

Tribunal Rules

Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

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

Reply from the Tribunal Procedure Committee

Introduction

1. The Tribunal Procedure Committee ('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.
2. Under section 22(4) of the TCEA, power to make such 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.
3. 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.
4. The TPC also has due regard to the public sector equality duty contained in section 149 of the Equality Act 2010 when making rules. Further information on the TPC can be found at our website: <https://www.gov.uk/government/organisations/tribunal-procedure-committee>
5. The TCEA provides for the First-tier Tribunal and the Upper Tribunal, both of which are independent tribunals. The Upper Tribunal is divided into four separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills. The chambers are:
 - the Administrative Appeals Chamber ;
 - the Immigration and Asylum Chamber ;
 - the Lands Chamber ('UTLC') ; and
 - the Tax and Chancery Chamber.
6. The principal work of the UTLC is to deal with appeals from the following first-instance tribunals:
 - the First-tier Tribunal (Property Chamber) in England;
 - the Residential Property Tribunal in Wales;
 - the Leasehold Valuation Tribunal in Wales;
 - the Valuation Tribunal in England; and
 - the Valuation Tribunal in Wales.

Applications may also be made to the UTLC in relation to disputes about:

- compensation for the compulsory purchase of land;
- discharge or modification of land affected by restrictive covenants;
- compensation for the effect on land affected by public works;
- tree preservation orders;

- compensation for damage to land damaged by subsidence from mining;
 - the valuation of land or buildings for Capital Gains Tax or Inheritance Tax purposes
 - 'right to light' disputes; and
 - compensation for blighted land.
7. In this instance, it should be noted that the jurisdictions in relation to compulsory purchase include appeals from the grant or refusal of a Certificate of Appropriate Alternative Development under s.18 Land Compensation Act 1961 ('CAAD appeals').
8. The procedural rules made under section 22(4) of the TCEA applicable to the UTLC are the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (the 'UTLC Rules'). The current version can be found at:

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

The Consultation Process

9. A consultation (the 'Consultation') ran over the period 14 December 2021 to 8 February 2022. Its purpose was to seek views on possible changes to Rule 10 of 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*').
10. The background to the issues involved are set out in the Consultation document, a copy of which is available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040641/tpc-rule-10-consultation-document.pdf

11. There were two responses to the Consultation, namely from:
- a. the Planning and Environmental Law Bar Association ("PEBA"); and
 - b. Transport for London, Legal ("TfL").

These are listed in Annex A.

12. The two questions in the Consultation are set out below. The TPC then gives its replies and the conclusions reached in light of the responses.

Question 1: The proposed rule changes

13. The first question was:

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

14. PEBA supported the proposed changes. It considered that there should be a power for the UTLC to award costs in CAAD appeals. Unless such a change is made, there was no way for a successful acquiring authority to recover its costs of a CAAD appeal – even if it was the applicant for the certificate and/or the party who might have been wholly successful in the appeal. The current situation was unfair to public authorities, and the burden otherwise falls on the taxpayer. Costs-shifting powers also discouraged speculative appeals.

15. TfL agreed that the proposed change to Rule 10(6) should be made for the reasons given in paras 25-27 of the Consultation. It stressed the current inconsistency between an award of costs in a separate CAAD appeal and when the issues of planning are ‘wrapped up’ under s17(1) of the Land Compensation Act 1961 (‘LCA 1961’). It also observed that an appellant in a CAAD appeal may have a considerable financial interest in pursuing the appeal. Currently an affected landowner had relative impunity in pursuing an appeal and recovering those costs under s.17(10) if the landowner believed there was a strong likelihood that any element of the appeal might be determined in their favour – even if it was a question which did not go to the key question of valuation.

Question 2: Other comments

16. The second question was:

Do you have any further comments?

17. In para 28 of the Consultation document, the TPC anticipated that possible opposing positions to the rule changes were that:

- the changes would further erode the general principle that tribunals (or at the very least property tribunals) should not normally have costs-shifting powers; and
- they may be contrary to access to justice considerations.

PEBA addressed both these points in answering the second question.

18. PEBA observed in relation to the principle of costs-shifting powers in the UTLC, that there was a well-established power under Rule 10(6)(a) for the Tribunal to award costs in proceedings relating to compensation for compulsory purchase. An express costs-shifting power in CAAD appeals was entirely consistent with the approach taken by the UTLC over many years in compulsory purchase compensation cases (of which CAAD appeals were a part). There was also overlap with Rule 10(6)(a) costs – which could involve the same issues as CAAD appeals. In relation to access to justice considerations, individuals could decide not to participate in a CAAD appeal or:

- ask for the appeal to be determined by the UTLC under a procedure where there is not normally an award of costs, such as under the written representations or simplified procedures¹; and/or
- seek a costs protection order under paras 24.2- 24.4 of the Practice Direction: Upper Tribunal (Lands Chamber) 2020 (‘the UTLC Practice Direction’).

