Compulsory Purchase Association

# Annual Law Reform Lecture 2017

## Law and Practice Reform; The Continuing Agenda; Meeting the Challenges

Gowling WLG (UK) LLP,
4 More London Riverside, London, SE1 2AU
Tuesday 9th May 2017

**16.25 Registration; 16.45 Start; 18.30 Drinks Reception; 19.30 Close**
**1 Hour CPD**

**Background**

Compulsory purchase is becoming increasingly adversarial. A culture has developed between acquiring authorities and claimant advisors in which there is a lack of constructive engagement. Positions are increasingly polarised; conflict increases and timescales grow, all of which is leading to an increase in cost to the public purse and disruption and delay to affected owners and occupiers. The problem is exacerbated by an unprecedented rise in the volume of new major CPO projects, which has thinly spread the experienced resources and increased the prospect of pockets of poor advice and greater conflict.

In the past 12 months the CPA has been working up a macro reform proposal which seeks to deliver solutions to these problems. It aims to refocus the approach to compulsory purchase before and after the grant of powers and instigate a cultural change. The paper is maturing and it is now time to consult the CPA membership and the wider CPO community to introduce and receive comment on the themes and issues raised.

**Programme:**

**Welcome**

**Vicky Fowler,** *Partner, Gowlings WLG (UK) LLP & CPA Vice Chair*

**Session 1 - The context and catalysts for change – The need for and nature of further Reform**

**Colin Smith,** *Senior Director, CBRE*

**Session 2 - Reform to Engagement – Improving and Aligning Engagement**
**the provision of info, the need to acquire, pre-powers, early payment of fees**

**Adrian Maher,** *Director, aspireCP*

- Purpose of engagement – is blanket early acquisition realistic/beneficial to either party in all circumstances?
- Is there a better target for pre-CPO engagement that aligns parties and more likely to lead to genuine engagement?
- Guidance to be amended to fit with reality
- Practical measures to support a change in engagement
- Need for a realistic Land acquisition Strategy at the outset of the scheme

- Fee policies – upfront undertakings to enable dialogue limitation to quantum not hourly rates

**Reforms to the Exercise of Powers and Compensation Negotiations - independent valuations for Rule 2**

**Jonathon Stott,** *Managing Director, Gateley Hamer*

- Conduct - The RICS Professional Statement
- Independent valuations for Rule 2
- Separation of valuation role from acquisition negotiation
- Payment to be made before land is taken
- Revision of claim form to provide relevant and effective information

**Reforms to Dispute Resolution - UT pre reference protocol and pre-action powers**

**Barry Denyer-Green,** *Barrister, Falcon Chambers*

- UT is the final resolution, is all or nothing and is too far removed from negotiation; and is too expensive and takes too long
- Motivating engagement on compensation earlier - Pre-reference protocol for UT vs Guidance
- Better access to and understanding of ADR throughout the process
- RICS (with input from CPA) to include CPO/Compensation within its Dispute Resolution referral procedures?

**Question and Answer Session**

Compulsory Purchase Association


AT

# THE COMPULSORY PURCHASE ASSOCIATION

# REFORM OF CPO LAW AND PRACTICE

BACKGROUND READING FOR
MAY 2017 REFORM LECTURE

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Compulsory Purchase Association

# INTRODUCTION

The views expressed in this paper reflect the initial views of the Compulsory Purchase Association reform group which includes the current and some former chairmen of the CPA. It formed the basis of a presentation at a stakeholder meeting in December 2016. The suggested reforms have been modified in the light of comments received and now form the basis of the current consultation. It reflects a consensus view on the problems and suggested ways of addressing the issues. It should not be taken as a final position in this matter but more as an informed starting point to change which is urgently required. It is expected that the recommendations will evolve as the debate on this issue gathers momentum.

# EXECUTIVE SUMMARY

Compulsory purchase is becoming increasingly adversarial. A culture has developed between acquiring authorities and claimant advisors in which there is a lack of constructive engagement. Positions are increasingly polarised; conflict increases and timescales grow, all of which is leading to an increase in cost to the public purse.

The problem is exacerbated by an unprecedented rise in the volume of new major CPO projects, which has thinly spread the experienced resources and increased the prospect of pockets of poor advice and greater conflict.

Disputes inevitably arise. The timescales for a dispute being resolved at the Tribunal is well over 2 years. The costs of litigation is increasing to an extent that it is compromising access to justice.

There are many causes of this

a. There is no obligation on acquiring authorities to pay claimants reasonable costs in engaging with the acquiring authority prior to the exercise of compulsory purchase powers and so few do. The acquiring authorities' consequent lack of understanding of claimants' businesses inevitably means that opportunities to help them reduce their loss (and thereby the compensation payable) are missed, loss is crystallised and the amount is challenged retrospectively.

