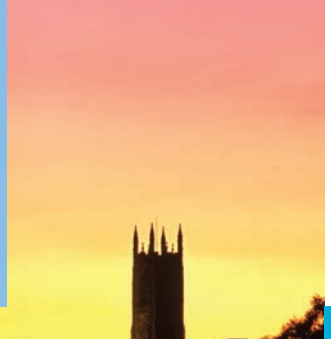
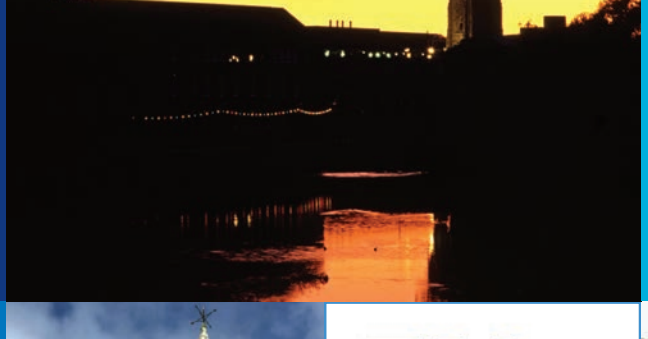
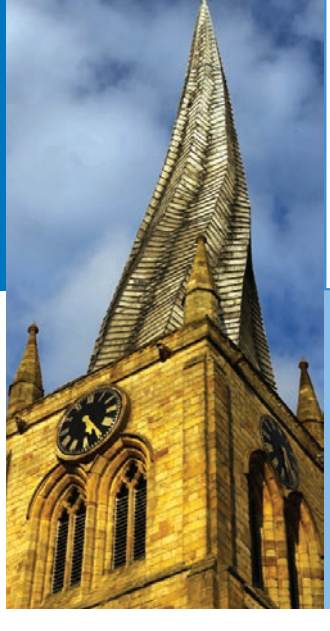
ConsortEM

The newsletter for EM LawShare
Spring 2016







EM LawShare
emlawshare.co.uk

Welcome

This is a landmark edition as we can now announce our 100th member. When we set up EM LawShare ten years ago with thirteen members, we never envisaged that we would achieve this level of membership and support.

However, the simple idea of having a limited number of partner firms capable of providing a whole range of specialist advice has proven to be a great success. In return for being chosen as one of these partners, the firms have provided members with unrivalled added value.

The uniqueness of EM Lawshare is its partnership ethos which has meant that we have been able to deliver unrivalled benefits to our members. These include our annual training programme of over 40 courses (see page 17 for the new 2016 programme), and our biennial conference at prestige venues (see page 3 for this year's details). All this and more for free! Maybe we shouldn't be surprised to have so many members.

Once again we have a range of fascinating articles for you on a variety of topics.

Nichola Evans gives details of a high-profile case BT Cornwall brought against Cornwall County Council about whether the council could terminate their £160 million contract due to BT failing to provide the service standard it had promised.

Ron Cheriyan tackles dispute resolution in his article on adjudication with a flowchart outlining the procedure and John Riddell revisits the issue of devolution to discuss latest developments.

Rebecca Hazeldine takes a look at the proposals set out in the draft Education and Adoption Bill in her article on tackling coasting schools.

Sarah Lamont discusses government proposals to change public sector exit payments and Nathan Holden shares the considerations for councils wanting to generate new income from private rented sector housing.

And finally, in this issue's Spotlight, Mona Sachdeva from Ashfield Homes talks about housing issues and changes to the welfare system and shares with us the best piece of advice she has ever received.

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Member news

New members

Since our last edition we have had eight new joiners including our 100th member, Coventry City Council. The other new members are: East Staffordshire District Council, Rugby Borough Council, Shropshire Council, Nuneaton and Bedworth Borough Council, Dronfield Town Council, Bedfordshire Fire and Rescue and the Coal Authority. A full list of members is on our website.

Precedent bank

We are just putting together the final touches to the EM LawShare precedent bank and hope to launch it soon. Since the pilot was well-received in autumn last year, the partner firms, led by Weightmans, have been working hard to populate it with useful precedents. It will not end there, as the aim is to build on it incrementally and to get you to contribute. We hope it will prove useful, especially to members who do not have access to one of the existing commercial online precedent banks. To try to ensure that it does meet your needs we will be sending out a survey to see what you think of it and to find out how we might improve it.

Secondments requests

As trialled in our last edition, a secondment request form has been put on the website, in the secure part under the 'Resources' heading. If members are looking for a secondee for maternity cover, a special project or any other reason, they can fill in this short form online which will automatically go to all six partner firms. They will then let the member know if they have anyone suitable, and how much it will cost. If there is sufficient interest over the next six months we will look, with the firms, at establishing a pool of public sector lawyers. To access a form, go to www.emlawshare.co.uk/forms. You will need a member's area account to view this page. Please contact our website administrator Senara Shapland senara.shapland@brownejacobson.com for assistance.

Delivery group new members

We are delighted to welcome Tahira Lee from Bassetlaw District Council and Mona Sachdeva of Ashfield Homes on to our delivery group. They will help out on the various sub-groups, such as the ones who put together the yearly training programme and organise the biennial conferences, as well as assisting the rest of the group in coming up with new ideas and giving feedback to the management panel on important issues affecting the consortium. Read more about Mona in the 'Spotlight' feature.

Mediator panel

Following on from interest expressed at a workshop we ran last November we are looking to set up a panel of expert mediators. Initially these will be from the partner firms but we would also like to include those from members. If you are a qualified mediator, or you know someone from your organisation who is and would be willing to act in that role for other members, please contact the EM Lawshare coordinator, Stuart Leslie, at sl.emlwshare@yahoo.com.

@EMLawShare

May we remind you that EMLawshare has its own Twitter account. It is another source of information so please keep an eye out for it. Follow EM Lawshare on Twitter @EMLawshare for events and publications on the latest legal developments. If you are organising or publishing and you wish to promote your event or article on Twitter please get in touch with Katie Andrews at Katie.andrews@bevanbrittan.com

How and why ICT contracts can be terminated

Towards the end of last year Cornwall County Council resisted a claim brought by BT Cornwall in the Commercial Court.[1] The claim concerned the provision of information and communications technology (ICT) services to the council and the question of whether the council could lawfully terminate the contract. The trial was heard by Mr Justice Knowles with the council successful in the claim.

Background

Following a procurement exercise, Cornwall County Council together with Cornwall Partnership NHS Foundation Trust and Peninsula Community Health CIC entered into a contract with BT Cornwall in March 2013.

