

Tribunal Procedure Committee

Consultation on Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 in relation to the costs of “CAAD appeals”

Introduction

1. The Tribunal Procedure Committee (“TPC”) is the body that makes rules to govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. It is an independent Non-Departmental Public Body, sponsored by the Ministry of Justice. Information on the TPC can be found at:
www.gov.uk/government/organisations/tribunal-procedure-committee
2. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.
3. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
 - (a) in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done;
 - (b) the Tribunal system is accessible and fair;
 - (c) proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently;
 - (d) the rules are both simple and simply expressed; and
 - (e) the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the Tribunal are handled quickly and efficiently.
4. In pursuing these aims the TPC seeks, among other things, to:
 - (a) make the rules as simple and streamlined as possible;
 - (b) avoid unnecessarily technical language;
 - (c) enable Tribunals to continue to operate tried and tested procedures which have been shown to work well; and
 - (d) adopt common rules across Tribunals wherever possible.
5. The TPC also has due regard to the public sector equality duty contained in section 149 of the Equality Act 2010 when making rules.

Leech Homes

6. The TPC has been asked to consider amendments to the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (“the UTLC Rules”), following the decision of the Court of Appeal in *Leech Homes Ltd v Northumberland CC* [2021] EWCA Civ 198;

[2021] 4 W.L.R. 102 (“*Leech Homes*”). In that case, the Court of Appeal concluded at [60] with the following words:

“It is a matter for the Tribunal Procedure Rules Committee to consider whether any change in the Procedure Rules is desirable”.

This consultation deals with such a change.

The Upper Tribunal (Lands Chamber)

7. The TCEA provides for the First-tier Tribunal and the Upper Tribunal, both of which are independent Tribunals. The Upper Tribunal comprises four chambers structured around subject areas:
 - (a) The Lands Chamber (“the UTLC”);
 - (b) The Administrative Appeals Chamber;
 - (c) The Tax and Chancery Chamber; and
 - (d) The Immigration and Asylum Chamber.

8. The principal work of the UTLC is to deal with appeals from the following first-instance tribunals:
 - (a) The First-tier Tribunal (Property Chamber) in England;
 - (b) The Residential Property Tribunal in Wales;
 - (c) The Leasehold Valuation Tribunal in Wales;
 - (d) The Valuation Tribunal in England; and
 - (e) The Valuation Tribunal in Wales.

9. Applications may also be made to the UTLC in relation to disputes about:
 - (a) Compensation for the compulsory purchase of land;
 - (b) Discharge or modification of land affected by restrictive covenants;
 - (c) Compensation for the effect on land affected by public works;
 - (d) Tree preservation orders;
 - (e) Compensation for damage to land damaged by subsidence from mining;
 - (f) The valuation of land or buildings for Capital Gains Tax or Inheritance Tax purposes
 - (g) ‘Right to Light’ disputes; and
 - (h) Compensation for blighted land

10. Further information about the UTLC can be found at:

<https://www.gov.uk/appeal-upper-tribunal-lands>

The UTLC Rules

11. The procedural rules made under section 22(4) of the TCEA applicable to the UTLC are the UTLC Rules. The current version can be found at:

<https://www.legislation.gov.uk/ukxi/2010/2600/contents/made>

“CAAD Appeals”

12. The issue arises in the context of so-called “CAAD appeals” under the Land Compensation Act 1961 (“LCA 1961”). In essence, LCA 1961 provides that compensation is payable after the compulsory acquisition of land under rules contained in s.5 LCA 1961. By rule 2 [sic], the value of the land acquired is “taken to be the amount which the land if sold in the open market might be expected to realise”. That proposition is supplemented by s.14 LCA 1961, which prescribes various assumptions, including the prospect of “appropriate alternative development” on the relevant land: see ss.14(3) and (4) LCA 1961.
13. Consent for appropriate alternative development is entirely hypothetical. For the purposes of deciding compensation, a person with an interest in the land (or indeed the acquiring authority) may therefore apply to a local planning authority for a “Certificate of Appropriate Alternative Development” under s.17 LCA 1961. There is a right of appeal against a positive or negative certificate. Appeals were originally to the Secretary of State under s.18(1) LCA 1961, but since 2012 appeals have been to the UTLC. This is known as a “CAAD appeal”.
14. The UTLC’s general power to award costs is contained in s.29 TCEA.¹ However, under s.29(3), the power to award costs is “subject to tribunal procedure rules”. The TPC has made rules under s.29(3), which appear in Rule 10 of the UTLC Rules. For present purposes, the material provision is Rule 10(6), which permits the UTLC to make an order for costs “in proceedings ... (a) for compensation for compulsory purchase”. Rule 10(6)(a) first appeared in the UTLC rules when they were originally enacted 2010. One of the points made by the Court of Appeal in *Leech Homes* at [56] was that when the route for CAAD appeals was changed in 2012, “rule 10(6)(a) [was not] amended to widen its previous scope”
15. LCA 1961 itself also includes an (albeit indirect) route to recover the costs of one of the parties in CAAD appeals. Under s.17(10) LCA 1961, “in assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person’s favour).”²
16. As already explained, prior to 2012, CAAD appeals were determined by the Secretary of State. Although the Secretary of State had power to award costs, in practice this power was rarely exercised because, as a matter of policy, costs were only awarded where there

¹ It has been suggested this was intended to reflect the decision in *LCC v Tobin* [1959] 1 All ER 649, in which the Court of Appeal decided that a landowner was entitled to recover as an element of compensation additional to the value of the land taken an amount reflecting professional fees reasonably incurred in connection with making a claim.