   This lack of paid-for advice is the root cause of the problem. It requires a change in statute to oblige the acquiring authority to commit to paying occupiers' reasonable fees from the date a draft CPO is made in relation to understanding the steps that could be taken in enabling the claimant to mitigate their loss.

b. Each occupier's requirements are unique and give rise to different challenges in relocating by the acquiring authority's target date for possession. Government guidance should be revised to emphasise that a claimant is assumed to have mitigated their loss unless an acquiring authority can demonstrate otherwise. Guidance should also place an obligation on acquiring authorities to demonstrate the measures they have taken to facilitate loss mitigation including a requirement on the acquiring authority use reasonable endeavours to engage and meet every occupier prior to the inquiry. The objective of such requirement being to understand the impact of the proposed acquisition and start the process of assessing what mitigation and relocation measures would be practical and proportionate.

c. Project funding is back ended, post the grant of powers. Government and promoters are not prepared to take on the cost risk of extensive acquisitions pre-authorisation. Government guidance (06/2004 as well as Oct 2015) creates an expectation of all land being acquired by agreement. This is not practical due the understandable need for promoters to have project certainty before committing to purchase all land. Acquiring authorities' approach at an inquiry is often "box ticking" at as they are not able to follow the Guidance in practice.

   Government guidance should be revised to remove the existing requirement to purchase ALL property by agreement. Instead the acquiring authority should demonstrate that they have taken reasonable steps to mitigate the impact of the proposed compulsory acquisition. Acquiring land early is just one possible solution.

d. Occupiers currently take professional advice but bear the risk of a challenge from the acquiring authority as to the reasonableness of their actions. They incur costs in the expectation of recovering it and are upset when they are exposed to unforeseen costs, it affects cash flow and positions quickly get polarised.

   The key to changing the current adversarial approach is to incentivise the parties to work together, from the promotion of the project through to eventual settlement or determination by the Tribunal. A change in guidance will be effective for improving working arrangements up to any public inquiry (at which time compliance with the guidance is assessed) but is likely to be ineffective after this time. The proposal at the stakeholder meeting in December 2016 was for a change in statute to oblige

   i. the acquiring authority to commit to paying occupiers reasonable fees in advance of the exercise of powers (as discussed above). The need for both parties to then engage in meaningful dialogue as to mow to mitigate the impact of the impending acquisition will be addressed in guidance.
   ii. For the claimant to give the acquiring authority full visibility of all proposed decisions before they commit to a course of action
   iii. The acquiring authority to promptly comment on such proposed actions within reasonable timeframe requested. Such comments to be likewise in open correspondence.

iv. An obligation on claimants to disclose the rationale for decisions and factual evidence in open correspondence. How much of this is compensatable can still be subject to without prejudice discussions

e. There is a desperate shortage of experienced compulsory purchase surveyors in the country and yet there is a large pool of RICS accredited valuers who could undertake the Rule 2 market value appraisals. We recommend borrowing aspects the USA system which has resulted in 80% of the land value assessments being agreed at the assessor's fair value and a further 5% close to it.

As the acquiring authority's views are mistrusted we propose guidance is changed recommending the acquiring authorities commission an independent valuation through the RICS. This valuation is checked by the claimant and acquiring authorities and issued. It is non-binding. In December 2016 we suggested that new Guidance is issued recommending that acquiring authorities

i. Procure an independent market valuation through the RICS at least 6 months before the compulsory purchase powers are exercised.
ii. Make an offer for the market value of the land (Rule 2) before exercising powers. Although the independent valuation is non binding it is likely that it will be accepted in most cases by the acquiring authorities

f. If we are to encourage neither party to challenge the "Fair value" assessment by an independent valuer then we need to change the basis upon which fees are assessed. We recommend the draft pre reference protocol is amended so

- Where the acquiring authority have commissioned an independent fair market valuation (rule 2) and made an offer to settle this head of claim at that figure then there is a rebuttable presumption that incurring further professional fees in negotiating this market value would not be reasonable and hence not recoverable.
- Claimants pre reference costs must be proportionate to the sum eventually agreed and the complexity of the issues;

g. Evaluative mediation is rarely used. This is surprising given compulsory purchase assessment is often very complex and parties' positions can become entrenched. An experienced third party giving a non-binding view on the merits of the parties' positions would be very powerful. However this needs to happen early in the process whereas at present it is many years after powers have been exercised. It is recommended that the draft pre-reference protocol (currently in circulation) is amended so in those circumstances where it is currently used there is a presumption in favour of evaluative mediation rather than non-evaluative mediation.

This package of measures will inevitably increase the acquiring authority's liability for fees which are at risk if the scheme is abandoned. Such fees are however generally less than 2% of the overall property costs and rarely abortive. The increased risk on acquiring authorities is more than justified by the huge opportunity to help the claimant mitigate their loss and thereby significantly reduce compensation payable. Additionally it transfers cost risk to the project

instigator and away from affected parties, which is fairer and easier for the project instigator to manage.

The CPA believes that a package of measures is required to materially change behaviours of both acquiring authorities and claimants. If the industry does not change its ways soon and embrace this change it will bring into question the acceptability of using CPO powers.

