

Advance Payments of Compensation – Section 52, Land Compensation Act 1973

Proposed Changes to Practice and Appropriate Guidelines

The Problem

Since the above section was enacted, a regular complaint of practitioners acting on behalf of claimants with regard to the making of advance payments of compensation by Acquiring Authorities (AA's) is that either payment is not made at all or only made considerably later than provided for within the legislation. Furthermore in cases where payment is made, the amount paid is substantially less than justified having regard to the loss claimed and evidenced.

On the other hand, AA's respond that requests for advance payment are not adequately supported by the information necessary to enable the AA to make a proper assessment.

A recent survey of the CPA membership revealed examples at the extremes:-

- (1) (From the claimant's perspective) a case where a reference has been made to the Lands Tribunal and a seven figure, ie in excess of £1m, 'sealed offer' made by the AA but no advance payment of compensation has yet been made by that AA.
- (2) (From the AA's perspective) a claim letter in which it was broadly stated 'in our opinion the compensation properly payable is the sum of £Xm, and on behalf of our client we formally request an advance payment of compensation' with no other information whatsoever being provided.

Within the above two extremes, other examples were provided ranging across the entire spectrum.

It would seem that part of the cause of the problem that leads to these extremes of practice is that the legislation states (Sec 52(1)) that the AA shall make an advance payment if requested once a request for such is made in writing, the claimant's interest in the land identified and the request supplemented by such other particulars as the AA may reasonably require (Sec 52(2)). In many cases claimants and their agents tend to take the statement in Sec 52(1) at face value, providing little other information to the AA. But if some rational thought is applied, where else could a person expect to be given often tens of thousand if not millions of pounds sterling just for asking for it.

Statutory Basis

Section 52, Land Compensation Act 1973 provides that where an AA has taken possession of any land or created rights over that land, the AA shall if requested by a person entitled to the compensation, make an advance payment on account of the compensation payable by it in respect of a compulsory acquisition.

The procedure can be stated quite simply as follows:-

- 1) The claimant must make his request in writing, and give particulars of his interest in the land.
- 2) The advance payment shall be either 90% of the AA's estimate of compensation or 90% of any agreed figure for compensation.
- 3) The advance payment must be made within 3 months of the written request or, if this 3 month period has expired before the date of possession, on the date of possession.
- 4) The detail of the advance payment is registered as a Local Land Charge.
- 5) If the AA's estimate is less than the proper compensation, then following agreement on either the whole or part of the compensation, the AA shall pay the balance following a further request.
- 6) If following the final agreement the advance payment is found to be in excess of the proper amount of compensation due to the claimant, then the excess of the advance payment has to be repaid.

Section 52A makes provision for the payment of interest on advance payments but does not require interest to be paid on any repayment of any excess advance payment.

The Planning and Compulsory Purchase Act 2004 makes detail provisions where the land is subject to a mortgage. Whilst these provisions are not directly relevant to or considered in this paper, where properties to be acquired by CPO are subject to mortgage, delay in the making of an advance payment can create considerable financial difficulties for claimants.

As noted previously, the significant deficiency of the Section 52 is that with the exception of stating that the request must be in writing and give particulars of the claimant's interest in land, the section contains no other provisions identifying the other information that the AA might be expected to reasonably require and consequently which information the claimant should provide.

The Criteria for Change

The purpose of the advance payment regime is to put the claimant in a financial position, so far as is possible and as early as is possible, so that it can re-order its affairs and go about its life with the minimum of disruption. In the majority of cases the claimant will find it necessary to either move to another dwelling in the case of premises occupied as a residence or move to other business premises and so avoid business closure in the case of a business. In either case, as a move must necessarily take place at the time of dispossession it follows that the majority of claimants are forced to fund their relocation as best they can in advance of any compensation monies being paid and indeed in advance of receiving any advance payment which therefore increases the need for a properly enforceable advance payment regime.

Any proposal for change should therefore meet the following criteria:-

- 1) There must be an enforceable obligation upon an AA to make an advance payment, provided that the claimant has provided reasonable information to enable a proper level of payment to be assessed.
- 2) The level of payment should be subject to challenge as to reasonableness in all the circumstances of the claim.
- 3) The procedure for enforcement needs to be quick, easy to use and any sums to be paid capable of collection.

The Solution

Having examined the Section 52 procedure critically, a number of faults are apparent.

No guidance as to the information required to support the claim for an advance payment

It is proposed that the notice requesting a Section 52 payment should be in a prescribed form and have a prescribed content as, for example, claim forms under Part 1 of the Land Compensation Act 1973.

The prescribed content of the Section 52 request should balance the needs of the authority for reasonable information with the level of information a claimant can practically be expected to provide in the early stages of a claim.

A potential and beneficial side effect of a prescribed procedure could be that negotiations might be shortened by incentivising claimants to provide a more fully reasoned claim together with supporting evidence much earlier in the process than is often the case at the present time.

No mechanism for a claimant to enforce the AA's obligation to make an advance payment

A major criticism of the present legislation is that it 'lacks teeth'. There is no mechanism whereby a claimant can require an AA to pay an advance payment except by seeking an order for mandamus but this is likely to take several months to progress through the courts.

Section 52 needs to be amended so as to provide a clear methodology by which reference can be made to an independent third party, which third party should have the power to order an AA to make an advance payment on being satisfied that the AA has been provided with the required detail identified by the prescribed claim form.