Moreover, PEBA agreed with the suggestion in the Consultation document that many private sector parties to CAAD appeals had interests in land with substantial development potential.

19. TfL’s further comments focussed on the relationship between the draft new Rule 10(6)(aa) and LCA 1961 s.17(10). As it stood, s.17(10) might still provide a landowner with a route to claim (as part of their compensation) part of its costs of a CAAD appeal – even if it was largely unsuccessful in the CAAD appeal. TfL gave examples of how this might operate unfairly, and indeed how it might theoretically mean that a landowner would recover costs by the s.17(10) route which it had been ordered to pay under draft new Rule 10(6)(aa). TfL suggested an amendment to LCA 1961 s.17(1) so the provision would read:

¹ See para 24.6 of the Practice Direction: Upper Tribunal (Lands Chamber) 2020).

“(10) 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, except where the tribunal makes an order that such expenses of an appeal under section 18 or a proportion of such expenses shall not be included in the compensation)”.

The TPC's Reply

20. Both respondents broadly supported the proposed rule change. The TPC concludes that the introduction of costs-shifting powers in CAAD appeals is consistent with the general position which applies to compulsory purchase in the UTLC, and in particular, the UTLC's express power to consider the costs of CAAD appeals in LCA 1961 s.17(10). It also notes that there was no suggestion by the Court of Appeal in *Leech Homes* that there is any policy reason behind (the absence of) costs-shifting powers in CAAD appeals.
21. There was only a limited response to the Consultation, which deals with only a small number of cases in the UTLC. The TPC is also conscious that one of the respondents was the body that originally advocated changes to the costs rules in the UTLC. Nevertheless, it is grateful for PEBA's observations, in particular its observations about the two possible counter arguments set out above.
22. The different traditions of tribunals and the courts in relation to costs was summarised by Jackson L.J. in the landmark *Review of Civil Litigation Costs: Final Report* (“the Jackson Report”) (December 2009) at Ch.34 [3.4]:

“The culture of the courts is that costs shifting promotes access to justice; therefore costs shifting is the norm or the default rule in most forms of litigation. The culture of tribunals is that costs shifting inhibits access to justice; therefore no costs shifting is the norm or the default rule in most tribunal proceedings.”²

Ultimately, the TPC is satisfied that the appellate jurisdiction of the UTLC in relation to CAAD appeals fits within a culture and framework of compulsory purchase, where costs-shifting is the procedural norm in the UTLC. Indeed, there is evidence that costs-shifting was the usual practice of the UTLC in many CAAD appeals before the *Leech Homes* appeal. As far as access to justice is concerned, PEBA rightly emphasises that the UTLC has developed a suite of costs control powers as a response to such considerations. Those powers are material to the TPC's obligations when making Rules.

23. In short, the TPC intends to proceed with the proposed amendments to Rule 10(6) of the UTLC Rules.
24. The TPC has considered the possible issues raised by TfL regarding the relationship between LCA 1961 s.17(10) and the proposed amended Rule 10(6). As regards the suggested amendment to s.17(10), that is beyond the powers of the TPC. However, the TPC notes that when determining compensation, section 17(10) requires the tribunal to take into account expenses “reasonably incurred” by the landowner in relation to issues it has succeeded on in

² See also Ch.46, at [3.5] to [3.6] of the *Review of Civil Litigation Costs: Preliminary Report* (May 2009).

a CAAD appeal. In making its s.17(10) assessment as to whether costs were “reasonably incurred”, the tribunal would no doubt be conscious of any order already made by the UTLC in relation to the costs of the CAAD appeal under Rule 10(6). That consideration should avoid any realistic prospect of the suggested circularity arising in practice.

Conclusion

25. Overall, the TPC is satisfied that it is appropriate to make the rules change outlined in the Consultation. Some minor drafting changes may of course be made in the light of any advice received.
26. The TPC intends to make rules and submit them to the Lord Chancellor with the intention that, if they are allowed, they can be contained in a statutory instrument made in Spring 2022.
27. The TPC is grateful to all those who contributed to the consultation process. The TPC values the contributions from stakeholders to the rules-making progress.
28. The TPC’s remit includes keeping rules under review. Please send any suggestions for further amendments to the UTLC Rules (or indeed any other of the rules within its jurisdiction) to:

TPC Secretariat

Email: tpcsecretariat@justice.gsi.gov.uk

Annex A – List of respondents to Consultation

1. Planning and Environmental Law Bar Association.
2. Transport for London, Legal.