## THE PROBLEM AND CONTEXT

1. The Housing and Planning Act 2016 and the Neighbourhood Planning Bill deal with technical changes to both the compulsory purchase acquisition process and the assessment of compensation. However, they do not go to the heart of the problems plaguing the assessment of compensation. The problem is a culture of adversarial behaviours from both acquiring authorities and claimant advisors, driven by a reluctance on the part of acquiring authorities to engage early with claimants and incur the cost of doing so. Statute does not require it. Indeed, statutory liability for compensation only commences from the exercise of powers.

2. The closest thing there is to a requirement to engage early is in government guidance, which states that
   *"The confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to acquire all of the land … in the Order by agreement …"*
   This derives mainly from Article 8(2) and Article 1 Protocol 1 of the European Convention on Human Rights (ECHR) which permits interference which is proportionate when balanced against the protection of the rights and freedoms of others. Inspectors are putting increased weigh on this government guidance as can be seen from the recent Aylesbury decision.

3. This obligation to try and purchase ALL properties by agreement has two serious implications. Firstly, it is impractical for all but the smallest project if funding is not available. The Crossrail 2 land budget is £3 billion and TfL do not have funds available to spend this sum buying land over the next 2 years in anticipation of powers being granted in 2021. We doubt HMT would make such funds available because of the risk of a compulsory purchase powers not being confirmed. It is considered that either government should consistently apply the Guidance for all projects and lead by example in making funds available or remove the requirement in the Guidance *to have taken reasonable steps to acquire <u>all of the land</u> by agreement.*

4. If this obligation is removed from Guidance then the challenge will be to replace it with measures which still comply with the ECHR requirements. As acquiring land early is just one possible solution it was proposed in December 2016 to replace it with new guidance to the effect of

"The confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to ~~*acquire all of the land and rights included in the Order by agreement*~~ *mitigate the impact of the proposed compulsory acquisition.*

Coupled with this was the obligation on acquiring authorities to undertake an independent rule 2 valuation in advance of the acquisition. This recognised that many agreements currently attempting complying with guidance often involve put options or acquisition after the CPO has been confirmed with a mechanism to determine the value of land is beforehand.

5. The acquiring authority should commit to keeping all occupiers aware of the anticipated date of taking possession (the Target Date.) This date could come forward or backwards as the design evolves and negotiations progress with the potential construction contractors. Part of the mitigation offered by the acquiring authority could include commitments relating to such target Date for possession. Any formal changes should be communicated to the affected party as soon as practicable

6. Substantial public funds are used in the lead up to a public inquiry in leading a reluctant horse to water. On the whole, occupiers do not want to leave their properties before the public inquiry as they do not want to have moved unnecessarily if the Order is not confirmed. Combined with lack of funding this normally results in the acquiring authority taking no more than an option to buy property at a later stage, but this is what will happen anyway when the powers are obtained.

7. The Guidance further recommends

   *Undertaking negotiations in parallel with preparing and making a compulsory purchase order can help to build a good working relationship with those whose interests are affected by showing that the authority is willing to be open and to treat their concerns with respect.*

8. The expectation raised in Guidance of comprehensive land acquisition ahead of powers is not serving the interests of acquiring authorities, owners or occupiers. A far more effective and pragmatic approach would be to promote obligations on both sides to engage constructively on mitigation and relocation assistance. The obligation to acquire by agreement in all cases can be a distraction from that and can raise unnecessary tensions, although selected acquisitions may be appropriate depending on the circumstances. An approach more focussed on assisting with mitigation and relocation would help to align objectives and create a better relationship between the parties.

9. Owners and occupiers faced with the threat of compulsory purchase want:
   - certainty to plan their lives and run their businesses elsewhere before they are forced to leave
   - to understand what the impact is likely to be,

- to understand when it is likely to take effect with some "book ends"
- commitment from the acquiring authority on compensation costs when they are considering relocation alternatives and mitigation strategies
- a plan to relocate at the acquiring authority's cost consistent with the principles enshrined in Horn –v- Sunderland ….

*"The principal of equivalence …. is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than their loss."*
What they get is often very different.

## ABSENCE OF ENGAGEMENT

10. The negotiation process is adversarial. Extreme positions are frequently taken by both acquiring authorities and claimants with a war of attrition over many years. Most claimants have never come across compulsory purchase before. Some advisors give an unrealistic expectation of likely compensation at the outset in order to get appointed. When the acquiring authority respond to a claim it often fails to meet expectations. The acquiring authority's views understandably are treated by suspicion by the claimant and they are convinced by their own arguments. The yawning gap between opening offers and eventual settlements is a disturbing feature of the way in which the system currently operates.

11. The problem starts with the view that mitigation of compensation is the sole responsibility of the affected landowner or occupier. Although the onus of proof that a claimant has failed to act reasonably and mitigate their loss lies with the acquiring authority, acquiring authorities tend to reserve their position on compensation until the claim is fully submitted and evidenced. This means that the claimant is forced to make decisions in a vacuum and retrospectively defend them to the acquiring authority which has the benefit of hindsight.