² This route to recovery is available only to the party entitled to receive compensation and does not enable the paying party (usually a public authority) to recover its costs of a CAAD appeal.

had been unreasonable conduct. But since 2012, on occasions where the UTLC has considered a CAAD appeal, it has apparently been prepared to make an order for costs in favour of the local planning authority.³

17. A separate costs regime applies to references to the UTLC to assess compensation itself where a more generous offer was made by the acquiring authority than the claimant obtained in compensation. Under s.4(1) LCA 1961, there is a presumption that the acquiring authority shall have its costs:

“... the Upper Tribunal shall, unless for special reasons it thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as they were incurred after the offer was made or, as the case may be, after the time when in the opinion of the Upper Tribunal the notice should have been delivered”.

This provision is reflected in Rule 10(2)(b) of the UTLC Rules.

18. Finally, it should also be mentioned that the question of “appropriate alternative development” is often an issue in the substantive reference to assess compensation, where there has been no application for a CAAD and/or a CAAD appeal. There is no obligation on either the paying or the receiving party to make use of the CAAD procedure and where they do not do so, the prospect of obtaining a valuable planning permission is often one of the issues which has to be decided by the UTLC in the compensation reference. Costs incurred in the reference as a whole, including costs of issues which could have been the subject of a CAAD appeal, are within the scope of the power to award costs in rule 10(6)(a) and subject to the s.4(1) costs regime. Where there has been a CAAD appeal (in practice, because the receiving party’s CAAD appeal costs are a separate head of compensation under s.17(10) LCA 1961), the UTLC often reserves issues of costs orders until the quantification stage of the reference.⁴

Leech Homes v Northumberland CC

19. *Leech Homes* involved land at East Lane Farm, Morpeth, which belonged to a housing developer, and which the County Council sought to acquire for the Morpeth Northern by-pass. The planning authority refused a s.17 certificate, and the landowner appealed to the UTLC. The UTLC determined that the land was to be treated for planning purposes as land to which green belt policies apply and rejected the appeal: UTLC decision [2020] UKUT 0150 (LC), 6 May 2020. The planning authority applied for, and was awarded, its costs: [2020] UKUT 0328 (LC), 26 November 2020. The landowner then appealed both decisions to the Court of Appeal.

³ The UTLC costs decision in *Leech Homes* gives examples of cases where costs have been allowed, such as in *Bonnell and Morgan v Carmarthenshire CC* [2017] UKUT 81 (LC); [2016] RVR 194.

⁴ See, for example, *Pro Investments Ltd v LB Hounslow* [2019] UKUT 0319 (LC).

20. Judgment was given on 19 February 2021. On the substantive issue, the Court dismissed the appeal and affirmed the negative certificate. But it allowed the appeal on costs. Lewison L.J. gave the leading judgment. In relation to costs, he stated:

“55. The genesis of rule 10 of the Procedure Rules is a report on costs published by the Senior President of Tribunals entitled " Costs in Tribunals " in December 2011. The main relevant recommendation in the report was that the UT (Lands Chamber) should depart from its general costs shifting practice towards a practice of not awarding costs against an unsuccessful party if they had behaved reasonably and incurred reasonable costs in exercising their rights. The new rule 10 was intended to implement that recommendation. But the Explanatory Memorandum accompanying the new rules went on to say that there would be occasions and individual cases in which an element of costs shifting would remain. Those cases included "cases relating to compulsory purchase". What was to be encompassed in that phrase was not further discussed.

56. It is to be noted, however, that at the time of the SPT's report appeals in CAAD cases remained assigned to the Secretary of State, whose practice remained that of not awarding costs except in cases of unreasonable behaviour; and section 17 (9A) entitled the expropriated landowner to his reasonable costs. Paragraph 7.14 of the Explanatory Memorandum explained that they were made in response to that report.

57. It must, in my judgment, follow that rule 10 (6) (a) cannot have been intended to capture CAAD appeals, because at the date of the SPT's report, which the new rules were intended to implement, they were not within the jurisdiction of the UT. It was not until 6 April 2012 that jurisdiction in CAAD appeals was conferred on the UT.

58. Even when that change was made, it could not have resulted in completely discretionary costs shifting because section 17 (10) remained in force. Nor was rule 10 (6) (a) amended in order to widen its previous scope. On the contrary, in the meantime section 4 of the 1961 Act had been amended as I have explained to narrow its scope.

59. It would, in my judgment, have been surprising if the mere fact that the route of appeal against a CAAD had been changed was intended to effect a silent but radical change in the long-established practice of awarding costs in CAAD appeals. If that had been intended the Explanatory Memorandum would surely have said so. Rule 10(6)(a) is well capable of being interpreted as being limited to disputes referred to the UT under section 1 of the 1961 Act all the more so because of the narrowing of the scope of section 4 which would give either party costs protection in such circumstances. In my judgment, it should be so interpreted.

