

MINISTRY OF JUSTICE CALL FOR EVIDENCE IN RELATION TO DISPUTE RESOLUTION IN ENGLAND AND WALES

RESPONSE ON BEHALF OF THE COMPULSORY PURCHASE ASSOCIATION

The Compulsory Purchase Association (“CPA”) is a not for profit member organisation that promotes best and effective practice in the delivery of land for infrastructure, housing and regeneration through the use of compulsory purchase powers.

Its objective is to work for the public benefit in relation to compulsory purchase and compensation in all its forms. It seeks to promote the highest professional standards amongst practitioners at all levels, and to ensure that the legal framework for compulsory purchase and compensation is clear, fair and effective.

Its members represent both acquiring authorities and claimants affected by compulsory acquisition.

As part of the compulsory purchase process there is need for effective resolution of claims for compensation from those affected by compulsory acquisition. The predominant method of resolving compensation, and other compulsory purchase related disputes, is through litigation in the Upper Tribunal (Lands Chamber). In recent years the CPA has supported the greater use of alternative methods of resolving disputes, such as mediation and has undertaken surveys of its members regarding the use of dispute resolution.

The CPA welcomes the opportunity to respond to the current call for evidence and share the experiences of its members in the use of dispute resolution in the compulsory purchase sector.

Questions

1. Drivers of engagement and settlement

An understanding of the drivers of engagement and settlement will enable the development of policies and procedures that ensure access to justice in a way that best meets people’s needs. Existing evidence points to reasonable settlement rates for pre-hearing dispute resolution schemes.

1. Do you have evidence of how the characteristics of parties and the type of dispute affect motivation and engagement to participate in dispute resolution processes?

Compulsory purchase and land compensation cases differ from many types of dispute, as in most cases the question of liability is not in issue and the compensating party invites the claimant to submit its claim for compensation. This usually occurs even before the right to compensation has crystallised. The parties are therefore compelled to engage in the process of resolving compensation disputes from an early stage.

However, the primary method of dispute resolution is through legal proceedings in the Upper Tribunal (Lands Chamber) and the uptake of alternative dispute resolution processes in the sector remains low, particularly taking account that the volume of claims is increasing resulting from a continued rise in the use of compulsory purchase to deliver land for a wide variety of infrastructure and other development schemes in England and Wales.

The CPA considers that there is great potential for dispute resolution processes to play a far more prominent role in resolving compensation disputes, reducing the use of litigation as the primary method of resolving cases.

2. Do you have any experience or evidence of the types of incentives that help motivate parties to participate in dispute resolution processes? Do you have evidence of what does not work?

In compulsory purchase and land compensation cases, often the main incentives that motivate parties to participate in dispute resolution processes are shorter timescales, reduced costs and confidentiality of the outcome (e.g. settlement via mediation), when compared with cases determined through proceedings in the Upper Tribunal (Lands Chamber).

Increasingly, access to expert determination or evaluative mediation where the input of an experienced and knowledgeable compulsory purchase practitioner(s) to help parties resolve cases has emerged as an important factor in motivating parties to engage in dispute resolution.

Further, changes in procedural rules and guidance of professional bodies in the sector are impacting on the decisions made by parties to engage in dispute resolution processes. In particular, recent changes in the Upper Tribunal (Lands Chamber) Practice Directions and professional guidance (e.g. Royal Institution of Chartered Surveyors (“RICS”) mandatory Professional Statement: Surveyors Advising in Respect of Compulsory Purchase and Statutory Compensation) and the CPA’s Land Compensation Claims Protocol (a voluntary pre-reference protocol), all strongly promote the use of dispute resolution processes in the sector as best practice. There appears to be increased consideration in the Upper Tribunal (Lands Chamber) in the determination of costs for parties failing to engage in dispute resolution process prior to, or during, legal proceedings.

The combination of these various factors is resulting in greater awareness and wider uptake of dispute resolution processes in the compulsory purchase sector, however whilst positive, the upward trend is still considered to be in its infancy.

Finally, the Upper Tribunal (Lands Chamber) remains one of the few areas of the court system that does not have an adopted pre-action protocol. The CPA have stepped into this space with its voluntary Land Compensation Claims Protocol which has received industry support, however it remains the CPA’s view that a formal pre-action protocol should be adopted by the Upper Tribunal (Lands Chamber) on compulsory purchase related matters.

3. Some evidence suggests that mandatory dispute resolution gateways, such as the Mediation Information & Assessment Meeting (MIAM), work well when they are part of the court process. Do you agree? Please provide evidence to support your response.

Mandatory dispute resolution gateways are not currently applicable to compulsory purchase and land compensation cases.

