3 December 2012

The Secretary
Tribunal Procedure Committee
Post point 4.37
102 Petty Francs
London SW1H 9AJ

By email to: tpcsecretariat@justice.gsi.gov.uk

Dear Sirs

**Consultation on the proposed changes to the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010**

I write on behalf of the National Committee of the Compulsory Purchase Association in relation to the above consultation. The Association's objective is to work for the public benefit in relation to compulsory purchase and compensation in all its forms. This includes promoting the highest professional standards amongst practitioners at all levels and participating in debate as to matters of current interest in compulsory purchase and compensation. The CPA has some 500 members practising in this field, including surveyors, lawyers, accountants, planners and officers of public authorities. Many of the Association's members are engaged in work in the Lands Chamber of the Upper Tribunal ("the Tribunal").

We largely confine our comments to the issues within the CPA's primary remit, namely the consultation on Rule 10 on costs (Questions 16-37). Our comments are set out below by reference to the question numbers in the consultation document.

16) Is it appropriate to repeal section 4 of the Land Compensation Act 1961? If not, why not?

Yes, provided that an appropriate replacement is provided in the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. The CPA is concerned that the "more flexible" approach (para 54) envisaged will lead to a reduction in the certainty arising from the application of the costs rules, to the detriment of the parties to compensation cases in the Tribunal. Whilst inflexible rules are not desirable, rules which are applied with too much flexibility will mean that parties are unable to predict with a sufficient degree of certainty what the costs outcome in any particular set of circumstances is likely to be. This will not assist in the efficient conduct of Tribunal litigation.

The CPA supports essentially the same costs regime continuing in compulsory purchase and injurious affection compensation cases in the Tribunal (para 94).

17) Is it considered desirable to maintain the present costs regime applied in cases presently under section 4 by use of Practice Directions (Option 1) rather than by specific rules? If so, why?

No. The CPA's preference is for provision to be made in the Rules rather than in the practice directions. Whilst the CPA has considerable confidence in the current and next President of the Tribunal, there is a residual concern that the practice directions could be open to change in the future without sufficient safeguards. If a provision of primary legislation which serves a useful purpose is to be repealed, it should be replaced by a provision with a degree of permanence. This can only really be achieved by a provision in the Rules rather than in the practice direction. The role of the practice directions is to amplify the Rules rather than to substitute for what Parliament has previously set out in primary legislation. Section 4 should be replaced by something which has the status of a rule rather than a provision in a practice direction which is perhaps more akin to guidance.

The CPA agrees that replacements for s4(3) and 4(4) would not be necessary (para 62). The CPA agrees that s4(5) should be reflected by a provision in the Rules (para 61).

18) If Option 1 is considered desirable, might the drafting of Rule 10 (Option 1) be improved, and if so how?

The CPA agrees that the disparity of interest or resources provision in draft Rule 10(1B) should not be applied to compulsory purchase or injurious affection cases. It is almost invariably the case that the acquiring authority would have greater resources than a claimant and this cannot properly be the basis of providing for costs orders.

The CPA agrees that the phrase "compulsory purchase or injurious affection" in draft Rule 10(1D)(a) is appropriate (para 96). The CPA considers, however, that the phrase "including references made after the acquisition of land has been agreed" is unclear. It is not obvious what this latter phrase is intended to encompass.

As to draft Rule 10(1E) and the no order for costs regime, the CPA does not consider that this provision should apply to "small" compulsory purchase or injurious affection compensation cases. Please see further our comments in relation to paragraph 12.5 of the draft practice directions on this point.

As to draft Rule 10(2)(aa), the application should not just include "reasons why the conditions or circumstances… apply" but also sufficient supporting evidence to show that they apply. This is especially the case in relation to a no costs order sought under draft Rule 10(1E). A requirement for supporting evidence should be added to draft Rule 10(2)(aa). The practice directions could helpfully explain what supporting evidence should be submitted.

