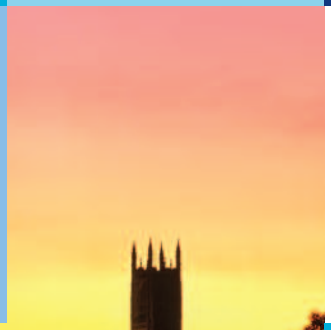
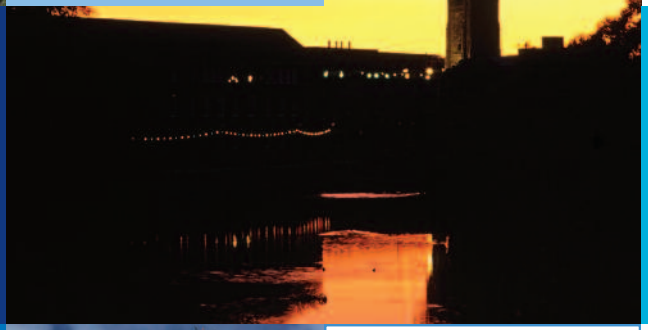
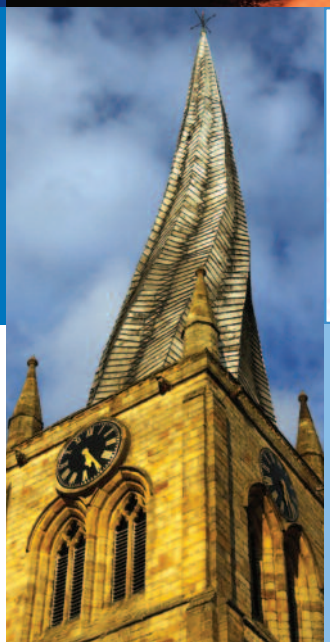
ConsortEM

The newsletter for EM LawShare
Autumn 2016







EM LawShare
emlawshare.co.uk

Welcome

Welcome to the autumn edition of ConsortEM.

We are putting the finishing touches to the arrangements for the conference in October and we can now reveal that the key speaker will be Tom Cheesewright an 'applied futurist'. If, like us, you have no idea what one of these is, please read the illuminating and fascinating article on page 4. If you have not already booked a place, see page 5 for more details. We are confident it will be our best conference yet.

There are some great articles in this edition and several relate to the issue of how to try to generate funds and work more effectively in these times of austerity. Then there is Brexit which our Spotlight contributor, Ruth Dennis from Ashfield District Council, predicts will 'keep lawyers across all sectors very busy for a considerable time' (page 14). Ruth also gives her candid views on the assets of community value legislation while its detail and implications are described on pages 10 and 11.

Hopefully, whether it is through the conference or newsletter and other benefits that EM LawShare offers, we are meeting your needs. If we are not, or there are things you wish we provided but do not, then please let us know.

The almost country-wide coverage we now have (see page 3) suggests that we are mostly getting it right and, with 111 members, we are far and away the largest consortium of our type. However, that does not mean we cannot learn from others and Stuart recently met up with his counterpart from the North West Legal Consortium to exchange information and ideas on how we both work.

There will be opportunities to speak to us at the conference (see page 3) but do email either of us at any time with any ideas or comments you may have.

We are really looking forward to seeing as many of you as possible at the conference.

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Contact our website administrator senara.shapland@brownejacobson.com for more information.

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Member news

New members

We have had three new members since our last edition: Hertfordshire County Council, Stafford Borough Council and Plymouth City Council, bringing our total number to 111. The EM LawShare membership now stretches from Durham in the north to Plymouth in the south and from Herefordshire in the west to Suffolk in the east.

Practice management group?

One of the ideas that came out of our recent meeting with our North West Legal Consortium counterparts was about whether to establish a practice management group. They have set one up this year and found it useful for discussing and swapping information on such issues as:

- case management systems;
- business continuity plans;
- performance measurement; and
- benchmarking.

If you or your practice manager, if you are lucky enough to have one, would be interested in being part of such a group, please email our coordinator, Stuart Leslie at sl.emlawshare@yahoo.com.

Feedback at the conference

The 2016 EM LawShare annual conference is taking place on Friday 14 October at Holywell Park, Loughborough University. It will be a fantastic opportunity to hear from some of the country's leading legal minds and network with colleagues at an outstanding venue.

If you are coming to the conference, please come and tell our ambassadors what you think of EM LawShare. The ambassadors will all be members of the management panel or delivery group and you will be able to identify them by their distinctive badges. We welcome all points of view, both good and bad, and, if requested, will treat them with complete confidence.

The new framework contract – any ideas?

Though it hardly seems any time at all since we let the last framework contract to appoint the six partner firms, we have just started the process of preparing to let the contract for 2018–2022. So this is an ideal time for you to tell us about:

- any difficulties you have had with the present arrangement;
- what you think works well; and
- any new ideas you have for added value that we could ask the partner firms to provide.

Any comments or ideas will be welcome.
Please email them to: sl.emlawshare@yahoo.com.

Conference special
To boldly go – five key trends that will revolutionise the way you work

Much has been written recently about the London Borough of Enfield's decision to use, as the London Evening Standard put it, a 'robotic supercomputer' instead of humans to deliver frontline services. These services are delivered by 'Amelia' an avatar that answers questions online or on the phone. In the words of its developers IPSoft, she answers 'as a human would'. This is not your usual sort of automatic answering service or website steering callers and users towards either human or web-based information. The critical difference is that these systems actually digest all the available information and create their own answers to questions in plain English.