The contract was of long duration and of high value, estimated at £160 million. It had extensive reach and covered many different services including health, transport, communications and public safety.

The council was unhappy about the delivery of services under the service delivery agreement and on 24 June 2015 wrote to BT Cornwall indicating that by reason of various breaches of the contract, the council was entitled to terminate the contract forthwith.

When the parties could not reach agreement on the issues, BT Cornwall issued proceedings in the Commercial Court and applied for an injunction to prevent Cornwall County Council from terminating the agreement.

The matter came before Mr Justice Teare in August 2015. He gave directions for there to be an expedited trial and that the following issue ought to be determined:

> 'Whether, assessed as at 20 July 2015, [BT Cornwall] was in breach of [the agreement] such that the defendants were entitled in all the circumstances to terminate the agreement forthwith, and whether [BT Cornwall] should be granted an injunction to restrain such termination.'

Cornwall County Council defended the case strongly and robustly. The trial commenced with a reading day on 30 November 2015 and the hearing began on 1 December 2015. Judgment was handed down on 21 December 2015.

The arguments

The main issue that was explored at trial related to the key performance indicators (KPIs) which were dealt with in Schedule 13, entitled 'Price Performance Mechanism'. In particular, there was a focus on KPI 1. BT Cornwall's monthly review reports show that between November 2014 and April 2015 service in relation to KPI 1 was below target service level six times, and below the breach trigger five times.

This level of failure would amount to a material breach under Clause 48.2.1.1 of the agreement, allowing termination without a remedy period.

It was accepted by the parties that there was a large backlog of incidents in early 2015. It was the council's position that these were incidents which clearly needed to be taken into account and should form part of the calculation of whether or not BT Cornwall was in breach of the target service levels.

BT Cornwall argued that the figures for February, March and April 2015 in the monthly service reports 'could not be used because KPI 1 was intended to be a measure of failure within a month by reference to a benchmark of what was achievable within that month. For these three months the figures were the subject of an express caveat to the effect that their level was due to a large backlog of failed incidents being cleared, so that (it was argued) they could not be said to represent the level of failure within a month.'

Mr Justice Knowles did not accept BT Cornwall's arguments in this regard. He noted that the agreement recorded that a matter would be logged for breach purposes.

BT Cornwall also attempted to argue that the KPIs were not operative and needed to be agreed. Again, Mr Justice Knowles held in the council's favour and found that even if the KPIs were not 'fit for purpose' they were still operative until changed using the appropriate change mechanism. He said:

> 'In my view, confirmed by my hearing what the witnesses had to say at trial, the items show: (a) that baselining work remained to be done for some of the KPI performance measures that were in the agreement; (b) that after that work had been done there would a joint review of the contract KPI/PI performance measures; and (c) that amendments to the agreement would be proposed in light of the joint review.
>
> 'In the events that happened the parties did not get to stages (b) or (c) before the council wrote to BT Cornwall on 24 June 2015 asserting that the defendants had a right to terminate the agreement forthwith.'

BT Cornwall put forward a further argument in relation to this and had served evidence of a re-assessment exercise they had carried out. A witness, Mr Mark Pate, gave evidence of the exercise carried out by a team of employees whereby incidents notified to the service desk were reassessed and, where it was felt appropriate, reclassified.

[1] BT Cornwall Limited v Cornwall Council & Orss [2015] All ER (D) 228 (Dec), [2015] EWHC 3755 (Comm)

In terms of the exercise itself the judge said:

> 'If BT Cornwall was the one to instigate a correction it would first need to show (and in my judgment it did not do so) why the existing figures and calculations, which were its own work, were not objective, fair and reasonable or how it was that the assessment had not been conducted, and the report written, in good faith.'

The judge went on to look at the exercise which had been carried out by Mr Pate and concluded:

> 'Mr Pate gave evidence for BT Cornwall of work he had done on the figures in recent weeks. I was left unclear about Mr Pate's methodology and unconvinced by his approach to 'sampling'. As between his work and the figures derived contemporaneously from the monthly service reports, I preferred the latter.'

BT Cornwall had further arguments which it advanced in relation to the KPIs. It suggested that there was a waiver. Under the agreement the council had the right 'at their sole discretion' to waive key performance indicator scores achieved due to service failures 'if they are satisfied (acting reasonably) that a remedial plan to prevent the service failure being repeated is in place and being adhered to'.

Again, the judge was not convinced by the arguments advanced, saying:

> 'But the paragraph does require the exercise of the right it confers (or a successful contention that there was an obligation to exercise the right and that that obligation was not complied with). I heard no evidence at the trial that would cause me to conclude that the right had been exercised or should have been exercised.
>
> 'Mr Finlayson [the CEO of BT Cornwall] gave evidence that a waiver from Material Breach 'was implied and everyone understood'. I do not accept that as an accurate statement of or conclusion on the facts. Nor is it enough in law.'

Next, BT Cornwall sought to convince the court that there was a KPI backlog agreement. They suggested that the parties knew that if BT Cornwall cleared the backlog it would place them in a breach position. The argument was put forward that it was understood that the breaches would not be taken into account by the council in determining if BT Cornwall was in material breach. The agreement, it was alleged, was not in writing.

The judge was not convinced, saying:

> 'Nothing was written to record the suggested 'KPI backlog agreement'. In my view that is because there was no agreement and not because, as BT Cornwall argues, there was a general atmosphere of co-operation, and the parties were working fast to resolve problems ... Having heard them give evidence, I do not accept Mr Kritikos' or Mr Finlayson's evidence where it suggests that agreement was reached in the form of the asserted KPI backlog agreement.'

The court then went on to consider whether the council should have terminated the contract earlier and whether there had been affirmation of the contract. The court noted the procedures which were adhered to by the council in reaching their decision and Mr Justice Knowles said:

> 'There was no material delay on the council's part, and certainly neither its actions nor the passage of time are to be taken as an election not to terminate for material breach. The word 'forthwith' in Clause 48.1 addresses the point at which the council may act, and not the period within which it must act if it is going to.
>
> 'BT Cornwall argues that 'the Executive Forum represented a major commitment for BT Cornwall, not only in terms of the executive input at the highest level, but also in terms of the huge resources and costs involved', which it put at £4.3 million. This is no more than a reflection of how serious it had allowed things to become; it does not advance its argument that the council was not entitled to enforce the agreement in accordance with its terms.'