Draft Rule 10(5B) is not appropriately drafted. Please refer to the response to Question 36 below.

19) Is it considered desirable to maintain the present costs regime applied in cases presently under section 4 by specific rules (Option 2) rather than use of Practice Directions? If so, why?

Yes, for the reasons given above in relation to Question 17. The CPA would wish to see Option 2 implemented, as described in paragraph 64.

20) If Option 2 is considered desirable, might the drafting of Rule 10 (Option 2) be improved? If so, how?

Please refer to our comments above in relation to Question 18.

In Option 2 draft Rule 10(1F)(a), the CPA's preference would be to avoid the duplication inherent in providing that a claimant "may deliver to the acquiring authority a notice in writing" of the compensation claimed and to simply cross-refer to the existing need for a claimant to provide a proper notice of reference under Rule 28 (see in particular Rule 28(3)(g)), as supplemented by paragraph 6.1(2) of the November 2010 Practice Directions. There is no need to provide in the Rules a new provision for a "notice in writing" when a claimant ought already to provide a proper statement of its claim in the notice of reference. The CPA would therefore suggest that draft Rule 10(1F)(b)(ii) is drafted simply to refer to a claimant's failure to provide a proper notice of reference. It would be useful in the circumstances to add to Rule 28(3)(g) a requirement for a notice of reference to include the words "details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated" or similar and also to require a summary of the contentions on which a claimant relies in support of its claim. This would both avoid the need to duplicate the obligation on a claimant to set out its compensation claim and also ensure that a notice of reference under Rule 28(3) did provide proper particulars of a claimant's claim from the very start of Tribunal proceedings.

The CPA supports the use of the phrase "special reasons" in Option 2 draft Rule 10(1F)(c) for the reasons given in the answer to Question 21 below.

21) Having regard to the drafting of Rule 10 (Option 1), are the draft Practice Directions considered appropriate? If not, why not?

As to paragraph 12.2 of the draft practice directions, the CPA comments as follows.

First, the CPA considers that the substitution of the well-understood "special reasons" provision for a new approach ("will normally") will unnecessarily reduce certainty and predictability in the costs regime (see para 62(a)). The approach to "special reasons" has been considered in a number of cases (see eg Colneway v EA [2004] RVR 37) and is well-understood by practitioners. If the words are changed, even if the intended effect is the same, the utility of this previous case-law will be lost. The CPA would prefer to retain the existing "special reasons" approach. The CPA notes that the Option 2 version of Rule 10 (at para 79) retains the "special reasons" approach (see also para 67).

Secondly, as to the "notice of claim" provision in paragraph 12.2(a), please see our comments in relation to Question 20 (re Option 2 draft Rule 10(1F)(a)). There is in practice no need to provide for a "notice of claim" to be given where the Rules already provide for a notice of reference to be provided by a claimant (subject of course to that notice of reference being required to contain sufficient details, as noted above).

Thirdly, as to paragraph 12.2(b), the text should read "compensation determined by the Tribunal or agreed by the parties" to provide for circumstances in which a Tribunal reference is compromised before the amount of compensation is determined by the Tribunal.

As to paragraph 12.5 of the draft practice directions, the CPA comments as follows.

The CPA agrees that that practice directions should define the circumstances in which draft Rule 10(1E) would be applied (para 12.1 states that para 12.5 sets out the "basis upon which it will exercise this power").

Whilst the CPA broadly agrees with the provisions in paragraphs 12.5 (1), (3) and (4), the CPA does not agree with the provision in paragraph 12.5(2). Draft Rule 10(1E) should not apply to compulsory purchase or injurious affection compensation cases just because they are "small". Paragraph 12.5(2) should be omitted.

