means of guarding against prohibitive costs. He acknowledged that claims for compensation for injurious affection do not fall within *Aarhus*, but nevertheless he clearly considered it a relevant model.

29. Might an approach to costs protection modelled on *Aarhus be* appropriate to smaller claims for compensation for compulsory purchase? Might a disparity between costs awarded against claimants and public authorities (or those undertaking public projects) be justified on the grounds that such cases usually involve the infringement of the rights of the landowner to achieve a public benefit? If so, what effect would the making of such an order have in a case where an offer was made by a compensating authority to which section 4 of the 1961 Act applied? Would the fact that an order had been made with an element of cost capping for both parties be a sufficient "special reason" to disapply section 4? We do not know the answers to any of those questions, because the Tribunal's case law concerning costs protection is so underdeveloped. I certainly cannot answer them today, and they must await consideration in an appropriate case. But I draw attention to section 29(2) of the 2007 Act and to rule 10 of the Tribunal's Rules, and the jurisprudence on costs-capping, as an example of an area where too much focus on new structures or

transferring jurisdictions may have been at the expense of more fully investigating tools which are already to hand.

30. Returning to the question of obstacles to access to justice in smaller claims for compensation, it is sometimes said that parties are put off by the complexity of proceedings in the Lands Chamber. There is no doubt that the compensation code is complex. The Lands Chamber's own procedures are not particularly complex, especially where claims proceed under the simplified procedure. Most modest claims are determined by the Chamber's surveyor members, without judicial participation. These often involve complicated issues of valuation, rather than law, and require the Tribunal to adopt an enabling approach to parties who are unrepresented, which it is well equipped to do.

31. The Tribunal is very aware that bringing a claim, and pursuing it to a hearing, can be daunting and it adopts the approach of all tribunals in seeking to reduce complexity and unnecessary formality. Arrangements are often made to hear claims outside London, at a venue convenient to the parties. There is no requirement for parties to be represented by lawyers; they are free to instruct a chartered surveyor or a lay person, or to represent themselves; the Chamber provides accessible on-line guidance to each step in the proceedings.

32. The risk of unnecessary complexity and expense is one any court or tribunal must be aware of. Where the Tribunal is responsible for causing it, it is our responsibility to identify and eliminate those causes as far as possible. Where the cause is not the way the Tribunal behaves, but is instead the way professional representatives behave, the Tribunal will also do its best to identify and discourage the relevant behaviour.

33. When I refer to behaviour on the part of professional representatives which increases costs, I am not referring to behaviour which amounts to misconduct, and which can be the subject of a specific costs sanction under the rules (which allow for wasted costs orders against representatives). There are occasions in the Tribunal when professional representatives, acting within the rules, are nevertheless guilty of significant over-engineering, which serves to increase the cost of proceedings unnecessarily. I don't just mean in relation to the perennial problem of hearing bundles, which regularly contain two or three times as much material as is required to determine the matters in dispute. Over-engineering is also a problem in pleadings and skeleton arguments, which often seem to be drafted without any consideration for economy of expression; it is seen in notices of reference which arrive at the Tribunal with elaborate files full of unnecessary background documents, which the parties already have and which the Tribunal will never look at; and it arises in expert reports, which are often full of redundant discussion of the law and unnecessary repetition of facts which are not in dispute. All of this background scenery, padding and decoration adds to the cost of dispute resolution, obstructs the Tribunal in getting at the real issues, and impedes access to justice.

34. I appreciate that it often takes longer to write a short letter than a long one, or to draft a statement of case or expert report which focusses on what needs to be said rather than including everything that can be said. But I can assure you the more concise and focussed a document is, the more likely it is to be read and understood.

35. It is relatively rare for a reference for compensation to be made to the Tribunal without there first having been fairly detailed exchanges between the parties and their professional advisers, especially where the pre-reference Protocol has been

utilised. In that sort of case the making of a reference to the Tribunal ought not to be seen as an opportunity to re-invent the wheel: economy of expression in pleadings and correspondence, taking as read and understood that which is long since become common ground, focussing rigorously on what is really in dispute, and eschewing the opportunities for gamesmanship and point scoring which any form of litigation will occasionally present, ought all to be ingrained as good practice. An Association like the CPA can play an important role in encouraging a litigation culture which seeks to reduce unnecessary cost.

36. The Tribunal can also play a more active role in managing compensation cases. Earlier in this talk I mentioned that our practice in cases under the Electronic Communications Code has been to assign all new references to the special procedure, where they are listed for a case management hearing at which a final hearing date is fixed, and where compliance with case management directions is closely supervised by a Judge or Member of the Tribunal. Our experience has been that, as the parties and their representatives have come to understand the Tribunal's expectations, they have found it easier to reach agreement on suitable directions and there has been less "messing around". The same approach may have a part to play in reducing unnecessary costs in compensation references. A pilot under which, perhaps for a period of 12 months, all compensation references are managed under the special procedure may be worth considering.

37. That brings me finally to the Lands Chamber's new draft Practice Directions which I hope will be published for consultation after the long vacation. The purpose of the new Practice Directions is to communicate to parties and their representatives what the Tribunal expects of them and how, in most cases, a dispute of a particular type

will be managed. The document is written with the needs of all tribunal users in mind, so professional users will have to excuse inclusion of some very familiar information. It is also intended to influence and change for the better how dispute resolution is approached in the Tribunal. To take an example, it will impose limits on the length of statements of case and skeleton arguments. It will also encourage cooperation between parties, their professional representatives, and their expert witnesses, in each case with a view to making proceedings in the Tribunal more efficient, and therefore cheaper.

38. When the draft Practice Direction is available for consultation I very much hope the Association and individual members will take the opportunity to read and comment on it, especially if you think it can be improved.

MR