12. In fairness to acquiring authorities, claimants often provide only a partial picture of their relocation or mitigation strategy or none at all. This can sometimes be in anticipation of information being "cherry picked" by acquiring authorities who later challenge aspects of the claim. It is also just as often because the information is imperfect and the claimant has to act on the limited information available, especially before relocation premises are identified.

13. The effect of the foregoing is frequently to give rise to lengthy, costly and damaging but avoidable disputes about mitigation and the reasonableness of claimants' actions.

## CLAIMANTS' FEES

14. Reimbursement of claimants reasonable fees incurred in anticipation of the exercise of powers is another major contributory factor driving the lack of engagement. There is currently no obligation for acquiring authorities to pay the claimants fees at all prior to the excise of compulsory purchase powers. The only fee certainty the claimant gets is when they receive formal notice of the excise of compulsory purchase powers 3 months before the property is acquired. Occupiers either go without advice or appoint consultants at their own cost and risk.

15. Occupiers make decisions in good faith in expectation that costs will be recoverable. An adversarial relationship starts when they are not. They are often challenged on the grounds of reasonableness, on the new for old, etc. This arises as the engagement between the claimant and acquiring authority is too late in the process. As a general rule acquiring authorities have very little discussion with the claimants and their advisors as to whether the decisions they are about to make are reasonable and whether the costs they are incurring will be paid in full or not.

## DISPUTES

16. Disputes inevitably arise, and the Tribunal is in place as an option of last resort. The Tribunal can and in many cases does play an extremely effective role as a facilitator of the dispute resolution process. There are, however, a number of flaws in the present system. In particular:
    a. Tribunal cases generally take in excess of two years. Given the huge forthcoming volume of work on Crossrail 2, HS2, Utility CPOs and forthcoming housing schemes the volume of litigation is likely to multiply and timescales extend.
    b. The costs of taking a claim to the Tribunal are astronomical. This raises question whether the claimants have fair access to justice.
    c. The role of the Tribunal is also very late in the process. The Tribunal only has jurisdiction following a reference after the excise of compulsory purchase powers. There is no widely adopted mechanism to resolving disputes early in the negotiations.
    d. Alternative dispute resolution also plays too limited a role in the present system, with there being a real lack of understanding about advantages it can have. This is particularly true of evaluative mediation (i.e. where the mediator uses their own technical expertise to guide the parties to a reasonable solution), which is not well-known.
    e. Written representations are rarely use for compulsory purchase cases.

f. A small but not insignificant number of professionals who have acted as advocates during the negotiation process forget their primary duty to court when acting as an expert witness.

## SUMMARY

17. The CPA perceive that without radical change in behaviours the potentially huge increase in workload could threaten the credibility and acceptability of compulsory purchase. This is compounded by the bow wave of new CPO projects. New entrants coming into the market lack experience and are often inadequately trained. Judgement is at the heart of what we do and that requires experience, hence the daunting extent of the challenge in the short to medium term.

18. At the CPA National Conference on the 30th June this year, Colin Smith of CBRE touched on many of these points. His theme was the CPO process is fundamentally broken and we need a radical change in approach. Would you like to be treated is such an adversarial way?

19. The changes required are from inception through to assessment of compensation by the Tribunal. They are all geared towards changing behaviour and stopping an adversarial approach to compensation. It requires "Carrot and stick" incentivisation to ensure both the acquiring authority and claimant actively engage to mitigate the impact on claimant; a change in statute; Government Guidance and a mechanism for earlier disputes resolution.

Compulsory Purchase Association

## Session 1 - The context and catalysts for change – The need for and nature of further Reform

**Colin Smith,** *Senior Director, CBRE*

**Reforms to date**

In recent years significant improvements have been made to many aspects of the CPO Compensation Code – s237, Planning Assumptions, Advance Payments, No Scheme Principle, temporary possessions – the achievements have been substantial and Government's understanding and commitment to reform is to be welcomed.

**Compensation**

- We have a well-developed and comprehensive compensation code

- On matters such as Blight and Compensation when no land is taken – Pt 1 we lead the world

**Trends and Future Demands**

The is very significant growth in the demand for and use of Compulsory Purchase.

- Major transport infrastructure – HS2, Crossrail 2, new highways and increased capacity at LHR
- Energy – New electricity transmission lines
- Environmental – Thames Tideway Tunnel
- Regeneration – modernising retail and increasingly with housing as the primary driver and also housing to replace inadequate worn out stock from the '60/'70's

During the period through to the mid-2020s the number of acquisitions will be 3x the number dealt with during the past decade.

As a rough estimate over £15 billion worth of compensation will be paid in the coming decade.

**The Challenge**

- To meet this growth in demand significant additional resources are required - the challenge is daunting.
- Skills and experience are not gained quickly and there is also of course the ever present issue of ensuring available talent is attracted to work in our area of expertise.
- The work is demanding, intellectually and often emotionally, those affected by use of CPO are often challenging and demanding.

Fee rates must reflect the market for work of such importance affecting peoples livelihoods, homes and security it is vital that the best quality people are engaged.