This is the first time this software has been used in the public sector in the UK and it has been suggested that Amelia is capable of generating savings of over 60 per cent over human equivalents. One of Amelia's key features is the ability to learn; if Amelia cannot answer a question it is referred to a human operator and in the process Amelia learns from the exchange. As the Evening Standard article points out, Enfield's director of finance, resource and customer services, said there were 'no plans' to sack any of its 50 call centre workers,' but he gave no guarantees.

Closer to home for in-house lawyers, the substitution of artificial intelligence systems for call centre staff may seem a remote concern and arguably continues a trend begun with deindustrialisation as jobs were replaced by technology in manufacturing. That process is now being repeated in the factories of the service economy, call centres and warehouses but it potentially goes beyond that and represents a threat to professions, and at the very least will radically alter the way that professional services are delivered and by whom, or what, in the future.

Artificial intelligence is just one small part of the changes that will affect the workplace for in-house lawyers in the future. According to Tom Cheesewright, applied futurist, there are five key trends that will shape our working lives, not over the next twenty years but, with the speed of technological advance, in as short a timeframe as the next ten years.

The ubiquity of technology

Over the next ten years, computers will start to disappear into the fabric of our environment. Everything around us will be increasingly connected as the price of computing power gets so low that even the tiniest piece of utility justifies its application. More and more roles that it made sense for a human to undertake will become practical for machines.

Expectations of performance

When everything is digital, performance becomes easier to measure and expectations of that performance rise. Because Amazon can deliver in a couple of hours, we expect everyone else to do the same. Evidence suggests our expectations are portable: what we get at home, we will want in the workplace.

Borders fall, scale changes

Despite Brexit, borders are falling all around the world: where once it took years and cost millions to bring a brand to a new country, it can now be done in weeks for much less. Organisations are interacting with lower friction than ever before, changing the nature of what it means to be large or integrated.

Diversity grows

Inspired by the constant clash of ideas online and empowered by ubiquitous access to information and technology, we are innovating at rates unseen before. This means there is simply more: more choice; more channels of communication and more ways of doing things. Navigating this morass is the challenge.

Agility is the imperative

With accelerated innovation, the onus changes from optimisation to adaptation. No longer can we spend ten years doing what we do just that little bit better. Now we have to be ready to change it altogether to fit the emerging new world.

Tom Cheesewright will be speaking at the forthcoming EM LawShare conference (free to EM LawShare local authority members) on 14 October 2016 at Loughborough University.

If you want to hear more from Tom, email alanna.redfern@geldards.com to book your place at the conference.

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A fair deal for pensions or an added complication?

The Department for Communities and Local Government (DCLG) recently unveiled its long awaited consultation on implementing the reformed Fair Deal in the Local Government Pension Scheme (LGPS). The consultation closed on 20 August 2016.

Background

A Fair Deal for Staff Pensions: staff transfers from central government (New Fair Deal) was the revised guidance issued in 2013 to central government departments and agencies, the NHS and other parts of the public sector under the control of government ministers. On compulsory transfers under New Fair Deal, transferred staff have to be given continued access to the public service pension scheme they participated in immediately before transfer.

This is in contrast to the Best Value Staff Transfers (Pensions) Direction 2007 (Best Value Direction) which requires local and other best value authorities to ensure that the pension benefits of transferring staff are protected by the contractor either becoming an admission body in the LGPS or the contractor offering a pension scheme that is either broadly comparable to or better than the LGPS.

The Fair Deal changes

Under the consultation, DCLG is proposing to remove the option for contractors to provide a broadly comparable pension scheme on transfer. In line with New Fair Deal, contractors will be required to become an admission body in the LGPS. The Best Value Direction will then be revoked in due course.

The proposals amend the LGPS regulations by introducing a new category of employee, known as a 'protected transferee', and

a new category of scheme employer, known as a 'protected transferee employer'. A protected transferee employer will be required under the LGPS regulations to enter into an admission agreement with the administering authority of the LGPS fund that the employees participated in immediately before being compulsorily transferred. The two exceptions to this are where:

- the new employer already participates in a public service pension scheme, such as on local authority staff transferring to a NHS body. In such transfers, DCLG presumably expects that the transferring staff will be provided with membership of the NHS pension scheme; and
- the new employer is a 'designation' body, so is required to designate which of its employees are eligible for LGPS membership. In this case, rather than entering into an admission agreement, the new employer, under the amended LGPS regulations, will be required to designate protected transferees as being eligible for the LGPS.

But do the draft provisions fully align with New Fair Deal?

In a number of respects, the proposals are not aligned. For example, there is no requirement on a second or subsequent generation transfer to put transferring employees back into the LGPS if they currently participate in an incumbent contractor's broadly comparable pension scheme. This is out of step with New Fair Deal.

The consultation document suggests that it would require explicit statutory powers for local government to require employers on a retender to return the relevant transferring employees to the LGPS if they moved out of the scheme under an earlier transfer to which the Best Value Direction applied. On a retender where employees currently participate in the incumbent provider's broadly comparable pension scheme, new providers can access the LGPS by seeking admitted body status, but there will be no requirement for them to do so.

The provisions also seem to extend to employers not currently caught by New Fair Deal or the Best Value Direction. 'Protected transferees' covers all LGPS active or eligible employees who are employed by scheme employers or admission bodies, excluding the police and higher education employers, and who are compulsorily transferred to a different employer who does not offer membership of a public service pension scheme. This is wide enough to catch existing admission bodies that would ordinarily be outside the scope of New Fair Deal and the Best Value Direction. Was this what was intended?