Finally, BT Cornwall suggested that the council had not acted in good faith. Again, the judge had little sympathy with BT Cornwall's position, finding:

> 'BT Cornwall faced problems of its own making and did not provide to the defendants the service it had promised to the standard it had promised. The council worked with BT Cornwall to try to resolve things but ultimately decided the position was not good enough. There is no absence of good faith or presence of capriciousness in expecting BT Cornwall to clear the backlog at once and also to take the contractual consequences if that meant KPIs would be breached again. There was (as discussed above) no KPI backlog agreement, waiver, estoppel or affirmation. And unless and until different KPIs were agreed there is no absence of good faith or presence of capriciousness in expecting BT Cornwall to honour the existing agreed KPIs, 'fit for purpose' or not.'

In conclusion, Mr Justice Knowles refused to grant an injunction to BT Cornwall and found that 'Assessed as at 20 July 2015, BT Cornwall was in breach of the agreement such that the defendants were entitled in all the circumstances to terminate the agreement forthwith.' The council's evidence and witnesses were preferred.

Conclusion

Mr Justice Knowles clearly felt that the contractual terms were sufficiently certain and there had been no agreement by the parties to depart from the agreement whether by finding that the parties had reached a backlog agreement, that there had been a waiver or that there was a valid estoppel argument. While he did not make a finding as to whether BT Cornwall could retrospectively conduct a re-assessment exercise, he did take the view that BT Cornwall ought to have set out why the figures in the monthly reports could not be relied upon.

The judgment sets out very succinctly that if a party to an agreement seeks to argue that the agreement has been departed from, then there needs to be real, tangible evidence of that. In the absence of any such evidence the court will apply the strict contractual terms.

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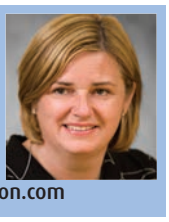

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Tackling failing or 'coasting' schools

The government's mission to drive up school standards by speeding up the process of improving failing schools and tackling underperformance in 'coasting' schools is well underway.

The Education and Adoption Act 2016 recently received Royal Assent. The majority of the new powers laid out in the act will come into effect from 18 April 2016. At the same time, the Department for Education (DfE) published their responses to the consultation, *Intervening in failing, underperforming and coasting schools,* which sought views on the proposals for tackling underperformance, and the definition of a 'coasting school'. The statutory guidance, *Schools Causing Concern,* was also consulted on, and a final version which takes into account the changes under the Education and Adoption Act 2016, has now been published.

Under the changes, local authorities and governors are actively required to take steps to convert schools to academies, while the Secretary of State's power to intervene directly has been greatly extended. The new powers of the Secretary of State will now be exercised by Regional School Commissioners who are expected to follow the DfE's guidance in exercising those powers. The powers of local authorities to intervene remain largely unchanged although there are implications in the way in which these are used alongside the new powers of the Secretary of State.

The guidance sets out the roles and responsibilities of Regional School Commissioners and local authorities, and how they will work with others to ensure underperformance is challenged and schools are supported to improve. Given the increased powers of the Secretary of State it will be interesting to see how commissioners and local authorities work together in exercising their powers. There will be certain requirements for local authorities and school commissioners to notify each other when they intend to exercise their powers. In some cases, the authority's powers will be restricted where the commissioners have already exercised their powers.

The Education and Inspection Act 2006 (as amended by the Education and Adoption Act 2016), will continue to be the main act dealing with intervention in maintained schools. This act only applies to local authority-maintained schools.

Academies and free schools are not subject to this regime as they have a separate legal framework. Regional School Commissioners will scrutinise academies' performance and will require academies to take appropriate action or face termination of their funding agreement. New provisions have been included in the Education and Adoption Act 2016 to ensure that Regional School Commissioners have robust powers to hold all academies to account in a similar way to other schools. The Education and Adoption Act 2016 makes amendments to the Academies Act 2010 and includes a provision to ensure consistency on funding agreements for both schools and academies that are failing or coasting.

To become eligible for intervention, a school must fall within one of the following categories. The first four categories are well established under the Education and Inspections Act 2006 but there are now some procedural amendments.

1 **Performance standards and safety warning notices** (section 60) – A local authority and Secretary of State under the new provisions may issue a warning

notice. As was the case previously, such a warning notice can be given where standards of performance are unacceptably low; there has been serious breakdown in management or where the safety of pupils or staff is threatened. Considerations to be taken into account are set out in the guidance. If a Regional School Commissioner has given a warning notice, the local authority may no longer give one. Failure to comply with the warning notice within the specified time period will mean that the school becomes eligible. The intervention powers must be used within a period of two months from the end of the compliance period.

2 **Teachers' pay and conditions warning notices** (section 60A) – Only a local authority can issue such a warning notice. The effect of a failure to comply is the same as for performance notices.

3 **Schools judged by Ofsted as requiring significant improvement** (section 61)

4 **Schools judged by Ofsted as requiring special measures** (section 62)

5 **New category of coasting schools** (section 60B) – A coasting school is one where performance data shows that for the past three years they have failed to ensure pupils have reached their potential. The precise definition of a coasting school will be set out in more detail in regulations by the Secretary of State.

A school will be notified by a Regional School Commissioner if they are coasting, following publication of the final performance results for that year. Once they have received such a notification, they become eligible. Prior to notification, commissioners may contact schools to start informal discussions, providing an opportunity for all parties to work together to start developing plans for improvement.

The Regional School Commissioner will have discretion to decide whether the school has a sufficient plan and sufficient capacity to improve on its own, whether it needs additional support and to challenge whether it will be necessary to intervene using any of the powers explained below.

Any views or evidence from the local authority will also be taken into account or the school commissioner may wish to work with the local authority if they are already providing support. The guidance sets out the process and various factors which can be taken into account.

Once a school becomes eligible, there are a number of powers open to local authorities and the Secretary of State (to be exercised by the Regional School Commissioners) to support the school. Many powers are already available to local authorities. Note, only some of these powers are available where the school is eligible under section 60A. The Education and Adoption Act 2016 greatly increases the powers available to the Secretary of State.