The present advance payment regime is of little assistance to displaced businesses

An advance payment is only made once possession is taken. Where a business is relocating in advance of possession however, it will often be incurring substantial up-front expenditure which the present regime expects the business to fund itself,

recovering such items of cost which are compensatable under the statutory compensation code once possession has been taken. In circumstances such as those faced by the financial and property world at present, a claimant may find it impossible to borrow adequate funds to implement its relocation.

Section 52 needs to be amended to provide scope for AA's to make advance payments of compensation in advance of possession being taken thereby assisting those relocating to do so with the minimum of stress and financial burden.

The Present Difficulty

Clearly what is needed is legislative reform whereby Section 52 identifies in greater detail what information the claimant should provide and sets out either a detailed procedure of time limits governing various actions by either party or a less dictatorial procedure which nevertheless is able to achieve the same outcome, i.e. a binding decision as to whether the AA has sufficient information to make an advance payment and the ability to order that such payment be made within a certain period of time.

The present difficulty is that the prospect of parliamentary time being available for such amendments (which in the context of the nation are minority amendments) is realistically nil. And if such time was available then the statutory planning assumptions, to give but one example, are of a higher priority.

The Partial Solution

As a first stage, it is thought that if guidelines identifying the information that the claimant should be expected to provide are produced and adopted by government, then in the interim these might be sufficient to assist in advance payments being made within the three month period following request and may secure a more realistic quantum of payment.

The proposal initially therefore is to approach government with a draft guideline with the intention that it be incorporated as an appendix in Circular 06/04. This will not need primary legislation and so it is hoped that it could be achieved relatively quickly.

It is acknowledged that it would not be possible to introduce an enforceable payment regime by this method since this would certainly require primary legislation. However where a claimant sought to enforce payment of an advance payment through the courts, it could assist that process as the claimant would be able to demonstrate that it had produced the necessary information that would be expected to be reasonably required..

The second stage would be amending legislation to address non-payment etc if and when parliamentary time permits.

The suggested supporting information that should accompany the request for an advance payment is identified in Appendix 1.

Conclusions

1. Guidelines would at least identify the supporting information expected from a claimant and provide a claimant with support in a third party determination should either an AA fail to respond or make what was considered to be an inadequate payment.
- 2.. It would encourage greater transparency in the assessment of advance payments with the potential benefit that such transparency is more likely to assist in an earlier settlement of the total compensation payable.
3. Part of the above proposals could be implemented swiftly as guidance through a Circular whilst awaiting primary or secondary legislation for the remainder.

Appendix 1

Prescribed Content for Advance Payment Requests

Claimant Details

- Name and address of claimant
- Name, address and telephone number of advisor handling claim (if any)
- Name, address and telephone number of solicitor (if any)
- Address / description of the land (to be) acquired
- Claimant's interest in the land

Details of Interest of Claimant

- If leasehold – provide full copy of signed lease together with copies of any relevant ancillary documents, e.g Licence to Assign, Licence for Alterations, etc.
- If freehold – provide office copy entry of Land Registry title or, if not registered, sufficient title detail (perhaps solicitor's undertaking) to prove entitlement to freehold interest.
- If subject to mortgage or other loan secured on the property – provide full mortgage details, e.g. name and address of mortgagee, account number, principal outstanding, early repayment penalty etc. If it has been agreed as between mortgagor/mortgagee that the mortgagor will receive the advance payment, either in part or in whole, a copy of a letter of confirmation from the mortgagee must be provided.

Property Details

- Floor areas - measured or approximate, including source and statement of measurement scheme used (GIA / NIA / Zone A etc)
- Break down of areas by type (sales area, storage, office, industrial, yard, staff accom, etc)
- Any outstanding statutory notices other than in respect of the CPO

Business Details (if applicable to the claim)

- Nature of business carried on at premises and style of business, e.g. Ltd, Plc, Partnership, Sole trader, Franchisee.
- Last three years, signed full trading accounts relating to the property
- Date of establishment at reference property. If less than period covered by the last three years accounts, full postal address of previous property together with Property Details as above (to the extent that such are available).
- Does the business operate from any other premises, if so where and in what capacity (admin, head office, trading branches etc)
- If it is intended to opt for total extinguishment under Section 46 Land Compensation Act 1973, copy of the assessment in the current Rating List, copies of birth certificates of all those identified within the accounts as having an interest in the business.
- Special equipment installed or used at premises with details
- Special requirements or adaptations to property with details
- Any special relocational requirements with reasons

VAT status

- State whether the claimant is able to recover VAT.
- Identify the vatable status of the interest in land, i.e. has the option to tax been elected.

Claim Outline

Land taken

- Amount claimed
- Supporting calculation and evidence

Injurious Affection / Severance

- Amount claimed
- Source / mechanism of injurious effect
- Supporting calculation and evidence

Disturbance

- Basis of claim i.e. relocation or extinguishment, with supporting reasons.
- Amount claimed
- Breakdown by head of claim with supporting reasons or evidence. Some items may need to be estimated but an explanation of assumptions and how estimated figures were arrived at should be provided, e.g.
 - ⇒ Decommissioning / vacation of existing premises
 - ⇒ Redundancies and contract cancellations
 - ⇒ Loss on forced sale of stock and equipment including inventory of equipment being claimed for.
 - ⇒ Impacts on trading profits due to move / closure
 - ⇒ Other matters