It will be interesting to see whether these proposed amendments to the LGPS regulations are revised and refined now that the consultation process has come to an end and once the feedback is evaluated.

Other changes being proposed

As well as amending the LGPS regulations to implement New Fair Deal, the consultation sets out a number of other proposed changes to the legislation in relation to the government's policy on pension freedom and choice, and to address issues of good stewardship of the scheme. The main changes being proposed are:

- the regulations will be expressly amended so that it is put beyond doubt that an admission agreement can have retrospective effect. This will be an important and helpful change for contractors when entering into service contracts where it has not been possible to get the admission agreement in place before the services are transferred over or where the transfer date has had to be delayed due to getting the admission agreement in place;
- a new set of options for accessing benefits accrued through the LGPS additional voluntary contribution arrangements. A member with such benefits will, depending on when they access those benefits, have the choice to use them for one or more lump sums, to purchase additional pension, to purchase an annuity or to transfer the benefits into another appropriate pension arrangement, for example, to take advantage of flexi-access drawdown;
- the regulations will be amended to allow for exit credits to be paid to employers that no longer have active members in the fund. This will mean that where a surplus is revealed on an exit valuation, the fund will be required to pay that surplus to the exiting employer within one month of the exiting employer ceasing to be a scheme employer or such longer period as is agreed. This is positive for scheme employers in terms of preventing a trapped surplus arising in the fund. However, it will mean that administering authorities can reasonably require scheme employers, particularly admission bodies, to generously fund their pension liabilities up front; and
- the requirement for employer consent to early retirement will be removed for deferred members whose pension benefits were earnt under the 2008 scheme and who retire between the ages of 55 and 60. As these benefits are actuarially reduced they are cost neutral to the fund so there is no need for the consent requirement.

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Challenges in ICT disaggregated service models

The disaggregated service model is often mooted as a replacement for the traditional outsourcing to a single prime supplier. The traditional approach is replaced with a multi-supplier, best of breed philosophy. This requires a change in philosophy regarding information and communication technology (ICT) service delivery and should not be underestimated or undertaken lightly.

Under the traditional single supplier model, an authority enters into a long-term arrangement with a large systems integrator supplier who is responsible for the end-to-end service provision. The benefits of these types of arrangements include:

- fewer management overheads for the authority;
- a supplier who may have greater capability or capacity than the in-house resource; and
- a supplier who is likely to pass the financial selection criteria.

However, reliance on a large systems integrator supplier for all of an authority's ICT needs has well-documented drawbacks. These include the lack of flexibility in taking on new and emerging technology that arises through the course of the contract as well as the associated cost benefits. It also takes in the difficulty of moving away from the systems integrator supplier, given the business criticality of the service and technology lock-in.

The disaggregated ICT service model is a way of working that has been given particular focus in central government as a result of increasing dissatisfaction with the traditional approach to outsourcing information and communication technology services.

Under the disaggregated service model, an authority enters into separate parallel arrangements with different suppliers for different parts of the outsourced services, sometimes referred to as the 'service tower' model. The benefits of this model include a reduction in risk to service delivery, an ability to award shorter and smaller contracts enabling small and medium-sized enterprises to qualify and increased flexibility for innovation and quality service delivery.

Contractual challenges

The disaggregated service model is not new and has been at the forefront of central government procurement strategy for several years. With it, several inevitable key contractual challenges arise that would not otherwise exist to the same extent under the traditional approach.

Integration and implementing an effective SIAM

One of the most significant challenges is ensuring effective and complete integration between the different solutions proposed by suppliers, commonly known as the Service Integration and Management (SIAM) function. Who takes this responsibility, how to resource it and the implications of a lacklustre SIAM function are all questions that should be considered prior to undertaking any procurement.

There are three key options:

- retain the service integration and management function in-house;
- outsource the SIAM function; or
- adopt a hybrid model.

Option one relies on the in-house team having the requisite skills and experience to design and integrate the technology as well as the capacity to manage the suppliers, with the authority retaining the service integration risk. The second option relies on the authority procuring compatible services at the outset in order for the SIAM supplier to be successful in connecting them together to make the end-to-end service work. As such, an element of the risk will always sit with the authority regardless of which option is taken. Perhaps as a result, option three is becoming the most common.

Dependencies

It is important that the authority has a clear mechanism for designing, defining and agreeing dependencies with all of the relevant parties which will inevitably exist in a disaggregated service model. There are a number of contractual mechanisms that can be developed to achieve this, such as:

- a dependency matrix whereby all suppliers buy in to the dependencies; or
- meetings with all bidders to discuss and agree obligations and dependencies.

Either way, discussions around dependencies are likely to take time and this should be sufficiently factored into any procurement timetable.

Simultaneous contract signature

Simultaneous contract signature can be a valuable lever for the authority, although there may be procurement or resourcing issues as to why this is not practical for all projects. It helps to keep dialogue focused and allows the authority to back off the different dependencies before contracting with any one supplier. This ensures that when the contractual starting gun is triggered, all parties are on a level playing field and can focus on delivery in order to achieve the identified business outcomes.

Transformation

The length of time and cost of transformation will be of key importance to any authority seeking to remove itself from its single supplier legacy arrangement. In particular, the need to ensure that service levels are not interrupted and targeted cost reductions do actually arrive will be key considerations. Authorities want to avoid a situation where they have to rely on extensions to their single supplier arrangement due to inadequate planning – the worst case scenario. Planning the transformation activities early and ensuring that there are quality governance structures in place, such as joint meetings, reviews and reports, as well as an effective escalation route, will be of paramount importance for any contractual arrangements.