- **Entering into arrangements** (section 63 and section 66A) – Notice can be given to a school requiring it to take a specified action including obtaining advisory support, collaborating with another school or educational body or joining a federation. This power has been extended to the Secretary of State under the new powers.
- **Appointing additional governors or an Interim Executive Board** (sections 64, 65, 67, 69 and 70C) – Both the local authority and the Secretary of State will continue to have power to appoint additional governors or an Interim Executive Board which is subject to the local authority obtaining Secretary of State consent. The Secretary of State will now be able to direct the local authority in relation to the size and composition of the board. The Secretary of State also has the power to take over responsibility of an Interim Executive Board which a local authority has put in place. The guidance provides details as to the membership and roles of a board.
- **Suspending their right to a delegated budget** (section 66) – Local authorities will continue to have power to suspend a school's delegated budget.
- **Directing a school closure** (section 68) – The Secretary of State can direct a local authority to cease to maintain a school, usually in cases where there is no prospect of the school making sufficient improvements.
- **Making an academy order** (Academies Act 2010, sections 4 and 5) – Where a school has been judged inadequate (such as requiring significant improvement or special measures), action is needed urgently and there is now a new duty placed on the Secretary of State to make an academy order. In other cases, the Secretary of State will have discretion as to whether to make an academy order. If this happens, the new provisions place a duty on local authorities and the governing body to work towards the conversion and take all reasonable steps. The Regional School Commissioner will be able to direct them to take specified steps if required. There is now no requirement for the school to carry out any consultation, nor is the commissioner required to consult except in the case of voluntary or foundation schools. However, an academy sponsor is now required to communicate to parents any information about their plans for the school.

Before exercising these powers, there are some requirements for consultation and notification with various parties, including the governing body, foundation trust or religious body.

The majority of the new, strengthened provisions and the revised statutory guidance will take effect from 18 April 2016; the start of the summer term. Schools identified as coasting will only be notified after the publication of the performance tables reflecting final 2016 results; no school can be classed as coasting before then.

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The benefits of adjudication in construction disputes

Adjudication is now an established method of dispute resolution in the construction industry in the UK. It has had a marked effect on the other procedures for resolving disputes - prior to its inception in 1998, the main means of resolving construction disputes in the UK was by either arbitration or litigation. Adjudication has since transformed the construction landscape, taking its place as the industry's preferred method of dispute resolution.

Public authorities often engage contractors on large construction projects and come under intense scrutiny when problems arise. Projects rarely finish on time and disputes will often arise in relation to payment. It is important for authorities to recognise and understand the benefits of adjudication, and to distinguish it from the other main forms of dispute resolution.

A party to a construction contract has the right to refer to adjudication any dispute arising under the contract . The process is quick – effectively 28 days (42 days if the referring party agrees) from start to finish – and is cheaper than many other forms of dispute resolution. The decision of an adjudicator is expressed to be temporarily binding, which means that it is binding until it is finally determined by a judge or arbitrator or by the parties reaching agreement.

If either party is unhappy with the procedure or the outcome, they may refer the dispute to litigation or arbitration, although in practice this happens infrequently. This is attractive to all parties as it allows projects to continue even if the parties are indecisive. For instance, contractors can unlock payments without having to wait for a judgment or an arbitration award. This compares favourably to litigation where there is a risk of the contractor becoming insolvent due to continued stagnation of available resources.

The timescale of the adjudication procedure is extremely tight – effectively 28 days from start to finish, as shown in the flowchart opposite.

The adjudicator is not bound by strict rules of evidence, although procedural rules may be imposed by the nominating body. This is similar to the position in arbitration where strict rules of evidence also do not apply, although procedural rules may be based on the organisation's guidelines. This differs from litigation where parties must comply with the rigours of the Civil Procedure Rules.

Another feature of adjudication is that parties must bear their own costs in referring the dispute and presenting it during the adjudication. The adjudicator has no power to award costs unless this is expressly provided for in the contract or the parties agree.

Despite certain challenges, adjudication is an effective and useful means of resolving disputes that require quick determination, such as loss and expense claims and extension of time claims.

Unless the dispute is of public importance, there are obvious benefits in choosing a private and confidential method of dispute resolution. Like arbitration, adjudication permits parties to a dispute to maintain privacy, although details of the dispute may become public if a party seeks to enforce an adjudicator's decision in the courts. This compares favourably to litigation where judgments are routinely reported and publicly accessible.

One of the key risks in adjudication is the risk of ambush. The referring party has freedom to prepare the notice of adjudication and referral without any time restriction. A responding party has an extremely limited timeframe (usually 7-14 days) in which to respond to the referral notice. A referring party may choose to use this tactical advantage in order to launch an adjudication with little or no warning.

However, is the risk of ambush unique to adjudication? A claimant has similar freedom to prepare the claim form without any time restriction (subject of course to the strictures of the Limitation Act). Under Civil Procedure Rule 15.4, a defendant is required to file the defence 14 days after service of the claim form. While this gives defendants slightly longer to respond to the claim form, it is nonetheless a short timeframe.

Despite certain shortcomings, adjudication is viewed to have been largely successful in resolving disputes in the construction industry in the UK. It is a nimble animal compared to the unwieldy beasts of litigation and arbitration. Many common law countries have adopted similar statutory adjudication schemes in an attempt to ease the cash flow difficulties that can plague contractors.

The message is clear – adjudication works and is here to stay.