**More Radical Reform is vital**

- Without in any way being negative the much needed and welcome reforms achieved to date have been essentially tinkering with the system we have inherited
  radical improvements – 'Reforms' are needed if the demand being encountered is to be met and crucially the operation of the system is suited to contemporary society, human rights and legitimate expectations.
- To quote a responder to the presentation at the Stakeholders Summit…

'we are trying to use a 19th century methodology for a 21st century environment' and
'the work involved should be brought forward to an earlier stage in the process if maintained and of serious intent this delivers a faster and cheaper result'

**Can we learn from other regimes around the world?**

**The USA**

**The International Rights of Way Association (IRWA) broadly similar to the CPA based in the States but with global influence and aspirations.**

- The US Uniform Relocation Assistance and Real Property Act 1970 has to quote Lee Hamre at last November's presentation, 'has worked extraordinarily well for over 45 years'.
- Uniformity, Fairness and Equitable Treatment are the guiding principles of the Uniform Act. 'Expeditious Acquisition and Payment' and 'Defined Relocation Assistance'.
- A key issue is 'taking property prior to compensation being paid to owners and occupiers is inconsistent with the principles of fairness and equitable treatment' hence payment of the agreed purchase price is made before possession or in the case of use of CPO the MV appraisal of the real property is deposited with the court.

**The International Federation of Surveyors – Compulsory Purchase and Compensation Recommendations for Good Practice (2010)**

- Need for those carrying out the process of land acquisition to have necessary professional and technical competence and experience - to be defined in law
- A code of Ethics (code of conduct) to serve as a guide in the process of compulsory purchase and assessment of compensation
- The body conduction the compulsory purchase process should be independent and impartial – should have no affiliation to either the expropriator nor any of the affected parties that may cause doubt as to impartiality.
- Transparency of documentation – relevant information to be given as early in the different stages of the process as possible so they are able to make informed choices comments and arguments.
- Reasonable expenses to be paid by the expropriator, such expenses incurred in advance of the date of project approval if in order to ensure efficiency, equity and ethical outcomes in process.
- In the case of enablement of profitable development by use of CPO, not only the losses to the affected party to be taken into account also the value of the land to the expropriator – share of the profit.

**United Nations – Land Tenure Series 10 Compulsory Acquisition of Land and Compensation (2008)**

- Assistance should be provided so owners and occupiers can participate effectively in negotiations on valuation and compensation
- Process to be supervised and monitored to ensure the acquiring authority is accountable for its actions and personal discretion is limited

- Possession to be taken after owners and occupiers have been paid at least partial compensation, accompanied by clearly defined compensation guarantees
- Good faith attempts to acquire the necessary land through voluntary sale and purchase should be made before using the power of compulsory acquisition
- The acquiring agency should take steps to ensure there are a sufficient number of independent valuers and advocates to help people assess their compensation claims
- Procedures should be conducted at low or no cost to people. Only in exceptional circumstances should costs be awarded against them.

**Current projects land acquisition examples in the USA and Australia**

**High Speed Rail in California San Francisco to Los Angeles and then to San Diego**

''High-speed rail follows essentially the same right of way processes as other public works projects.

Using eminent domain is used only when necessary''.

**Freight Railway Australia 1,700km**

''Inland Rail provides a high performance and direct interstate freight rail corridor between two of Australia's largest cities—Melbourne and Brisbane. In most instances, private land is acquired through direct negotiation with the landowner, with compensation assessed and negotiated by qualified appraisers. If there are substantial disagreements in the amount, these are resolved via negotiation, mediation, arbitration and ultimately, court action. Although ARTC is a fully owned by the government, it does not hold power to compulsory acquire land. If negotiations fail, ARTC can request the various state governments to commence the compulsory process''.

**The nature of (more radical) Reform for the UK**

It is considered these fall into three areas which are generically described as

- **Engagement**
- **The Exercise of Powers – Process**
- **Dispute Resolution**

## Session 2 Rule 2 Assessments

**Jonathan Stott,** *Managing Director, Gateley Hamer*

1 - There is a general issue relating to the assessment of Rule 2 claims. Many of us have encountered examples of acquiring authorities making unreasonably low offers for the market value of claimant's interests, only to increase offers over a period of time, delaying the settlement of the claim and causing claimants unnecessary stress and costs. On the other side of the coin, there are examples of claimant's agents setting their client's expectations unrealistically high, which also prolongs negotiations unnecessarily.

2 - The majority of Rule 2 claims are relatively straightforward and generally speaking the majority of protracted negotiations relate to cases where planning assumptions or severance / injurious affection are in play. Disturbance claims often take far longer to deal with than MV claims.

An initial proposal for reform is that:

*We recommend that new Guidance is issued recommending the acquiring authority to;*

i) *Procure an independent market value by the RICS at least 6 months before the compulsory purchase powers are exercised.*

ii) *Make an offer for the market value of the land (Rule 2) before exercising powers*

3 - However, there are various practical issues around the implementation of the drafted proposal, not least relating to timing of the independent valuation, the length of time it would take for independent assessments to be made in relation to all Rule 2 claims, the availability of suitably experienced valuers, and issues with the RICS appointment process.