Encouraging key supplier behaviours

As with any multi-supplier model, the authority will need to work hard to foster a cooperative, collaborative and open environment, often where the suppliers with whom they have contracted are in direct competition with each other on other projects. The contractual arrangements will, therefore, need to drive the correct behaviours in the language that all suppliers respond to: financial incentives.

Current landscape and comment

The Government Digital Service has previously clarified that use of the disaggregated service model is not a government policy and has commented that, quite rightly, the focus should always be on user requirements rather than fitting requirements to a particular service model or procurement strategy.

Focusing on identifying and, importantly, being able to articulate business user needs should form a key consideration in any initial business case, even before the procurement strategy or contract structure has been considered. Once these user needs have been articulated, the project aims can be properly formulated. Any procurement strategy and service model should be structured to ensure that these project aims are successfully delivered, in time and on budget. In short, the objectives of a project driven by business user needs should be placed at the heart of any transaction, with the law as a tool for achieving them.

It appears that there is no imminent shift away from the service tower model on the horizon, with several major projects under way in the UK that adhere to this approach, including procurements by Transport for London, the Department of Work and Pensions, and the Metropolitan Police who selected Accenture for its application management tower earlier this year. There is no reason why delivering information and communication technology services in smaller, modular services cannot achieve business outcomes that put the business user needs at the heart of the project, when supported by clearly articulated requirements and robust contractual arrangements. The disaggregated service model, therefore, remains a viable, available service model. While the disaggregated service model has typically been most used in central government to date, we are now seeing local government keen to use the model and it will be interesting to watch how this trend develops.

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Assets of community value

Legislation on assets of community value, the Localism Act 2011 and the Assets of Community Value (England) Regulations 2012, is intended to empower local communities to protect assets of value to the community by ensuring that they know of intended disposals and have time to bid for those assets. As a result, local authorities in England have acquired responsibilities for maintaining lists of assets of community value and lists of unsuccessful nominations for inclusion on those lists. They are also liable to pay compensation to landowners who suffer losses as a result of their properties being listed as assets of community value. Local authorities should ensure that they are familiar both with the legislation and the implications of case law so as to manage pressure on their resources and avoid challenges to their decisions.

Community nominations to include land on a local authority's list may be made by a parish council in the area or a voluntary or community body with a local connection. If a community nomination is made relating to land which is in a local authority's area and is of community value, the local authority must include it on the list. This is subject to exceptions specified in the Assets of Community Value Regulations, such as residences.

Section 88 of the Localism Act defines land as being of community value in two circumstances. One is that a current non-ancillary use of the land furthers the social wellbeing or social interests of the local community and it is realistic to think that there can continue to be non-ancillary use which will do so. The other is that a non-ancillary use in the recent past furthered the social wellbeing or interests of the local community and it is realistic to think that a non-ancillary use could do so in the next five years. Social interests for the purposes of section 88 include cultural, recreational and sporting interests.

For a landowner, the main implications of land being an asset of community value are notification and moratorium requirements. The landowner must notify the local authority of their intention to dispose of the land. There is then an interim moratorium period of six weeks when a community interest group, as defined in the regulations, can request to be treated as a potential bidder. If a community interest group does this, a full moratorium period of six months applies during which the owner cannot dispose of the land other than to a community interest group. The intention is to ensure that community interest groups are aware of the intended disposal and have time to prepare a bid.

In recognition of the potential impact on landowners, the Assets of Community Value Regulations give them the right to seek compensation from the local authority for loss or expense suffered as a result of the listing of their land as an asset of community value. Landowners have rights to require local authorities to review decisions to include land on their lists and decisions about compensation. If they are dissatisfied with the outcome of a review, they may appeal to the First-Tier Tribunal.

The legislation has imposed detailed requirements but the cases heard by the First-Tier Tribunal General Regulatory Chamber have given added insight into aspects that can be contentious. Some interesting points have emerged:

- The planning position is relevant to the question of whether it is realistic to think that a property could be used for the social wellbeing or social interests of the local community. In *Haddon Property Development Ltd v Cheshire East Council and Wychwood Community Group* CR/2015/0017, it was found that this was not realistic for a golf clubhouse which had been built with temporary planning permission and was an unauthorised development when it was nominated as an asset of community value.
- A fact-specific investigation must determine what comprises the land or building against which the statutory tests must be applied. The statutory tests should not be applied separately to elements of premises which have such a physical and functional relationship with each other as to make it necessary for them to be viewed as a whole. Many pubs have been listed as assets of community value and several have featured in cases before the First-Tier Tribunal.

  In *Kicking Horse Ltd & Anor v London Borough of Camden & Anor* CR/2015/0012, it was argued on behalf of the owners that the ground floor of a pub met the statutory criteria for an asset of community value but that the basement, garden, first floor and second floor did not. The tribunal described this as leading to the 'frankly absurd' result that the community would be given the chance to buy the ground floor but not the cellar, which might be essential to the operation of the pub. The tribunal decided that this was not what Parliament intended. It found that the entirety of the building, together with the garden, comprised a single set of premises and met the criteria for listing as an asset of community value.

  Similarly, in *Wellington Pub Company v The Royal Borough of Kensington and Chelsea* CR/2015/0007, the tribunal found that there was a sufficient physical and functional relationship between residential accommodation and a pub in the same premises. The local authority correctly treated the whole premises as comprising a building that was only partly used as a residence. The premises could therefore be an asset of community value and the exemption for residential premises was not applicable.