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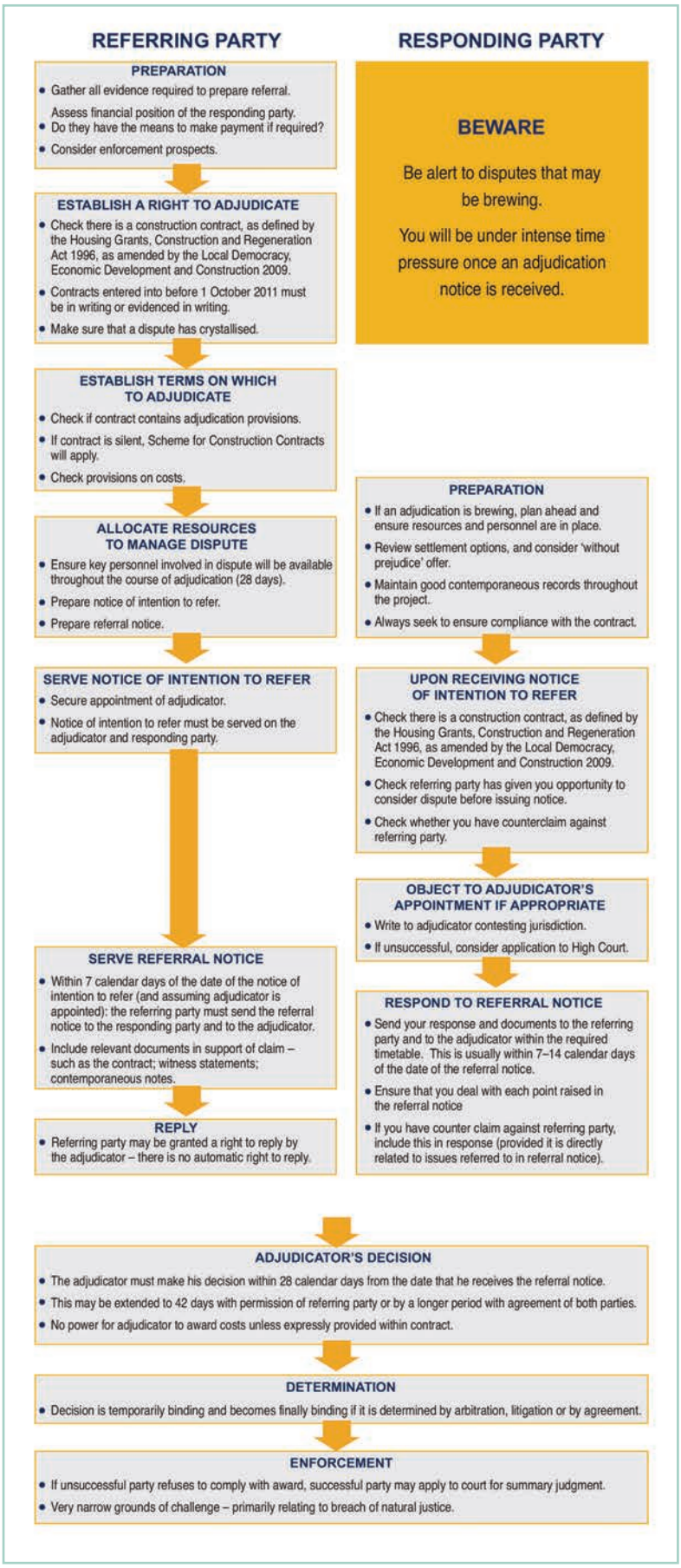
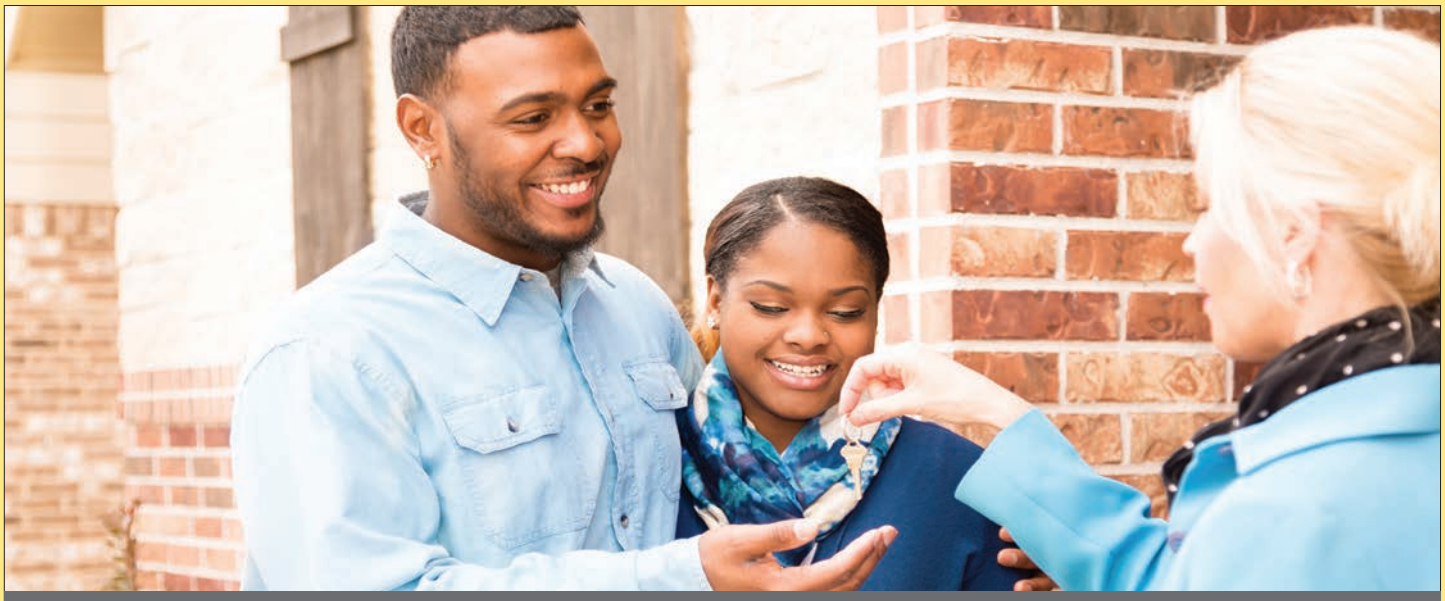
THE ADJUDICATION PROCESS



Participating in the private rented sector – key legal considerations for councils wanting to participate



Local authorities up and down the country are constantly on the lookout for ways to generate new income sources. A popular and topical option, especially in parts of the country where property prices are high, is to provide private rented sector housing. This can be for a number of reasons; some authorities are looking to improve investment return on the financial reserves they hold, because the private rented sector potentially offers much higher rates of return than normal bank interest, others seek a reliable revenue stream to help balance the books.

Whatever the motivation, there are a number of basic issues to consider:

- regulatory controls – what are they and do they cause a problem?
- does housing for rent need to be provided through a separate entity (ie from the local authority)?
- powers – is there a power to do this?
- state aid and EU procurement – where does this fit in?
- tax issues.

Regulatory controls

Having decided to embark on providing private rented sector housing, one of the first issues that a local authority will encounter is that the powers given to local authorities for housing purposes do not contemplate that housing would be provided on a commercial basis by local authorities.

Local authorities, in general, may only grant secure tenancies. In addition, after a qualifying period, secure tenants are entitled to exercise the right to buy their rented home at a discount. This works if providing housing for rent is an end in itself but not if viewed as an investment opportunity, and from a funder's perspective it is not attractive. For this reason, the housing must be provided through a separate entity so that more investment-friendly forms of tenancy, for example, assured short-hold tenancies, may be offered.

Local authorities must maintain, when exercising their housing function, a housing revenue account. This is more a special accounting treatment, rather than an account, that ring-fences the income and expenditure in respect of housing provided through the exercise of a local authority's housing powers. The account causes a number of problems; it cuts across a local authority's powers to borrow prudentially, in that it effectively imposes borrowing limits when the prudential borrowing does not, and land held or accounted for in the housing revene account is subject to different disposal requirements than those that relate to land held for general purposes; this point is explored further below.