4 - In view of the comments immediately above, it might not be necessary, practical or feasible to require that an independent market value be undertaken in relation to all cases where property is CP'd. Additionally, if the acquiring authority is not obliged to make an offer in accordance with the independent assessment, there may be limited benefit of the assessment being undertaken. However, it would be helpful if a mechanism / process could be established to enable claimants to call on an independent valuation to be undertaken at an earlier stage in the process if AAs do not make an offer which the claimant considers to be reasonable. With this in mind, we are proposing an alternative reform, as follows:

*An affected landowner (claimant) may require the acquiring authority to provide an assessment of market value at any time following the making of the CPO (or submission of TWAO / DCO etc). If the claimant does not accept the AA's assessment they may require the acquiring authority to procure an independent market valuation to be undertaken by a Surveyor appointed by the RICS. Following receipt of the independent valuation it will be for the AA to decide whether to make an offer that reflects the independent valuation, and it will be for the claimant to decide whether or not to accept the offer if it is made.*

As with other proposed reforms, consideration needs to be given as to whether the reform should take the form of guidance or be enshrined in legislation. Practical considerations also need to be taken in to account and we will be asking the CPA membership to provide opinion as to the need for reform in this area, the proposal that has been made, and any means by which it can be improved.

**Session 3 Dispute Resolution**

**Barry Denyer Green,** *Barrister, Falcon Chambers*

The Pre Reference Protocol. This was the focus of the Reform lecture in 2015, but has been updated to reflect the current reform initiative.

# *Draft 2*

# Pre-Action Protocol for Claims for Compensation following Compulsory Acquisition of Land and for Depreciation in the value of Land following Public Works (the 'Compensation Protocol')

## 1 Introduction

1.1

This protocol applies to claims for compensation, following or in anticipation of the compulsory acquisition of land, and to compensation for the diminution in the value of land resulting from the construction and use of public works.

Claims falling within the above description include:

- Claims for compensation following the acquisition of new rights in or over land
- Claims for the value of land acquired
- Claims for severance or injurious affection (whether or not land has been acquired)
- Claims for compensation for any disturbance or other losses
- Claims for any statutory payments arising in relation to compulsory acquisition
- Claims for compensation under Part I of the Land Compensation Act 1973.

This protocol also applies to claims for compensation where temporary possession of land is taken under statutory powers.

It does not apply to compensation claims in relation to statutory wayleaves, the Electronic Communications Code, the Water Industry Act 1991, the Land Drainages Act 1991, coal subsidence, or oil exploration and exploitation.

1.2

This protocol sets out conduct that the Upper Tribunal (Lands Chamber) ("the Tribunal") would normally expect prospective parties to follow before issuing a Reference. It will apply both where the person claiming compensation ("the Claimant") makes a Reference, and where a Reference is made by an acquiring or compensating authority ("the Authority"). The obligations placed on the parties are set out from {section/paragraph X} below.

1.3

Where a Claimant or Authority does not seek professional advice when making a claim for compensation or a Reference they should still, in so far as reasonably possible, comply with the terms of this protocol.

1.4

Parties should assist each other to ensure this Protocol is followed.

## 2 Objectives of the Protocol

2.1

This protocol seeks to establish a reasonable process and timetable for the exchange of information relevant to a claim for compensation, sets standards for the content and quality of claims and their supporting documentation and sets out the Tribunal's expectations for the conduct of pre-action negotiations.

2.2
The protocol's objectives are:

2.2.1
to encourage the exchange of early and full information about a claim for compensation;

2.2.2
to encourage the parties to take reasonable steps to avoid a Reference by encouraging settlement of the dispute before proceedings are commenced; and

2.2.3
to support the efficient management of proceedings where a Reference cannot be avoided.

2.3
A flow chart is attached at Annex A, which shows each of the stages that the parties are expected to undertake before the issue of a Reference.

**3 Relationship to Tribunal Rules and Practice Direction**
3.1
This protocol applies in the pre-reference period, before the Upper Tribunal (Lands Chamber) Procedure Rules 2010 (as amended) and the Lands Chamber Practice Directions 2010 (as amended) are engaged. It sets out the standard of conduct that the Tribunal expects parties to adhere to in that period.

3.2
The protocol is consistent with the Rules and Practice Direction. However, in the event of any conflict between this protocol and the Tribunal Rules and/or the Practice Direction, the Rules and/or Practice Direction will prevail.

**4 Sanctions for non-compliance**
4.1
Where a party fails to comply with this Protocol, the Tribunal will take this into account when exercising its case management functions, and when considering any question of costs.

4.2
Breach of this protocol may result in the Tribunal imposing sanctions on the non-complying party. Such sanctions may include but are not limited to costs sanctions.

4.3
The Tribunal has full discretion when dealing with any instance of non-compliance with the protocol and will respond to breaches in a manner proportionate to their seriousness and effect. The Tribunal is not likely to be concerned with minor or technical breaches of the protocol and will consider whether the parties have complied in substance with the relevant principles and requirements.