- Religious observances were not within the scope of 'social wellbeing and social interests of the community' for the purposes of the Localism Act 2011 (*The General Conference of the New Church v Bristol City Council* CR/2014/0013).
- It is not necessary to have a worked out business plan to show a realistic prospect of future use for the social wellbeing or social interests of the local community. What is realistic may admit a number of possibilities, none of which needs to be the most likely outcome *(Evenden Estates v Brighton and Hove City Council* CR/2014/0015). In *Martin Moat v North Lincolnshire District Council* and *Keadby and Althorpe Parish Council* CR/2014/0014, the tribunal referred to evidence of community intent which made it 'more than fanciful' that the premises could further the social wellbeing or social interests of the local community.
- A landowner's intentions to develop land and to restrict public access will not necessarily prevent the land from being listed as an asset of community value. In *Banner Homes Limited v St Albans City and District Council* CR/2014/0018, the landowner erected a fence and signs saying 'private land no unauthorised access'. Nevertheless, the tribunal decided that, given the long history of peaceable, socially beneficial use of the land and the previous views of its owners, it was not fanciful to think that in the next five years there could be a similar use of the land.

A report published by the House of Commons Communities and Local Government Committee in 2015 on community rights commented that the community right to bid process had achieved some success because the phase of listing land as an asset of community value was relatively straightforward but that there must be scope for enhancing people's chances of success with the bidding phase. As communities continue to exercise their rights, local authorities need to be aware of their obligations and to take account of any lessons to be learned from the tribunal cases.

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Councils as investors and property developers

As the financial position of local authorities has weakened in recent years, they have increasingly had to find ways of generating new sources of revenue to make up for budget cuts.

One area local authorities have turned to is investing in commercial property. As *Public Finance* magazine reported 'Guests staying at a Travelodge hotel in Edinburgh's picturesque Learmouth Terrace might be slightly surprised to learn that it is the property of Mansfield District Council ... Similarly, staff working at an insurance broker in Chatham, Kent may not be aware that their landlord ... is Luton Borough Council'. This pattern is being duplicated across the country with local authorities snapping up shopping centres, car parks and office premises both in and outside their areas.

Local authority participation in commercial property deals goes beyond pure ownership to include:

- investing jointly with the private sector to bring forward new development such as business parks;
- turning around the fortunes of existing tired developments, including shopping centres which have lost ground to online retailers or newer competing developments; or
- entering into a more speculative development arrangement harnessing a local authority's good covenant, that is its creditworthiness, to secure capital investment that can be turned into a healthy long term revenue stream. At least, that is the plan!

It is not all about the money!

Although income generation is an important factor it is not all about making money, as the *Estate Gazette* reported recently. It is as much about local authorities taking back the control of their town centres, for example acquiring a shopping centre from a pension scheme investor with limited appetite for new investment. 'For a lot of local authorities they are taking centres that, after being bought 10 years ago, have been metaphorically stuck in the freezer.' '...a lot of local authorities still value bricks and mortar, and retail space is often at the heart of their town or city. It's a great way for them to improve the value of a town and persuade more private investors to develop there.'

What is the legal position?

Powers

Section 1 of the Localism Act 2011, the general power of competence, is widely cited as the relevant power, that is, the power to do anything any individual may do. However, it is worth bearing in mind that the general power of competence is not completely unfettered. Section 4 limits a local authority's use of the power to act commercially where it does so through a company. You also need to be wary of any pre-commencement limitations on the use of the power. Although the use of the general power of competence may overlap with the scope of a pre-commencement power, it is limited to the same extent as the pre-commencement power is limited. For example, in the property context, the Local Authorities Land Act 1963 empowers a local authority to advance money to any person to acquire land, erect any building or carry out any work on land. However, this is conditional on the loan being secured by way of a mortgage. Any attempt to rely instead on the general power of competence for these purposes would likewise be constrained by virtue of the pre-commencement limitation referred to above.

Underlying public law constraints

The mere existence of a power is not enough to guarantee that a council's decision to invest will not be free of challenge. Councils still have to exercise their powers reasonably. This includes having regard to the implicit fiduciary duty owed to their council tax payers. Recent research conducted by *Public Finance* magazine suggests there is a significant gap between local authorities' ambitions and their ability to deliver them. In particular, there seems to be a lack of understanding as to what the market needs and the risks involved. In a buoyant market these risks are often hidden or downplayed.

Taking a punt?

A typical example of a more speculative approach to investing is the 'income strip' deal. In this scenario, a local authority agrees with a developer and their funder to take a long lease on land, say 40 years, whereby:

- the rents are fixed subject to retail prices increasing;
- there is no right to assign; and
- at the end of the lease term the council has the option to purchase the freehold for £1.

The reason funders are keen to lend is because local authorities would never be allowed to default and therefore the debt is virtually risk free.

From the council's perspective, this is attractive as it allows it to generate an income stream through the rent from the premises and potentially 100 per cent of the business rates from 2020 onwards as they relate to the premises.

However, the catch with such arrangements is that they are predicated on assumptions about the future. If the underlying economic circumstances change and the rental income were to drop, this could create difficulties. In the words of Warren Buffett, 'you only find out who is swimming naked when the tide goes out.' What had begun as a highly attractive and lucrative investment could become very costly very quickly.