Structure and powers

For the reasons mentioned above, in practice, private rented sector housing provided by local authorities is delivered through a separate corporate entity to that of the local authority. As to the choice of the appropriate structure, this is linked to the availability of legal powers. The general power of competence in section 1 Localism Act 2011 is an obvious candidate, although section 4 restricts the use of the power for commercial purposes to circumstances where a local authority participates in the commercial activity

through a limited company. However, there may be other alternatives if trading for a profit is not the objective, for example, a company limited by guarantee. A disadvantage of operating through a company is the requirement to pay Corporation Tax. Local authorities do not themselves pay Corporation Tax, but dividends generated by the company are taxed at source, so operating through a company is less tax efficient. There are certain types of legal structure that would allow a local authority to benefit from its non-taxpaying status, for example a limited liability partnership. However, it is questionable whether participating in these structures is within a local authority's powers because of the degree to which providing private rented sector housing may constitute trading.

Linked to the issue of the powers of participation are the issues around providing funding to the vehicle. Again, the power of general competence is the obvious option. There are other more specific powers; section 12 of the Local Government Act 2003 which permits a local authority to invest for any purpose relevant to its functions under any enactment, and section 24 of the Local Government Act 1988 gives the power to provide finance for private sector housing.

State aid

If a local authority provides finance, guarantees or any benefit to a party, this may constitute State aid if the recipient is an economic undertaking and the benefit is capable of distorting competition, thereby affecting trade between member states. To assist local authorities in determining the appropriate level of interest to charge on loans provided by a local authority to an economic undertaking, the EU Commission has published advice and periodically publishes reference interest rates, above which loans will not be deemed potentially to be State aid. The average rate applicable to the UK currently is 2.04 per cent. Where a local authority is able to borrow using its prudential borrowing powers, then these interest rates tend to be competitive and there is scope to charge a slightly higher rate in lending those funds to a private rented sector entity, thereby allowing the local authority to generate a return on the provision of the finance.

EU procurement

The Public Contracts Regulations 2015 apply to contracts awarded by contracting authorities including local authorities for works, services or supplies. To underpin the arrangements between the local authority and the private rented sector entity, this is likely to involve a contract for works or services or a combination of both. Further, the Concession Contracts Regulations that are due to come into force on 18 April 2016 may apply where a concession contract is awarded.

Clearly, if a local authority has established an entity for the purposes of promoting the development of housing for rent, its relationship with it will involve the local authority in procuring, at the very least, services from the entity. Normally, the approach is to place reliance on Regulation 12 of the 2015 Regulations. This allows a local authority to award a contract directly to a private rented sector entity that it wholly owns if, in return, the entity is devoted to providing an essential part of its activities (80 per cent or more) to the local authority.

Where will the land come from?

Having set up a private rented sector entity, how does the local authority, as this is usually the case, transfer land it holds to that entity? If the land is held within the housing revenue account it may only be disposed of in accordance with section 32/43 Housing Act 1985 this requires the Secretary of State's consent, given either specifically or generally. There is a general consent permitting the disposal of vacant housing revenue account land at any price and there are also other consents that may assist. Further, section 25 of the Local Government Act 1988 provides that the Secretary of State's consent is needed for any financial assistance given by a local authority for privately let housing. Clearly if the local authority is to provide funds by way of loans to the private rented sector entity these provisions will be relevant. If consent is obtained under section 25, no further consent under section 32/43 is required.

If the land is held for general land-holding purposes, then the disposal power will be pursuant to section 123 Local Government Act 1972. This imposes a duty to secure the best consideration that can be reasonably obtained unless the land is disposed of by way of a very short lease (less than seven years) or the Secretary of State gives consent. Circular 06/03 provides a general consent that permits the disposal of land at an under-value of £2 million without specific consent, as long as the disposal will promote the wellbeing of the local authority's area.

Tax position

The potential tax implications arise from Stamp Duty Land Tax (SDLT), Corporation Tax and Value Added Tax (VAT). They impact both the private rented sector entity and the local authority in different ways. The transfer of land to the private entity is unlikely to incur SDLT because the entity is likely to be over 75 per cent owned by the local authority. The private rented sector entity will be required to pay corporation tax on the generation of rental income profits as well as capital gains, if a company, and is likely to be subject to VAT. In contrast, the local authority can recover VAT through section 33 Value Added Taxes Act 1994, as long as the VAT supplies (that is, the service it receives) relate to non-business activities of the local authority. It is important to consider fully the tax implications when contemplating arrangements of this type.

Conclusions

As set out above, there are a variety of issues to consider before embarking on, or participating in, an arrangement of this type. It is important that the local authority's advisors fully understand the issues and find ways to overcome the hurdles, a handful of which have been explored in this article.

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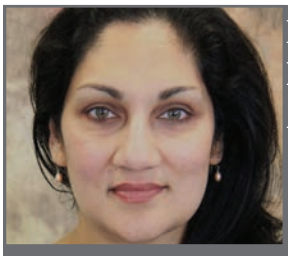
Spotlight on ...



Mona Sachdeva,
head of corporate services,
Ashfield Homes Limited

In each edition of ConsortEM we shine a light on a member to show the variety of roles within the consortium. This month Mona provides an insight into working in-house for a council controlled company.

How long have you been with Ashfield Homes Limited?

I joined in 2006 as the company solicitor and took this post as a promotion in 2012, following a senior management restructure.

What does your role entail?

I am involved in and manage a range of in-house functions: legal, governance, HR, administration, performance and ICT. This means that I undertake a range of generic legal work. I miss specialising, but enjoy the variety.

To whom do you report? What is the structure of your team?

I report to the managing director of the company. I manage corporate services, but am a member of the company's senior management team and advisor to our board of 12 non-executive directors.

What are the most pressing issues for you at the moment?

The council that owns the company wishes to revert to directly delivered services. Subject to the outcome of a statutory consultation, the council has determined to dissolve the company's management agreement on 12 months' notice. I am lead manager for the process.

What regulatory issues are on the horizon?

The forthcoming cuts to social rents are going to cripple the housing revenue account for the next few years. This in essence funds our area of business and investment. The changes to the welfare system will make those rents more difficult to collect and so will lead to an increase in arrears. The demand for affordable housing is on the rise, but there is no money to build.

How does Ashfield Homes Limited compare with other places you have worked?

I began my career in the private sector following completion of my 'articles' (how old?). Following extended maternity leave to have triplets (how efficient?), thoughts turned back to work (how mad?) and I decided to try public sector work (how selfless?).

I undertook interim contracts for Mansfield DC and Nottinghamshire CC before settling down to permanent pensionable service at Ashfield DC and then Derby CC in the class of Leslie.

When I moved here, the more corporate environment suited me. Decisions are made quickly and in a relatively politically neutral environment while retaining what is good about the not-for-profit sector. It is a vibrant working environment, with dedicated staff who love working here so, even with no flexitime, employees stay committed and work hard.

I believe in the council controlled company model but ultimately, as with any public sector service, it is subject to politics in some way.