**THE PROTOCOL**
**5 The Claim**
5.1
The obligations in this part apply to a person who wishes to make a claim for compensation to which this protocol applies.

5.2
In the case of the compulsory acquisition, or temporary possession, of land, the claimant should send the Authority a claim document that satisfies the requirements of the Land Compensation Act 1961 and any regulations thereunder, or under the Land Compensation Act 1973, of which there is an illustration at either Annex B (land acquisition) or C (Part I claim) ("the Claim"). The Claim should include details of any claim for the value of land taken, severance and/or injurious affection, disturbance or other losses, and any statutory payments. The Claim should be sent within any time limit specified by any legislative requirement.

5.3
Where, such as in the case of a claim for disturbance or other losses, the heads of claim and measure of loss or damage cannot be identified and/or prepared in detail within any legislative time limit, the outline of the potential heads of claim and, if possible, estimates of the compensation sought shall be sent to the Authority within any such time limit with an indication of when such details can be provided. Once such details are known, they should be provided to the Authority in an updated Claim as soon as reasonably possible.

5.4
It is for a claimant to prove their loss. As such, claims should be accompanied by appropriate supporting information. Subject to any legislative requirements, the Claim should include:

5.4.1
Where compensation is sought for land taken, and/or severance and injurious affection, or other diminution in the value of land: Full details of the interest in the land being acquired, a copy of any registered title, copies of any leases, details of the condition of the land at the valuation date, a copy of any valuation relied upon (with supporting comparables, where applicable), any relevant planning permission(s) and/or lawful use and development certificates, and, if reliance is being placed on an assumed planning permission or on 'hope value', a statement setting out the basis for that assumption or hope value. The claim should also include a statement explaining how any legislative requirement about the effects of the scheme underlying the compulsory acquisition is addressed.

5.4.2
Where a claim is additionally made for disturbance or other losses, the Claim should include a statement as to the losses and expenses the Claimant has suffered or incurred, or anticipates incurring. In the case of losses or expenses already suffered or incurred, details of these should include the date(s) of the loss or expense and be supported by invoices or other documentary evidence, including (where available) narrated invoices and/or receipts. In the case of losses or expenses anticipated to be incurred, such as the fees of professional advisors, the Claim form should provide details of the costs or losses expected to be incurred, an estimate of the amount and the basis for any estimate.

5.4.3
Where the losses claim include loss to a business, the Claim should include an explanation of how any loss has been calculated, supported by accounts for the business. The accounts provided should where possible include the accounts for a period of at least three years before any date when it is said that the business has suffered a loss, and should continue to the date of the Claim.

5.4.4
Where a claim is made for the partial or total extinguishment of a business, the Claim should include a statement explaining why the business had to be extinguished (in whole or part), and detailing what attempts were made to relocate or otherwise continue the business, including identifying any properties inspected for relocation and explaining why such properties were unsuitable.

5.4.5
Where a claim is made for any statutory payments, the Claim should include a statement explaining the entitlement to such a payment, and if applicable, how the sum claimed has been calculated.

5.4.6
Where compensation is sought for the personal time of the Claimant, the Claim should be accompanied by a record of the time claimed for and details of how the time was spent. In the case of a claim for the time of any directors or officers of a company, the Claim shall additionally set out any payments made by the company in respect of such time, or how any loss to the company is otherwise said to arise.

5.4.7
Where the Claimant has made an application for an advance payment of compensation, the date and details of any such application, and any payment made pursuant to that application, shall be included in the Claim.

5.4.8
Where the claim is for compensation for the temporary possession of land, the claim should include such details as set out at paras 3.2.1 to 3.2.5 above as are appropriate to justify the claim. The Claim should identify any statutory notices served in connection with the taking of temporary possession, and state the period(s) of temporary possession that are the subject of the claim.

5.5
In the case of a claim for a payment pursuant to Part 1 of the Land Compensation Act 1973, the Claim must comply with any legislative requirements. Full details of the interest in the land or property affected, a copy of any registered title, and copies of any leases should be provided. Additionally, any valuations must be accompanied by appropriate supporting evidence, such as comparable evidence, and the Claim must clearly identify the physical factors alleged to have caused the diminution in value of the subject property.

5.6
Any claim prepared by a chartered surveyor must contain a signed endorsement that any requirement of the Royal Institution of Chartered Surveyors has been complied with. The endorsement should confirm that in the surveyor's opinion:

5.6.1
The valuations have been prepared in accordance with all the relevant legislative requirements;

5.6.2
The surveyor has followed any specified or relevant codes of practice or guidance issued by the RICS, including the current RICS practice statement on Surveyors Acting as Expert Witnesses;

5.6.3
The surveyor acknowledges that if he is to act as an expert witness in any Reference to the Tribunal, he owes a primary duty to the Tribunal to give his own opinion of values, and not to his client.

**6 The Authority's Response**

6.1
Where a Claimant has provided a Claim satisfying or substantially satisfying the requirements of a Claim as set out above, the Authority shall provide a written response to that claim ("a Response") within a reasonable time frame, normally within 56 days. Where the Authority is unable to respond within that period it shall inform the Claimant as soon possible and indicate when it will respond fully. The Response should set out in reasonable detail the Authority's position on every head of claim in respect of which compensation is sought.