Structures and options

Local authorities have two main investment options available to them. They can invest in a vehicle that purchases assets as a shareholder or purchase the assets directly. When adopting the latter approach, direct acquisition, if they are investing for a return then they could rely on section 12 of the Local Government Act 2003 and the accompanying statutory guidance issued by the Department of Communities and Local Government. However, according to the guidance, those powers cannot be used to borrow to invest solely to make a profit. Arguably, as the Local Government Act 2003 is pre-existing legislation, any constraints on its use cannot be remedied by relying on section 1 of the Localism Act 2011: the general power of competence. If the investment is in a vehicle, for example, as shareholder they could instead rely on section 95 of the Local Government Act 2003 or the Section 1 power.

State aid

Finally, the use of state resources must be applied carefully so as not to infringe state aid restrictions. Where a local authority is investing, for example in a property joint venture arrangement, it needs to be careful to ensure that the terms upon which finance is provided are equivalent to the terms that a private sector investor would lend or invest. In terms of lending, the EU Commission has issued guidance on the interest rates that a local authority should impose which are based on a combination of the lender's credit rating and the quality of the security for the debt they provide.

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Spotlight on ...

Ruth Dennis

Assistant Chief Executive (Governance) and Monitoring Officer, Ashfield District Council

In each edition of ConsortEM, we shine a light on a member to show the variety of roles within the consortium. This month, Ruth provides an insight into working as Assistant Chief Executive (Governance) and Monitoring Officer.

How long have you been with Ashfield District Council?

I have been with Ashfield since December 2000. I started off as an assistant solicitor and have had various roles before becoming Assistant Chief Executive (Governance) and Monitoring Officer in 2010.

What does your role entail?

In addition to my corporate governance and statutory monitoring officer role, I am responsible for democratic services, scrutiny, elections and the shared legal service in partnership with Mansfield District Council.

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

I report to the Chief Executive and am part of a corporate leadership team of seven people.

Ashfield has hosted the shared legal service since 2012. The legal team is made up of 21 people providing both councils with the full range of legal services. The shared service ensures that the two councils can retain an affordable, effective, in-house legal provision.

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

Earlier this year the council decided to terminate the management agreement with its arm's-length management organisation and return to a directly delivered housing function. I am leading the legal and governance aspects of the project which is challenging because of the tight timeframe we have been set and the multitude of issues that need to be dealt with. The council sees the return of the housing function as an exciting opportunity which will generate savings and efficiencies without reducing the level of service to tenants.

What regulatory issues are on the horizon?

Brexit! The legal consequences and legislative changes which will be needed as a result of exiting the European Union are going to keep lawyers across all sectors very busy for a considerable time to come.

How does Ashfield District Council compare with other places you have worked?

I trained in private practice before taking the leap into the public sector. I worked at Oadby and Wigston Borough Council (OWBC) for two years before moving to Ashfield. OWBC was a great place to learn about being a local authority lawyer. It is a small council and, as part of a legal team of two, I had to do a wide variety of legal, governance and elections work. I learnt a huge amount in a short space of time which has served me well.

Ashfield has had its challenges and working here has never been dull. We are in the early stages of a really exciting phase with a new CEO and the housing function coming back in-house, so I cannot see my job becoming dull or unchallenging any time soon.

What law would you like to see changed?

Only one?

The process relating to nominations for Assets of Community Value. Ashfield has had a relatively large number of nominations recently and I carry out reviews and compensation claims. In my opinion the public was led to believe that this legislation would save their community assets, the clue being in the title: Community Right to Buy. However, in reality, the vast majority of community groups are unable to fund the purchase and running of the facilities. In my experience, what often happens is a redevelopment or sale is delayed to the annoyance of the owner, the community still loses the asset. The council, and therefore ultimately the public, is responsible for any consequential compensation payments. There appears to be a lot of effort for very little public gain most of the time.

What is the best piece of advice you have ever received?

I have a tendency to want everything to be perfect so, in an attempt to reduce my stress levels and to get me to see things in perspective, I was encouraged to ask myself: 'Is it good enough?' It was not intended to mean that slapdash work is ok, it was intended to make me realise that perfection in everything, all of the time, is not always necessary. You need to be satisfied that each job has been done properly to an acceptable standard and is therefore 'good enough', and accept that you may not be able to make it perfect and some things need to be closer to perfect than others.

Finally, two truths and one lie in any order.

I once performed in a dance show to Beyonce's Crazy in Love.

Derby County Football Club will be promoted to the Premier League (disclaimer: the year of promotion cannot be guaranteed).

My husband has appeared in the TV programmes Doctors and Dalziel and Pascoe.

Brexit, localism and devolution

Many people were surprised by the outcome of the referendum on leaving the European Union and the ensuing political uncertainty. Consequences have included the resignation of David Cameron and the leadership challenge to Jeremy Corbyn, among other exits.

Before the referendum few people would have heard of Article 50 of the Treaty on the European Union. However, the implications of Brexit must now be the subject of discussion in many households on a regular basis.

The Treaty on the European Union

The clock only begins ticking on Britain's exit once the Article 50 Notice is served. There is then a period of two years within which we can negotiate the terms of our exit. If nothing is agreed, all 27 EU countries will have to agree to extend the timeframe or the EU Treaties will cease to have effect in the UK. The draft deal must be put to European Council leaders, and needs approval from at least 20 countries covering 65 per cent of the EU population before the deal can be ratified. The prospects of the UK being able to agree a deal within two years look slim. It took Greenland three years to negotiate an exit, including an agreement over fishing rights.

Theresa May appears to have ruled out a second referendum: 'Brexit means Brexit'. But questions have been raised about whether the Prime Minister can serve the notice without having a resolution of Parliament and a court challenge on this issue is likely to be heard in October.