4. Anecdotal evidence suggests that some mediators or those providing related services feel unable to refer parties to sources of support/information – such as the separated parents’ information programme in the family jurisdiction – and this is a barrier to effective dispute resolution process. Do you agree? If so, should mediators be able to refer parties onto other sources of support or interventions? Please provide evidence to support your response.

The CPA carried out polling of its members in January 2020 regarding the use of alternative dispute resolution in the sector. The responses to those polls indicate that a lack of clear and accessible information concerning the different alternative dispute resolution options has impacted on the level of uptake.

136 participants responded to the poll and the main findings were:

- Over last five years, independent expert determination and mediation most commonly used by members and/or acting in these roles;
- Majority of parties' perceptions of process were that they were "satisfied" whether the process adopted succeeded or failed; and
- Legislation, procedural requirements and professional guidance identified as the main drivers to change behaviours.

The CPA has responded through a variety of measures, including publishing guidance on its website regarding the use of ADR in compulsory purchase and land compensation cases and promoting the use of ADR through presentations given to the CPA Annual Conference.

In addition, the CPA is supportive of the RICS' efforts to introduce a specific Dispute Resolution process for compulsory purchase and land compensation cases.

5. Do you have evidence regarding the types of cases where uptake of dispute resolution is low, and the courts have turned out to be the most appropriate avenue for resolution in these cases?

In compulsory purchase and land compensation cases, the default method of resolution of cases remains through reference to legal proceedings in the Upper Tribunal (Lands Chamber). Uptake of alternative dispute resolution remains low in the sector, despite efforts of bodies such as the CPA and RICS to raise the profile and promote wider use of ADR amongst their respective memberships.

6. In your experience, at what points in the development of a dispute could extra support and information be targeted to incentivise a resolution outside of court? What type of dispute does your experience relate to?

At the earliest possible stage of the compulsory purchase process greater support and information can and should be made available to parties affected about the alternative options available to resolve disputes outside of legal proceedings, both prior to and following the acquisition of land taking place.

Increasingly, in large infrastructure schemes in particular (e.g. High Speed Two) the scheme promoters have adopted voluntary alternative dispute resolution schemes applicable to claims arising on the particular scheme. This is to be welcomed in raising the profile of alternative dispute processes in the sector and it is hoped will lead to a greater uptake of ADR schemes in the future.

7. Do you have any evidence about common misconceptions by parties involved in dispute resolution processes? Are there examples of how these can be mitigated?

The previous polls conducted by the CPA and related anecdotal evidence suggests there is a lack of understanding of the different types of ADR, for example whether a particular process (e.g. mediation) leads to a binding determination of the dispute, whether the process is confidential.

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2. Quality and outcomes

We want to ensure that parties are supported to use the best processes. As well as measures such as engagement/settlement rates and the perceptions of parties, it is important that parties achieve quality outcomes i.e. problems can be resolved effectively, fairly, and with minimal cost and delay for parties.

8. Do you have evidence about whether dispute resolution processes can achieve better outcomes or not in comparison to those achieved through the courts?

In the compulsory purchase sector, the time and costs involved in proceedings in the Upper Tribunal (Lands Chamber) can often be disproportionate to the value of the claim and issues in dispute. Dispute resolution processes, such as mediation, provide a quicker and more cost-effective method of resolving compulsory purchase related disputes, particularly for lower value or less complex cases.

9. Do you have evidence of where settlements reached in dispute resolution processes were more or less likely to fully resolve the problem and help avoid further problems in future?

Evidence in the compulsory purchase sector is that ADR processes are effective in achieving total settlement of issues in dispute between the parties. It is rare, where ADR has been successful, for issues to remain outstanding that require separate determination through legal proceedings.

10. How can we assess the quality of case outcomes across different jurisdictions using dispute resolution mechanisms, by case types for example, and for the individuals and organisations involved?

An important measure of the quality of outcomes is the volume of cases resolved via different dispute resolution processes, without recourse to litigation. It is possible to measure the outcomes of ADR processes through effective use of surveys or polling of sector organisations. This has proved effective in the compulsory purchase sector, where the CPA has access to wide ranging membership with a broad cross section of professionals engaged at all stages of the compulsory purchase process.

11. What would increase the take up of dispute resolution processes? What impact would a greater degree of compulsion to resolve disputes outside court have? Please provide evidence to support your view.

There are various factors that are likely to lead to an increase in the take up of dispute resolution processes, including:

- Availability of quality information explaining different dispute resolution processes;
- Practical education and experience of undertaking dispute resolution;
- Guidance from professional bodies and courts promoting the use of dispute resolution processes;

- Legislative, procedural requirements and professional guidance.