6.2
If the Authority fails to provide a Response to any one or more heads of claim in the Claim (not being a head of claim in respect of which the Claimant has reasonably been asked to provide evidence or additional evidence which has not thereafter been provided within a reasonable timeframe) and in any subsequent Reference to the Tribunal then raises matters that should have been made available in the Response, the Tribunal may take that omission into account in considering whether the Authority has complied with this protocol.

6.3
The Response should:

6.3.1
Set out clearly the Authority's position in respect of all aspects of the Claim, including identifying any heads of claim that are accepted, and in what amount, and otherwise providing a response to each and every head of claim, explaining what (if any) monetary sums that the Authority considers are payable as compensation, supported by valuations or other relevant information;

6.3.2
Follow the requirements for a Claim set out above, so far as appropriate;

6.3.3
If the Authority considers that further information is required in respect of any head of claim, or any aspect of it, set out what further information is required and why, and specify a reasonable time frame (normally 21 days) for any such further information to be provided;

6.3.4
confirm that the Authority and/or its surveyor will attend a meeting or meetings as proposed under section 7 below;

6.3.5
specify a reasonable time frame within which the Claimant should provide an Answer to the Response (if any) in accordance with the paragraphs below. This will usually be within 56 days of the date of the Response.

**7 The Claimant's Answer**

7.1 A Claimant is not obliged to provide an Answer to the Authority's Response, but if the Claimant fails to do so and in any subsequent Reference to the Tribunal then raises matters that could and should have been made available in an Answer, the Tribunal may take that omission into account in considering whether the Claimant has complied with this protocol.

7.2

Where the Claimant does provide an Answer the Answer shall deal with each and every matter in the Response so far as the same is not an admission of any head of claim in the Claim. The Answer will usually be within 56 days after the Response.

7.3

The Answer should follow the requirements for a Response set out above, so far as relevant and appropriate.

**8. Intended Reference by the Authority**

8.1

Where an Authority is proposing to make a Reference, and it has not received a Claim as described in this protocol, the Authority should notify the Claimant of its intention to make a reference and invite the Claimant to submit a Claim within a reasonable period, normally 42 days.

8.2

Where, following the making of the request described in paragraph 8.1, an Authority still does not receive a Claim, then prior to making a Reference the Authority shall write to the Claimant and indicate the heads of claim in respect of which it anticipates the Claimant may be entitled to make a Claim. Where it is reasonably possible for an Acquiring Authority to make an assessment or estimate of the compensation payable under any head of claim for which it considers the Claimant may be eligible, details of such assessment or estimate shall be provided in the letter, supported by any relevant valuation(s) or other supporting information. The Claimant should then be given a further reasonable period, normally 28 days, in which to respond to this letter.

**9 Disclosure of Documents**

9.1

Disclosure will generally be limited to the documents required to be support the Claim, the Authority's Response and any Answer, as described above. The parties can however agree that further disclosure may be given.

9.2

If either or both of the parties consider that further disclosure should be given but there is disagreement about some aspect of that process, then the Tribunal in any Reference will have regard to such dispute in considering whether either or both parties have complied with this Protocol.

**10 Negotiations**

10.1

The parties and/or their respective surveyors are encouraged to meet before the Authority is required to provide the Response and should generally meet within 42 days after the Authority has provided the Response. The meetings will be without-prejudice and the parties should seek to agree as many of the items in dispute as possible. Parties should consider the use of Scott Schedules or ongoing Statements of Agreed Facts and Issues to record areas of agreement and/or disagreement. Examples are given in…

**11 Alternative Dispute Resolution**

11.1

The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than a Reference to the Tribunal, and if so, endeavour to agree which form to adopt. In particular, consideration should be given to evaluative mediation, in which an experienced practitioner is able to use their own judgement on the merits of the cases of the respective parties.

11.2

Both parties may be required by the Tribunal to provide evidence that alternative means of resolving their dispute were considered. The courts and the Tribunal take the view that litigation and/or a Reference should be a last resort, and that a Reference should not be issued prematurely when a settlement is still actively being explored. The Tribunal may give particular consideration to the extent of the parties' compliance with this part of the protocol when making orders about who should pay costs, subject to any legislative requirements.

11.2

Information on mediation and other forms of alternative dispute resolution may be found through the following: www.justice.gov.uk/guidance/mediation/index.htm. and the Royal Institution of Chartered Surveyors (www.rics.org/).

11.3

Notwithstanding the above, it is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.

**12 Parties' review of their positions**

12.1

Both a Claimant and an Authority are encouraged to regularly review their positions in respect of any Claim made, and to communicate any change in those positions to the other party promptly.

12.2

Where the procedure set out in this protocol has not resulted in the resolution of any dispute between the Claimant and the Authority, they should in particular undertake a further review of their respective positions prior to any Reference being made. Consideration should be given to any opportunity for avoiding commencing proceedings or, at the least, narrowing the issues between them.