The petition, which was started before the result and calls for a second referendum in the event of the vote being less than 60 per cent from a turnout of less than 75 per cent, now has more than 4 million signatures and was debated on 5 September 2016 with no outcome flowing from over 70 pages of Hansard.

A private member's bill, Terms of Withdrawal from EU (Referendum) Bill 2016/17, has had its first reading. This requires a referendum to endorse the draft exit package proposed by the government for withdrawal or to allow a decision to remain a member prior to the UK giving notice under Article 50.

Theresa May has now announced that any notice will not be served until the New Year, which means that the earliest we are likely to leave the EU is 2019. Meanwhile, the new Department for Exiting the European Union has published its senior management team under David Davis, the Secretary of State for Brexit.

Uncertainty

There is no doubt that the referendum vote has created significant economic uncertainty with the loss of foreign investment into real estate trusts and volatility in financial markets. Overall, the Economist Intelligence Unit projects a six per cent contraction in the UK economy by 2020 and an eight per cent decline in investment. This will result in rising unemployment, falling tax revenues and public debt reaching the whole of our national output. Any economic downturn is likely to translate into increased welfare needs and costs as well as more people becoming homeless at a time when local government funding is projected to fall again.

Business as usual

Although it may be tempting for some elected members to say that because Brexit means Brexit we no longer have to comply with EU directives and rules, it is necessary to remember that all of the current rules continue to apply until such time as we leave the EU. It is difficult to know what the attitude of enforcement authorities will be in the intervening period. However, there is a slim chance that we might remain and it is very unclear what we will negotiate if we do leave. More than ever, lawyers must ensure that they adopt a risk-based approach to their advice to members and officers about the implications of Brexit.

The overriding message is that local authorities need to comply with current rules and regulations until such time as they are abolished.

What will follow Brexit?

The nature of any exit is unclear. Will we try to stay within the single market by retaining membership of the European Economic Area (EEA)? If so, like Iceland and Norway, this would mean free trade with Europe but we would still be required to follow EU procurement legislation and observe rules on the free movement of goods and workers.

Switzerland is neither an EU nor an EEA member but it is part of the single market through a series of bilateral agreements, which cover many areas of trade. It still has to comply with free movement although it is not subject to EU procurement rules. Or will we secure a deal negotiating as part of the World Trade Organization?

It is hard to imagine any local government service where there will be no impact on operations from the exit but, despite that, will the effect be that great? Parliament will need to legislate for virtually all changes: what will be the priorities and how far will legislation be pared back, if at all? Where direction currently comes from the EU, could that be replaced by other organisations, such as the World Trade Organization?

Let us delve a little more deeply into some of the more direct impacts:

- **European Convention on Human Rights:** this is a completely separate issue to EU membership. We are likely to remain a signatory but steps were already in place to reduce the impact of the Human Rights Act 1998 and the European Court of Justice. This would be through a British Bill of Rights that was announced in the Queen's Speech, through which we would also withdraw from the EU Charter of Fundamental Rights.

- **Employment:** much of our employment law may flow from EU directives but some of it predates EU law; in particular, equal pay, race and disability protection. Wholesale change may lead to uncertainty for employers and, therefore, rowing back on gold-plating of legislation may be more likely, such as maternity, holiday pay and TUPE. The EU will not want UK business to have an unfair competitive advantage through more relaxed employment law protection and we may, therefore, remain subject to EU labour regulations in any deal to remain as part of the free market.

- **Immigration:** if we remain part of the free market, this implies acceptance of free movement of labour. The alternative is an extension of the points-based system proposed by the Leave campaign. That would mean minimum salary requirements and labour market tests, an immigration skills charge of about £1,000 a year per sponsored employee and the recruitment or reliance on foreign workers may need a sponsorship licence.

- **Procurement law:** procurement rules are unlikely to be abolished in their entirety, although options will depend upon what is agreed, for example, with the European Economic Area or World Trade Organization. The Conservative Government believes in private enterprise and the free market economy so we may still see rules to ensure fair treatment and possibly compulsion. Some form of state aid and competition law may well be required to ensure a level playing field and to ensure that abuse of the dominant market position and cartels are monitored, as under the World Trade Organization.

- **Funding:** the Chancellor has promised that the government will honour existing agreed projects that are reliant on EU money but this still leaves much uncertainty on future regeneration funding, since thousands of proposals are yet to receive government approval. The Local Government Association is calling on the government to guarantee that local areas will receive all the EU funding they are expecting by the end of the decade, as well as honouring commitments to match fund EU monies with domestic funding. The Treasury's proposal to review all EU funding schemes, to ensure that any ongoing funding commitments meet a UK national interest test, does not provide any confidence that funding will be matched.

- **Information law:** the General Data Protection Regulation is scheduled to come into force on 25 May 2018 and supersedes the Data Protection Act 1998. It will take immediate effect. However, unless the UK adopts data standards equivalent to those in these regulations, sharing personal data with organisations based in the EU may become more difficult.

Overall impact of Brexit

Local authorities may feel the brunt of another recession with reduced council tax and business rates, as well as increased demand for services and welfare support, just when consultation on business rates retention has been announced by Greg Clark, Secretary of State for Business, Energy and Industrial Strategy.

With the prospect of continuing austerity, local authorities need to find ways to cut costs, reduce demand for services through behaviour change, invest in ICT solutions, and generate more income. All the uncertainty and the possibility of another recession mean that there has never been a more important time to look at the impact that all these measures will have on the local economy. Thought must also be given as to how local authorities may promote their own areas to pursue economic growth for the long term, either on their own or jointly through combined authorities.