Cases which are "small" are just as likely to give rise to points of principle, issues of law or questions of valuation practice, as larger cases. Cases which give rise to points of principle, issues of law or questions of valuation practice, should not be within the ambit of draft Rule 10(1E). It would be detrimental to both claimants and acquiring authorities if that were to be the case. Dealing with cases only by reference to size (which is not defined by reference to the amount in dispute or in any other way, eg the volume of evidence required) is a blunt instrument. We are also concerned that there would be substantial satellite litigation in connection with whether a case was properly characterised as "small" or not. The appropriate method to deal with "small" cases is to allocate them to either the simplified or the written representations procedure, which are essentially no costs regimes and are designed to ensure that cases are managed to keep the actual costs incurred to a minimum as a result.

Moreover, the CPA considers that there ought to be a provision which allows a party against whom a no costs order has been made to apply to the Tribunal for that order to be reconsidered at a later stage in the proceedings, if circumstances change or if the other party is behaving unreasonably in the conduct of the proceedings.

There may be merit in having an ability to seek costs protection on application in compulsory purchase and injurious affection compensation cases where an important point of principle arises for determination in any particular case, and where it is in the public interest that that point be determined. The CPA recognises, however, that such a regime would be difficult to operate in practice.

22) Having regard to the drafting of Rule 10 (Option 2), are the draft Practice Directions considered appropriate? If not, why not?

Please refer to our comments above.

23) Do you agree with the TPC's provisional view that Option 1 is to be preferred to Option 2? If not, why not?

No, for the reasons given above in relation to Question 17.

24) Is Rule 10(1) appropriately drafted, in its reference to the conditions or in the circumstances referred to in paragraphs (1A) to (1E)? If not, why not?

Yes.

25) Is it appropriate to include provision in Rule 10 for the costs incurred in applying for an order for wasted costs? If not, why not?

Yes.

26) If so, is Rule 10(1A)(a) appropriately drafted? If not, how should it be drafted?

Yes.

27) Is it appropriate to provide the UTLC with a specific power to impose costs orders to sanction non-compliance? If not, why not?

Yes.

28) If so, is Rule 10(1A)(b) appropriately drafted? If not, how should it be drafted?

No. The draft Rule should be phrased to make it clear to what the phrase “non compliance” relates (eg the Rules, Practice Directions, an Order of the Tribunal, etc).

29) Does Rule 10(1B) (both Options) successfully achieve its objective? If not, why not?

This does not apply to compulsory purchase and injurious affection compensation cases and so we do not comment further.

30) Does Rule 10(1E) (both Options) successfully achieve its objective? If not, why not?

Please see our comments above in relation to Question 18.

31) Does Rule 10(1F) (Option 2) successfully achieve its objective? If not, why not?

Yes, save for the comments above in relation to Question 20.

32) Is it appropriate for the UTLC to have the power to order payment of the costs of any costs assessment? If not, why not?

Yes this is appropriate.

33) If so, is Rule 10(4)(c) appropriately drafted? If not, why not?

Yes.

34) Should provision be made as regards payment of costs on account, pending a detailed assessment? If not, why not?

Yes.

35) If so, is Rule 10(5A) appropriately drafted? If not, why not?

Yes.

36) Is it appropriate for there to be a right of set off in relation to costs orders?

Yes. There should be *right* of set off in relation to costs orders. However, as drafted, draft Rule 10(5B) provides only that the Tribunal can “order that the paying person may deduct” costs

from the compensation payable. Not only is the language somewhat odd (ie the Tribunal ordering that a person may do something), the CPA considers that the set off should be a right and should apply generally and without the need for an order from the Tribunal (which would only add to the costs and duration of proceedings). The words "The Tribunal may" and the words "order that" should be omitted from the draft Rule 10(5B) in order to achieve this.

37) If such a power is appropriate, is Rule 10(5B) appropriately drafted?

No, Rule 10(5B) is not appropriately drafted, for the reasons given in response to Question 36.

The CPA also considers that it would be approach for interest on costs to be awarded, as suggested in paragraph 71(iii) of the consultation (Question 41).

If you have any questions arising out of this consultation response please do not hesitate to get in touch.

Yours sincerely

Richard Honey
Chairman

richard.honey@ftb.eu.com