60. For these reasons, I conclude that the power of the UT to make a costs order (absent unreasonable behaviour) was not enlarged when CAAD appeals were transferred to it; and that in consequence the UT did not have the power to make

the costs order that it did. It is a matter for the Tribunal Procedure Rules Committee to consider whether any change in the Procedure Rules is desirable.”

21. The *Leech Homes* judgment was raised at the first meeting of the UTLC User’s Group in early 2021. The Deputy President of the UTLC passed on correspondence with the Planning and Environmental Bar Association (“PEBA”), which has taken a lead on the issues raised in this consultation. In essence, PEBA considers rule 10(6) of the UTLC Rules ought to be amended to allow the UTLC power to award costs in CAAD appeals.

The proposed rule amendment

22. It is proposed that a simple amendment to Rule 10(6) of the UTLC Rules should be made which includes s.18 CAAD appeals in the list of proceedings in which the UTLC has power to award costs. The amended rule would read (by way of indicative drafting, and with the amendment in bold) as follows:

Orders for costs

10. —(1) The Tribunal may make an order for costs on an application or on its own initiative.
- (2) Any order under paragraph (1)—
- (a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);
 - (b) must, in a case to which section 4 of the 1961 Act⁵ applies, be in accordance with the provisions of that section.
- ...
- (5) The Tribunal may make an order for costs in judicial review proceedings.
- (6) The Tribunal may make an order for costs in proceedings—
- (a) for compensation for compulsory purchase;
 - (aa) on an appeal under section 18 of the 1961 Act;**
 - (b) for injurious affection of land;
 - (c) under section 84 of the Law of Property Act 1925(a) (discharge or modification of restrictive covenants affecting land);
 - (d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales;
 - (e) under Schedule 3A to the Communications Act 2003;
 - (f) under the Riot Compensation Act 2016; and
 - (g) on any appeal from the First-tier Tribunal relating to—
 - (i) a reference by the Chief Land Registrar, or
 - (ii) any other application, matter or appeal under the Land Registration Act 2002.

⁵ Rule 1(3) provides that “the 1961 Act” means the Land Compensation Act 1961.

Considerations

23. There were four CAAD Appeals determined in 2020 and three in 2019. Although numbers are small, significant sums may turn on the result of an appeal, since compensation can be substantial. The appellant in a CAAD appeal may have a considerable financial interest in pursuing an appeal, as will the respondent planning authority (since it is usually also the acquiring authority which pays the compensation).
24. Rule 10(6) has been amended on several occasions since 2010 to extend the power to award costs to additional categories, as the UTLC has acquired new jurisdictions in telecommunications, riot damage compensation and land registration. The TPC has also recently undertaken a similar exercise in relation to the costs provisions of Rule 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, where it added certain proceedings under the Electronic Communications Code to the list of cases where the First-tier Tribunal (Property Chamber) could properly make a costs award.
25. The main arguments in favour of a change are that:
 - (a) Unless an express costs making power is introduced, there will be no way for a successful acquiring authority to recover its costs of a CAAD appeal. This is despite the fact that the acquiring authority might have been the applicant for the certificate and/or might have been wholly successful in the appeal proceedings before the Tribunal.
 - (b) It is inconsistent to award costs on different bases under ss.4 and 18 LCA 1961, when the same issue of appropriate alternative development may be involved.
 - (c) It is unhelpful to assess costs on different bases if the usual practice of reserving CAAD appeal costs until the end of a reference is continued.
26. To these arguments could be added the consideration that an amendment would enable the UTLC to continue to make costs shifting awards which it was apt to make until *Leech Homes*. But the significance is perhaps lessened by the acceptance that the Secretary of State did not usually make costs awards in CAAD appeals before 2012.
27. It is also clear from the judgments in *Leech Homes* that the Court of Appeal considers it is entirely appropriate for the TPC to review the effect of Rule 10(6) and for it to consider whether any change in the UTLC Rules is desirable.
28. The TPC is not aware of any opposing positions to PEBA's proposals. Nevertheless, there are two arguments which present themselves against granting express costs shifting powers:
 - (a) This is a further erosion of the general principle that tribunals (or at the very least property tribunals) should not normally have costs shifting powers. Rule 10(6) is an exception to this principle.
 - (b) Access to justice considerations. However, it is suggested that in practice landowners in CAAD appeals generally have access to substantial funds – and in almost every case own a valuable piece of land.

29. It is understood that senior judges of the UTLC who have been consulted by the TPC would welcome the change proposed by PEBA.

Questions

Question 1: Do you agree with the proposed changes to Rule 10(6) of the UTLC Rules relating to CAAD appeals? If not, why not?

Question 2: Do you have any other comments?

How to Respond

Please reply using the response questionnaire template.

Please send your response via email by **8th February 2022** to tpcsecretariat@justice.gsi.gov.uk

Extra copies of this consultation document can be obtained using the above contact details or online at: <http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations>