

Compulsory Purchase Association

Tony Johnson Memorial Lecture

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Costs in compensation cases

George Bartlett QC, President of the Lands Chamber of the Upper Tribunal

The time has come for fresh consideration to be given to the basis on which awards of costs are made in compensation cases in the Lands Chamber of the Upper Tribunal. Under the chairmanship of Mr Justice Warren, President of the Tax and Chancery Chamber of the UT, a small group, of which I am part, is carrying out, at the request of the Senior President of Tribunals, a review of the costs regimes applicable in Tribunals in England and Wales. In December 2009 Lord Justice Jackson produced his mammoth report on costs in the courts: “Review of Civil Litigation Costs: Final Report”. The review of costs in tribunals will be a very much simpler affair, but it will necessarily have regard to any decision that may be made to implement any of the Jackson recommendations.

Costs regimes in tribunals have always differed from those in the courts. The vast majority of cases in tribunals are determined under no-costs regimes. This is a reflection of the fact that the vast majority of cases in tribunals are appeals by individuals against administrative decisions, in which only a small amount is at stake and the appellant is normally unrepresented. Any costs incurred by the claimant are thus likely to be minimal, so that an award in his favour would not be significant, while an award of costs against him would be likely to be disproportionate. Claims for social security benefits are a typical example of such cases, and they account for a large proportion of the tribunal workload.

But the great range of matters dealt with in tribunals means that a single costs regime will always be inappropriate. Necessarily different approaches will be appropriate in different jurisdictions. Disputes in the Lands Chamber are in their nature more comparable with ordinary civil litigation than with the general run of tribunal cases, and procedures for “costs shifting” (the Jackson term) exist and are likely to continue in some form or other. Under the Lands Tribunal Act 1949¹ the Lands Tribunal had a general power to award costs, and under the Lands Tribunal Rules 1996² such costs were in the discretion of the Tribunal. Now the Tribunals Courts and Enforcement Act 2007 provides that the costs of and incidental to proceedings in the Upper Tribunal shall be in the discretion of the Tribunal.³ The draft Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, which are expected to be made and to come into force next month, provide⁴ that the Tribunal may make an order for costs on an application or on its own initiative.

It should be noted that there is now power, under section 29(4) of the 2007 Act, to make a wasted costs order against the legal or other representative of a party to proceedings in the

¹ Section 3(5)

² Rule 52(1)

³ Section 29(1)

⁴ Rule 10(1)

Tribunal. Wasted costs⁵ are costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of such representative or which, in the light of any act or omission occurring after they were incurred, the Tribunal considers it is unreasonable to expect that party to pay. The wasted costs order may either disallow the whole or part of such costs or (as the case may be) order the representative to meet them.

The power to award costs and the discretion of the Tribunal are qualified by section 4 of the Land Compensation Act 1961 and in cases decided under the simplified procedure.⁶ I will have more to say about these provisions in due course. There is also a limitation that applies to the award of costs in appeals from leasehold valuation tribunals. These are the only statutory limitations, and apart from them the Tribunal's discretion on costs is exercised in accordance with the current non-statutory Interim Practice Directions. These will be replaced by statutory Lands Chamber Practice Directions, which are now out to consultation and which will come into force at the same time as the Lands Chamber Rules. They maintain the existing costs regimes for the particular jurisdictions that the Lands Chamber exercises.

Leaving aside for the moment compensation for the compulsory acquisition of land, the general rule in Lands Chamber cases is that costs follow the event. Thus in compensation cases where no land has been acquired – for example claims under Part 1 of the Land Compensation Act 1973 for injurious affection caused by new roads and airport extensions, in respect of mining subsidence under the Coal Mining Subsidence Act 1993 and for depreciation caused by pipe-laying under the Water Industry Act 1991 – the claimant will get his costs unless the compensating authority has offered more than the award; and he will have to pay the compensating authority's costs if the claim fails completely or if the award is less than an amount offered. In other references, such as blight notice and purchase notice references under the Town and Country Planning Act 1990 and references by consent (in which the Lands Chamber acts as arbitrator), costs normally follow the event.

In applications for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act 1925, which are in the nature of proceedings for the compulsory removal or reduction of private rights, a successful objector will normally get his costs, but an unsuccessful objector will not normally have to pay the applicant's costs unless he has behaved unreasonably. Where, at a preliminary stage, the applicant opposes the admission of an objector on the basis that he does not have the benefit of the covenant and this issue is decided as a preliminary issue, costs will normally follow the event.⁷

In rating appeals (from the Valuation Tribunal in England or valuation tribunals in Wales) costs normally follow the event, although an award of costs may reflect the degree of success. In appeals from leasehold valuation tribunals (in leasehold enfranchisement valuation matters and applications relating to service charges and certain other landlord and tenant disputes) no

⁵ As defined in section 29(5).

⁶ Lands Tribunal Rules 1996, rule 28(11)

⁷ See *Winter v Traditional and Contemporary Contracts Ltd* [2006] EWCA Civ 1740, per Carnwath LJ at para 24.

costs may be awarded unless a party has acted unreasonably, and then only up to a maximum of £500.⁸

Where proceedings are conducted under the simplified procedure the Lands Tribunal Rules at present provide that no costs are to be awarded except where section 4 of the 1961 Act applies or where the Tribunal considers it appropriate to have regard to an offer that has been made or where it regards the circumstances as exceptional; and if, exceptionally, an award of cost is made the amount must not exceed that which would have been allowed if the proceedings were in the county court.⁹ The simplified procedure will cease to be a creature of the Rules under the Lands Chamber Rules, but it will be preserved under the Lands Chamber Practice Directions, though in a less prescriptive form; and in relation to costs the Practice Directions will say that, except in compensation cases, cost will only be awarded in exceptional circumstances. Experience shows that the main reason for a request that the simplified procedure should be followed is to take advantage of the basic no-costs regime that applies.

It is with costs in compensation claims following compulsory acquisition that I am concerned this evening. Since the Acquisition of Land (Assessment of Compensation) Act 1919 the exercise of the Tribunal's discretion to award costs¹⁰ has been constrained by express statutory provisions. What was section 5 of the 1919 Act is now section 4 of the 1961 Act. Before 1919, under sections 34 and 51 of the Lands Clauses Compensation Act 1845, the costs of an arbitration or assessment by a jury were borne by the promoters unless the award was no greater than such sum as the promoters had offered, in which case each party bore its own costs.

The 1919 Act was the outcome of a report by Sir Leslie Scott KC and it embodied the principle stated by him (as Scott LJ) in *Horn v Sunderland Corporation* [1941] 2 KB 26 at 49:

“The statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does, it will put an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss.”

The Act marked the end of the era of compulsory purchase compensation in which the most important influence on the development of the law and valuation practice had been the railways. A landowner whose land was acquired compulsorily so that it could earn profits for a railway company tended to be the subject of generous treatment. It became a rule of practice to add 10% to the assessed value of the land. A claimant could opt to have his compensation assessed by a jury rather than by an arbitrator, and juries were notoriously generous. The costs regime that applied under the Lands Clauses Act reflected this general

⁸ Rule 52A of the Lands Tribunal Rules, applying the (now repealed) provisions of section 175(6) and (7) of the Commonhold and Leasehold Reform Act 2002.

⁹ Lands Tribunal Rules 1996, rule 28(11).

¹⁰ From 1919 until the Lands Tribunal Act 1949 the Tribunal comprised the Official Arbitrators.

approach. The Scott report and the 1919 Act started the new era in which the emphasis was on compulsory acquisition for public purposes and the overriding rights of the community.¹¹

The principle of equivalence required that the landowner should be paid neither more nor less than his loss; and the reason why he ought not to be paid more than his loss was that this would, as Scott LJ put it, “place an unfair burden on the public authority or other promoters who on public grounds have been given the power of compulsory acquisition.” Thus the 1919 Act abolished the 10% addition (rule (1) in section 2), and it also established a new costs regime embodying the prescriptive provisions that survive into the present law. The Official Arbitrators, who were established by the Act to determine disputed compensation claims in place of juries (and magistrates and arbitrators), were given the power to award costs, but their discretion was circumscribed by the terms of section 5.

On the face of it, apart from the consequence of a claimant failing to deliver a particularised claim, section 4 makes directly comparable provision for claimant and acquiring authority alike in terms of the effect of offers. Either party is able to protect itself by making an offer. If the compensation awarded does not exceed the acquiring authority’s offer, the claimant must bear its own costs and pay the costs of the acquiring authority. If the compensation awarded is equal to or more than the claimant’s offer, the acquiring authority must bear its own costs and pay the costs of the claimant. Given these particular provisions that enable a party to protect itself in costs by making an offer, it is not immediately apparent why, under the scheme of the provisions, a party that has not made an offer should receive an award of costs in its favour. It became the practice of the Lands Tribunal, however, where the acquiring authority had made a sealed offer, to award the claimant his costs up to the date of the offer even though he had not himself made an offer, and to award costs after the date of the offer either to the claimant or to the acquiring authority, depending on whether the sum determined as compensation was more or less than the offer. A successful claimant could, however, be deprived of some or all of his costs if there was a special reason for doing so.

The rationale for this approach is expressed in the judgment of Lord President Hope in *Emslie & Simpson Ltd v Aberdeen District Council* [1995] RVR 159 at 164:

“The expenses of determining the amount of disputed compensation may be seen to be part of the reasonable and necessary expense which is attributable to the taking of the lands compulsorily by the acquiring authority. The principle which applies to litigation as applied by Lord President Robertson in *Shepherd v Elliott* and quoted by *Maclaren on Expenses* at p 21 is that the cost of litigation should fall on him who caused it. The cost of determining the amount of the disputed compensation would seem, according to this principle, to fall on the acquiring authority without whose resort to the use of compulsory powers there would have been no need for the owner or occupier to be compensated. That seems to me to be the proper starting point for an examination of the question of expenses in these cases.”

¹¹ See on this Law Commission Consultation Paper No 165 “Towards a Compulsory Purchase Code: (1) Compensation” (July 2002) paras 2.3 to 2.5.

The appropriateness of the Lands Tribunal adopting this approach, which, as I say, is not obviously to be derived from the apparent scheme of section 4, is established by two decisions of the Court of Appeal. In *English Property Corporation v Kingston upon Thames RBC* [1999] RVR 316 a decision of the Lands Tribunal on costs was upheld in terms that Potter LJ in *Purfleet Farms Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] RVR 368¹² described as a tacit endorsement of the observations of Lord President Hope (and those of Lord Morison to the same effect) in *Emslie & Simpson*. It is, equally clear from the judgments in *Purfleet Farms*¹³ that the general rule adopted by the Tribunal and the reasons for doing so as set out in *Emslie & Simpson* were considered by them to be correct.

Under section 4 there are three sets of circumstances in each of which it is mandatory for the Lands Tribunal to make a particular order for costs unless for special reasons it thinks it proper not to do so. They are:

- (a) Where the acquiring authority have made an unconditional offer which is not exceeded by the amount of the award: here the claimant bears his own costs and pays the authority's costs after the date of the offer (subsection (1)(a)).
- (b) Where the claimant has failed to deliver a particularised claim to the acquiring authority, in time to enable them to make a proper offer: here the claimant bears his own costs and pays the authority's costs after the time when the claim should have been delivered (subsection (1)(b)).
- (c) Where the claimant has made a particularised claim and has also made an unconditional offer to accept a sum as compensation and the award is equal to or exceeds that sum: here the acquiring authority bear their own costs and pay the claimant's costs after the date of the offer (subsection (3)).

The section, however makes no provision for costs in the following four sets of circumstances:

- (d) Where the acquiring authority have made an unconditional offer which is exceeded by the award, but the claimant has made a claim but no offer.
- (e) Where the claimant has made a claim and has also made an offer which is for more than the sum awarded, but the acquiring authority have made no offer.
- (f) Where the claimant has made a claim but has not made an offer, and the acquiring authority also has not made an offer.
- (g) The period up to the time when the claim should have been delivered.

¹² At 373 para28.

¹³ See Potter LJ at paras 21 to 35 and Chadwick LJ at paras 42 to 43

In these latter four sets of circumstances costs are in the discretion of the Tribunal in the exercise of its general power to award costs under section 3(5) of the Lands Tribunal Act 1949.

This was the analysis produced by the Tribunal in *Colneway Ltd v Environment Agency* [2004] RVR 37. The effect of applying the approach that was endorsed in *Purfleet Farms* was that in the claimant would in general get all his costs, in (c), (d), (e), (f) and (g). Only in (a) and (b) would he have to pay the authority's costs. In all cases, however, the Tribunal would be able to depart from the general rule if there were special reasons for doing so.

Of the three elements in section 4 (see above) that contained in subsection (3), which provides for an unconditional offer on the part of the claimant, has, it seems to me, been rendered academic by the judicial rule that a claimant should normally have his costs unless the award is less than the acquiring authority's offer. Thus protected, there is no need for a claimant to make an unconditional offer to accept a particular sum.

This is the costs regime that now applies to claims for compensation for the compulsory purchase of land. What are the alternatives that ought to be considered in the review that is now taking place? In my view there are three, although I identify the first only to dismiss it. In any such costs regime there would need to be provision for unreasonable conduct, so that, to the extent that a party behaves unreasonably, in relation to such unreasonable conduct it loses any entitlement to costs and pays the other party's costs. Subject to this qualification the potential regimes that deserve consideration as alternatives to the present one are in my view these:

- (a) The acquiring authority pays the claimant's costs in all cases.
- (b) The acquiring authority pays the claimant's costs unless the compensation awarded is less than such offer as the acquiring authority may have made, in which case each party bears its own costs.
- (c) A no-costs regime. Each party bears its own costs.

In determining what the costs regime should be there are, it seems to me, three underlying objectives that should be met so far as it is possible to do so. They are not necessarily the only considerations, but they seem to me to be the ones that should dictate the choice between the alternatives that I have identified.

The first objective is that a claimant whose land has been compulsorily acquired should not be out of pocket unless he has behaved unreasonably. This is the objective that underlies the approach to costs enunciated in *Emslie & Simpson, English Property Corporation* and *Purfleet Farms*.

The second objective is that a claimant should not be deterred from pursuing a reasonable claim because of the threat of an award of costs against him. And it must be borne in mind that it is not simply the threat of an award of costs but the open-endedness of the potential

liability to such an award of costs that can constitute a strong disincentive to the pursuit of a reasonable claim.

The third objective is that, an acquiring authority should not feel constrained to pay an excessive sum as compensation because of the threat of a costs order against them.

In terms of offers made by the acquiring authority the effect on a claimant who refuses an offer that is not exceeded by the award under each of the regimes is this:

- (a) There is no effect, since the claimant gets his costs in any event unless he has behaved unreasonably; and the mere failure to accept an offer would not be unreasonable.
- (b) The claimant incurs costs in pursuing the claim further and has to meet them himself.
- (c) The claimant has to pay his own costs in pursuing the claim further.

Under the present regime the claimant incurs costs in pursuing the claim further and has both to meet these and to pay the acquiring authority's costs from the date of the offer.

How are the alternatives to be evaluated in terms of the objectives I have identified?

Regime (a) (the claimant always gets his costs) would undoubtedly achieve the first and second objectives (that the claimant should not be out of pocket and should not be deterred from pursuing a reasonable claim). But it would fail to meet the third objective (that the acquiring authority should not feel constrained to pay an excessive amount), and because of the concern that there would undoubtedly be that it could for this reason lead to settlements at higher amounts than under the present regime it does not seem to be a practicable option.

Regime (b) is the regime that existed up to 1919. It is what in Jackson terminology is a one-way costs shifting regime, since it is only the acquiring authority that is at risk of a costs order against them. It shares the advantages of regime (a) in relation to the first two objectives. It may, however, conflict with the third objective, but it would only be in greater conflict with the third objective than the present regime to the extent that, under the present regime, the prospect of an award of costs in their favour encourages an acquiring authority to resist a claim that they regard as excessive. This second alternative has the particular attraction as compared with a no-costs regime ((c) above) that it gives a claimant a greater incentive to accept a reasonable offer, but as compared with the existing regime, under which the claimant would stand not only to lose his own costs but to pay the acquiring authority's costs, the incentive would clearly be less. My own feeling is that this regime would probably be too favourable to the claimant in a complex or high value claim, but that for smaller claims, where the weight of financial resources is in the acquiring authority's favour, it would work fairly and without significantly increasing the total costs of a CPO.

Regime (c) (no-costs) would meet the second and third objectives, but it would fail to meet the first. For this reason seems inappropriate as the standard regime to be applied in all cases. But with the second objective in mind, there is clearly an argument for enabling a claimant to

opt for a qualified no-costs regime as an alternative to the existing regime. It is, as I have said, the open-endedness of the potential liability that may deter a claimant from pursuing a reasonable claim. If, on the other hand, a claimant knows that no such award of costs will be made against him unless he behaves unreasonably, and he is able to establish what fees he will have to pay to those he instructs to act for him, he is able to make a well-informed judgement on whether to proceed with the reference or to accept any offer that has been made. If he is prepared to forego the entitlement to costs conferred by the general rule in order to achieve the certainty of a no-costs regime, there is a strong argument that he ought to be able to do so.

It seems to me, therefore, that the realistic choices are these:

- (i) The existing regime would apply to larger claims, and regime (b) would apply to smaller claims.
- (ii) The existing regime would apply generally, but a claimant with a small claim would be able to opt for a no-costs regime.

It would, of course, be necessary to define what would constitute a small or a smaller claim for these purposes, and I would have in mind that both the amount in dispute and the complexity of the issues would be relevant for this purpose. And, of course, the general presumptions under each regime as to where costs should fall would always be qualified by the proviso about unreasonable conduct.

The adopted regime should, I think, be set out in a Practice Direction or in a combination of the Rules and Practice Directions. The case for repealing section 4 is, in my view strong – not simply to remove the redundant subsection (3) and to make such changes as may be considered appropriate – but also because prescription by Act of Parliament for this sort of thing is inappropriate. Provisions as to costs are properly the subject of Rules and Practice Directions.

In due course I expect that a consultation paper will be issued, and the views of the Compulsory Purchase Association will be extremely important. Indeed you may like to apply your minds to this in advance and put forward suggestions both in relation to the alternatives that I have suggested and any others that you might consider to be preferable. The working of the costs regime is a crucial element in the achievement of fair compensation, both through decided cases and in settlements, and you, the clients and practitioners, are best placed to express views upon it.