At present, in the compulsory purchase sector there are no measures in place that impose any level of compulsion on parties to engage in ADR processes. However, in recent years, through changes made to the Upper Tribunal (Lands Chamber) Practice Directions, publication of the RICS Mandatory Statement for Compulsory Purchase and the CPA's Land Compensation Claims Protocol, there is now a much firmer emphasis placed on the need for parties to consider the use of ADR at each stage of the process.

As noted in response to question 2, the Upper Tribunal (Lands Chamber) remains one of the few areas of the court system that does not have an adopted pre-action protocol. The CPA have stepped into this space with its voluntary Land Compensation Claims Protocol which has received industry support, however it remains the CPA's view that a formal pre-action protocol should be adopted by the Upper Tribunal (Lands Chamber) on compulsory purchase related matters.

12. Do you have evidence of how unrepresented parties are affected in dispute resolution processes such as mediation and conciliation?

The CPA has not compiled evidence specifically concerning the experience of unrepresented parties in dispute resolution processes. However, anecdotally, the uptake of alternative dispute resolution processes, such as mediation, by unrepresented parties is considered to be low.

13. Do you have evidence of negative impacts or unintended consequences associated with dispute resolution schemes? Do you have evidence of how they were mitigated and how?

N/A

14. Do you have evidence of how frequently dispute resolution settlements are complied with, or not? In situations where the agreement was not complied with, how was that resolved?

N/A

15. Do you have any summary of management information or other (anonymised) data you would be willing to share about your dispute resolution processes and outcomes? This could cover volumes of appointments and settlements, client groups, types of dispute, and outcomes. If yes, please provide details of what you have available and we may follow up with you.

N/A

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3. Dispute resolution service providers

We are keen to gain a greater understanding of the Dispute Resolution workforce and how they are currently trained, how standards of work are monitored and how quality is assured to users of their services.

16. Do you have evidence which demonstrates whether the standards needed to provide effective dispute resolution services are well understood?

N/A

17. Do you have evidence of the impact of the standard of qualifications and training of dispute resolution service providers on settlement rates/outcomes?

N/A

18. Do you have evidence of how complaints procedure frameworks for mediators and other dispute resolution service providers are applied? Do you have evidence of the effectiveness of the complaints' procedure frameworks?

N/A

19. Do you think there are the necessary safeguards in place for parties (e.g. where there has been professional misconduct) in their engagement with dispute resolution services?

N/A

20. What role is there for continuing professional development for mediators or those providing related services and should this be standardised?

N/A

21. Do you have evidence to demonstrate whether the current system is transparent enough to enable parties to make informed choices about the type of service and provider that is right for them?

N/A

4. Financial and economic costs/benefits of dispute resolution systems
We are keen to get more evidence around the possible savings of dispute resolution processes. We seek evidence to help us understand the economic differences between dispute resolution processes.

22. What are the usual charges for parties seeking private dispute resolution approaches? How does this differ by case types?

The typical charges for the appointment of a mediator in compulsory purchase compensation cases ranges between £3,500 - £10,000 and VAT. The costs of the mediator are typically split equally between the parties.

23. Do you have evidence on the type of fee exemptions that different dispute resolution professionals apply?

N/A

24. Do you have evidence on the impact of the level of fees charged for the resolution process?

N/A

25. Do you have any data on evaluation of the cost-effectiveness or otherwise of dispute resolution processes demonstrating savings for parties versus litigation?

N/A

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5. Technology infrastructure

We are interested to learn what evidence informs the potential for technology to play a larger role in accessing dispute resolution.

Although we are aware of many domestic and international platforms, we must continue learning from new and novel approaches to digital technology that can remove barriers to uptake, improve the user experience, reduce bureaucracy and costs, and ultimately improve outcomes for parties.

26. Do you have evidence of how and to what extent technology has played an effective role in dispute resolution processes for citizens or businesses?

N/A

27. Do you have evidence on the relative effectiveness of different technologies to facilitate dispute resolution? What works well for different types of disputes?

N/A

28. Do you have evidence of how technology has caused barriers in resolving disputes?

N/A

29. Do you have evidence of how an online dispute resolution platform has been developed to continue to keep pace with technological advancement?

N/A

30. Do you have evidence of how automated dispute resolution interventions such as artificial intelligence-led have been successfully implemented? How have these been reviewed and evaluated?

N/A

6. Public Sector Equality Duty

We are required by the Public Sector Equality Duty to consider the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people in shaping policy, delivering services and in relation to our own employees.

31. Do you have any evidence on how protected characteristics and socio-demographic differences impact upon interactions with dispute resolution processes?

The CPA has no evidence available to share in relation to this question.

32. Do you have any evidence on issues associated with population-level differences, experiences and inequalities that should be taken into consideration?

The CPA has no evidence available to share in relation to this question.