I have worked with some fabulous lawyers wherever I have been and mentored some who have gone on to achieve so much. No one place compares to the other – each is unique.

What law would you like to see changed?

The law of averages, if you ever play Lotto you already know it is wrong.

What is the best piece of advice you have received?

Don't ask a question unless you already know, or have a darned good idea of, the answer. This stands good professionally and personally.

Finally, two truths and one lie in any order.

- It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife.
- There will always be many different versions of the truth.
- It is a crime not to tell the truth in sworn testimony.

Ashfield Homes

Local devolution of powers – part 2

We discussed this issue in the winter edition of ConsortEM. So much has happened since then that we are revisiting it. The Cities and Local Government Devolution Act 2016 received the royal assent on 28 January 2016. Members of EM LawShare have become involved in devolution with a deal being made in the West Midlands and proposals being tabled in the North Midlands.

The Cities and Local Government Devolution Act 2016 was substantially amended on its passage through Parliament. It provides for elected mayors for combined authorities, the creatures that will exercise devolved powers. The act was amended so that the Secretary of State can require a combined authority to adopt a mayor where at least two of the constituent councils and the combined authorities agree. This can happen even where more than one authority does not agree to the election of a mayor. A non-consenting authority can be removed from the combined authority.

Other important provisions of the act include the removal of the statutory limitations on functions that can be given to a combined authoritiy. The Secretary of State can also order that the combined authorities take on the functions of another public authority in the area. These two provisions mean that a combined authority can take on health functions. Transport, skills, planning and job support are other functions that are likely to be devolved.

The act allows the Secretary of State to change the constitution and membership of local authorities and make structural and boundary arrangements. Once again this power was handed to the Secretary of State during the bill's passage through Parliament.

The act also allows mayors to take on the role and powers of Police and Crime Commissioners and sub-national transport bodies may be established to oversee transport strategy and investment priorities in a region.

Devolution deals and proposals show how the act may become reality through orders and regulations.

A West Midlands deal was made in November 2015. Full details appear on the gov.uk website but the most important powers devolved to the mayor and combined authority include responsibility for a devolved transport budget and franchised bus service. There will also be responsibility for a key route network of local authority roads.

Planning powers will be conferred on the mayor to drive housing delivery and improvements in the housing stock.

The combined authority will have control of an investment fund of £36.5 million per year and 19+ adult skills funding from 2018/19. There will be joint responsibility with central government for employment support for those claimants who are hardest to help. There will be responsibility to work with the government to develop and implement a devolved approach to the delivery of business support programmes from 2017.

The draft North Midlands deal is being considered by central government. Nineteen councils in Nottinghamshire and Derbyshire have signed up to it. The plan is for the transfer of significant powers for employment and skills, transport, housing, planning, business support and investment from the government to combined authorities. An investment fund of £900 million over 30 years will be created. The benefits of devolution are stated to be 55,000 new private sector jobs and 77,000 new homes. There will be £137 million a year in consolidated transport funding and transport aims include Midland Mainline electrification and an HS2 station. It is proposed that there will be a devolved and consolidated local transport budget and single local transport plan. Finally, the mayor will be taking on the role of the Police and Crime Commissioners for Nottinghamshire and Derbyshire.

These two plans illustrate the nature of the proposed devolution but many questions remain unanswered. One is the perennial issue of the relationship between local and central government. One the one hand, devolution suggests the empowering of localities and decentralisation. On the other, the powers of the Secretary of State to impose mayors and change constitutions and structural and boundary arrangements suggests a greater degree of central control.

As ever, the key to local autonomy may be finance. The power to raise a precept remains unclear and mayors appear to have no power to borrow. It is perhaps significant that the Communities and Local Government Select Committee report on the Devolution Bill issued in February stated that there should be more fiscal devolution, including significant spending and tax-raising powers. That will be an interesting debate.

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Public sector exit payments Cap, clawback and consistency

A look at the latest government proposals in the public sector.

Currently there are three proposals from the government to change exit payments in the public sector:

- a cap of £95,000 on the total aggregate value of exit payments made to most public sector workers. Draft Public Sector Exit Payment Regulations 2016 have been published which will impose a cap;
- recovery of exit payments made to higher-earning employees within the public sector who are re-engaged in the public sector within a period of 12 months. There are draft regulations, which have been subject to further consultation, and which were due to take effect from April 2016, although we understand it is more likely to be May 2016; and
- proposals to further restrict public sector redundancy payments by coordinating the rules for calculating payoffs across the civil service, the NHS and local government. Consultation on this was launched on 5 February 2016.

The impact of these changes will be far reaching as set out below.

The £95,000 cap on exit payments

On 16 September 2015, the government published its response to the (very brief) consultation on the proposed introduction of a £95,000 cap on the total aggregate value of all exit payments made to most public sector employees. It will apply, among other bodies, to local authorities, the NHS, the police force and schools.

The government intends to proceed by introducing the cap via the Enterprise Bill. The detail of the measures will be implemented through secondary legislation; this is anticipated for the summer or autumn of 2016.

On 3 November 2015 the government published the draft Public Sector Exit Payment Regulations 2016, which contain details of the restriction on public sector exit payments.

The exit payment threshold, or the cap, is set at £95,000, but may be varied by further regulations. The cap will apply to:

- redundancy and voluntary exit payments;
- payments to reduce or eliminate an actuarial reduction to a pension on early retirement;
- payments to discharge liability under a fixed term contract;
- payments by way of shares on loss of employment; and
- any other payment (whether or not contractual) made in consequence of loss of employment.

In relation to this last point, the government has confirmed that this will include payments in lieu of notice but it is not clear how this will affect existing contracts where a payment in lieu of the contractual notice period would exceed £95,000. It will be possible to waive the cap in a particular case with consent from the relevant minister, or from the full council in the case of local government exit payments, but it is not yet clear what would support such a waiver from full council.

The cap will not apply to:

- payments made for incapacity or death as a result of accident, injury or illness;
- payments of accrued but untaken holiday as the government conceded this point in light of consultation responses;
- bonus payments;
- payments made in damages ordered by a court;
- early retirement payments to firefighters; and
- payments to employees with protected terms following a TUPE transfer.

As ever, the devil will be in the detail. We understand that HM Treasury has confirmed that the draft regulations have been published for illustrative purposes only as a means of informing parliamentary debate on the relevant provisions of the Enterprise Bill. The government intends to lay a further version of the regulations which will be subject to affirmative resolution after the Enterprise Bill receives royal assent.