Many local authorities are looking to invest in assets in order to provide income streams that will help to secure the longer-term future of the council and replace income streams previously delivered through government grants. Trends for alternative delivery vehicles and investment in 'place' appear to be even more important in the future, particularly around collaboration with other public bodies in relation to assets, through the One Public Estate programme, and shared services, including with health. This would help to sustain the local economy, drive efficiencies and deliver better performance on outcomes for local people.

It will be interesting to see how far combined authorities deliver shared services into the future, not just between local authorities but between other public bodies where the Secretary of State devolves their functions.

Some local authorities are also exploring mergers in order to deliver efficiencies under section 15 of the Cities and Local Government Devolution Act 2016.

Local spend is important in this context, seeking to ensure that more money is spent and respent in the local economy. It is, therefore, surprising that only around one third of local authorities have sought to implement the Public Services (Social Value) Act 2012 into their commissioning and procurement activity to support local supply chains.

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Open book contract management

The Crown Commercial Service published a procurement policy note on 24 May 2016 setting out the government's approach to Open Book Contract Management (OBCM).

The purpose of this procurement policy note is to ensure that there is a proportionate and consistent approach of the open book strategy by central government departments, their executive agencies and non-departmental public bodies. This note is not mandatory for the remainder of the public sector.

What is OBCM?

OBCM is described as 'the scrutiny of a supplier's costs and margins through the reporting of, or accessing accounting data'. It is essentially a structured process for the sharing and management of charges and costs as well as operational and performance data between the public body and the client. It is hoped that this financial transparency will encourage a pattern of collaborative behaviour between public bodies and suppliers. It will mainly be used for the management and delivery of large and complex contracts which have significant value and risk attached to them.

What steps need to be taken?

The type of contract to which OBCM applies is wide-ranging but it is likely to be particularly relevant to those contracts that are secured through one of the complex procurement procedures, competitive dialogue and competitive procedure with negotiation. However, open book contract management should always be applied in a proportionate way. Guidance is issued alongside the procurement policy note which sets outs the process that organisations should follow.

In summary, the steps that organisations should take are:

1. Review contract portfolios

First, review the contract portfolio to establish which tier of OBCM to apply. This includes having decided by 24 June 2016 if third-party support is required to conduct the review. Where third-party support is required, organisations should contact the complex transactions team in the Cabinet Office to access these services. Alternatively, start the review of contract portfolios using internal resources.

2. Decide on the appropriate level of OBCM

The guidance provides a decision tool to help organisations apply contracts to one of the four available tiers. This is designed to assess the optimal level of OBCM application for the contract in question. The decision tool considers various different factors that categorise most contracts. These include:

- the scope of the contract;
- the number of service lines involved;
- the complexity of the supply chain and the number of suppliers;
- the complexity of the pricing model;
- the volumes under the contract;
- any dependencies;
- any saving potential; and
- innovations.

Those contracts falling into Tier 1 are likely to share characteristics such as a fixed scope and price with a single supplier. Whereas, on the other end of the scale, a Tier 4 contract will potentially involve a joint venture or partnership with uncertain volumes and an incentivised pricing model.

3. Use the application model

Once the correct tier has been identified, organisations should use the application model. This identifies the proportionate set of tools and processes that should be applied to that model. The tools should only be applied fully for more complex contracts; typically those in Tiers 3 or 4. They are built around agreeing and tracking allowable costs: those that qualify as being appropriate and attributable and so are valid costs within the contract. A clear definition of allowable costs is then used in assessing whether the costs incurred are reasonable.

It is important for organisations to remember that, while assigning a tier to each contract may determine the most appropriate processes to apply and how to apply them, this should not be applied in isolation. It remains critical for appropriate people within the organisation to apply a commercial sense check to the identified tool. While the model provides an answer, consideration needs to be given as to whether the tier to be allocated will deliver good benefits without being outweighed by the costs.

How will this impact your organisation?

Reviewing existing portfolios of contracts could initially be an intensive task. Assistance is available through a third-party provider but a cost of approximately £15,000 per organisation is attached to this service.

The procurement policy note suggests that organisations should have begun assessing their contract portfolios by no later than 24 June 2016 and mobilising resources to begin implementing OBCM no later than 24 July 2016. Organisations will need to commit themselves to building a strong resource capability in order to achieve a successful roll out and maintenance of good open book contract management practices.

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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
27 Sept	**Practical Session on Committees and Governance** (Advanced)	**Nottingham**
28 Sept	**Annual Local Government Update** Repeated from East Midlands (All levels)	**Cambridge**
29 Sept	**Adult Social Care Update** Repeated from Sheffield (Intermediate)	**Leicester**
4 Oct	**Licensing Update** (Intermediate)	**Nottingham**
4 Oct	**Licencing Workshop** Number limited to 25 (Intermediate)	**Nottingham**
6 Oct	**Housing Development and Regeneration** Repeated from East Midlands (Level TBC)	**Birmingham**
12 Oct	**Employment** Repeated from East Midlands (All levels)	**Birmingham**
20 Oct	**Procurement Update** Repeated from East Midlands (Intermediate)	**Sheffield**
15 Nov	**Health and Social Care Integration and New Responsibilities for Councils** (Intermediate)	**Nottingham**
17 Nov	**Practical Session on Committees and Governance** Repeated from East Midlands (Advanced)	**Birmingham**
22 Nov	**New Models including Joint Ventures and Local Authority Companies** (Advanced)	**Nottingham**

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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