Recovery of exit payments

On 25 June 2014, HM Treasury published a consultation on the recovery of public sector exit payments and responded to that consultation on 28 October 2014. Then on 21 December 2015, HM Treasury published a consultation on draft Repayment of Public Sector Exit Payments Regulations 2016 to implement its proposals, under the Small Business, Enterprise and Employment Act 2015. Since the consultation in 2014, the government has modified some elements of the policy. There have been some significant changes:

- the minimum salary to which the recovery provisions will apply has been reduced from £100,000 to £80,000 per year;
- applying the exit payment recovery policy to qualifying returns to any part of the public sector, instead of only returns to the same part of the public sector;
- removing the full recovery period of 28 days and the tapering will now commence on day 1 following termination, effectively reducing the

repayment liability proportionately over the subsequent 365 days; and

- including employer-funded pension top up payments made under the Local Government Pension Scheme within the sums to be recovered, in order to align with the recovery of other similar payments.

The consultation documents also list the types of payment and the public sector organisations that are in scope of the regulations and those that are proposed to be exempt. It makes clear that the policy would apply to all bodies within the definition of the public sector by the Office for National Statistics (ONS), except those granted an exemption. It states that housing associations would be granted an exemption, as the intention is to ensure that the ONS reclassifies them as part of the private sector.

The Secretary of State of the parent department of each subsector may decide whether to grant a waiver to an individual to remove the obligation to repay. Again, full council may grant a waiver for repayment in cases involving local authorities, and for the local government bodies for which they have oversight or control.

It is important to note that the legislation will cover individuals who return to work for a public sector organisation off payroll, for example, as an individual consultant or as an employee of a consultancy firm.

Review of consistency in redundancy payments across the public sector

If the above were not enough to be dealing with, on 5 February 2016 HM Treasury published a consultation on what it called 'further cross-public sector action on exit payment terms, to reduce the costs of redundancy payments and ensure greater consistency between workforces'.

The proposals will apply to the majority of public sector employees, and the government is proposing to take action on some, or all, of the following elements across all major public sector compensation provision:

- setting the maximum tariff for calculating exit payments at three weeks' pay per year of service;
- capping the maximum number of months' salary that can be used when calculating redundancy payments to 15 months;
- setting a maximum salary for the calculation of exit payments. This limit could be set at various levels and could potentially align with the NHS redundancy scheme's salary cap of £80,000;
- enabling the amount of lump sum compensation an individual is entitled to receive to be tapered as they get close to the normal pension age or target retirement age of the pension scheme to which they belong, or could belong, in that employment; and
- reducing the cost of employer-funded pension top up payments, such as limiting the amount for early retirement, or removing access to them, and increasing the minimum age at which an employee is able to receive an employer-funded pension top-up.

Comment

These changes raise a number of issues for local authorities.

The £95,000 cap is ostensibly to address the public perception that senior employees are being given six-figure pay-outs at the expense of the public purse. However, a cap set at this level could catch much lower earners with long service in the public sector. This is because the cost of enhancing pension for, for example, those in the Local Government Pension Scheme who are 55 or over, known as 'pension strain', is also included in the £95,000 cap.

A concern among authorities is that the cap, particularly including the strain on fund cost in the cap, would erode the ability of employers to manage their workforce reduction programmes in an effective way. There is likely to be an increase in the number of employees who are currently eligible for early retirement seeking to leave now, prior to the introduction of the cap, under voluntary redundancy arrangements, which could potentially mean a drain of knowledge and talent. In addition, after the cap is introduced, restrictions on pay outs for senior or long-serving staff could have an impact on how redundancy exercises are planned overall.

Authorities have questioned the necessity of applying the cap to local government, which already operates within a transparent framework. This includes published policies, whereby an exit payment of over £100,000 has to be approved by full council.

There is a concern that the combined impact of the statutory cap and repayment provisions will be to drive talented employees out of the public sector ahead of the imposition of the cap and then to keep them out of the public sector, at least for an extended period.

These regulations are also complicated and detailed; having similar titles adds to the confusion. To have two sets of regulations dealing with similar issues seems unnecessarily piecemeal as an approach and it will be important to be familiar with the detail of all the regulations and the parent legislation.

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2016/17 EM Lawshare Training Programme

We are delighted to announce a diverse programme of over 40 training events in 2016/17 from our partners Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard and Weightmans.

Courses will be presented by lawyers from these six firms, each of whom are specialists in their field and some courses will be jointly presented by lawyers from member authorities.

Courses will be held in the East Midlands; Leicester, Nottingham and Derby, with some courses repeated in Birmingham, Sheffield, Milton Keynes and Cambridge.

We also offer a number of courses via video conferencing to Birmingham, Leicester, Manchester, Milton Keynes and Sheffield.

Date	Title	Location
26 April 2016	**Information Law Update** (Intermediate)	**Nottingham**
27 April	**Civil Procedure Rules** (Intermediate)	**Nottingham**
28 April	**Development Agreements and Regeneration** Intermediate)	**Leicester**
18 May	**Housing Development and Regeneration**	**Nottingham**
19 May	**Prosecution Update for Local Authority Lawyers** An update on prosecutions law and procedure for lawyers in local authorities (Intermediate)	**Leicester**
TBC May	**Annual Local Government Update** (All Levels)	**Nottingham**
14 June	**Judicial Review** (Advanced)	**Derby**
16 June	**Disposal of Surplus Land – general considerations and issues** (Advanced)	**Nottingham**
24 June	**Adult Social Care Update** (Intermediate)	**Sheffield**
28 June	**Employment** (All levels)	**Nottingham**
30 June	**Procurement Update** (Intermediate)	**Leicester**

Detailed course outlines will be available on www.emlawshare.co.uk

Cancellations and non–attendance

If you cannot attend a course you are booked on you should cancel by emailing julie.scheller@freeths.co.uk or phone 0845 272 5701. Your email should state clearly the title and date of the course and should be sent at least 48 hours before the course is due to start. We appreciate that this may not be possible in all circumstances, but if you fail to attend and fail to give the required notice on four occasions in a twelve month period we reserve the right to require a £50 deposit before accepting any future bookings from you. The deposit will be returned if you do attend.

N.B. It is your responsibility to sign in at the course and if you do not you are deemed to be absent for the purposes of this policy.

New approach to continuing competence

From November 2016 the SRA has removed the requirement for solicitors to undertake 16 hours per year of CPD and have replaced this with a requirement for individuals to make an annual declaration confirming they have reflected on their practice and addressed any identified learning and development needs.

EM Lawshare has considered the Competence Statement and the new requirements in detail and tailored the 2016/17 Training Programme to be fit for purpose under the new approach.

Detailed course outlines will be available on www.emlawshare.co.uk

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