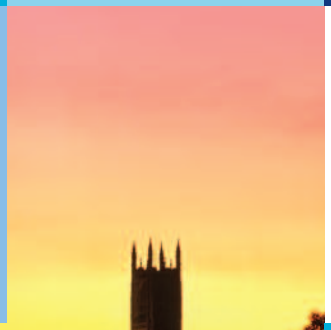
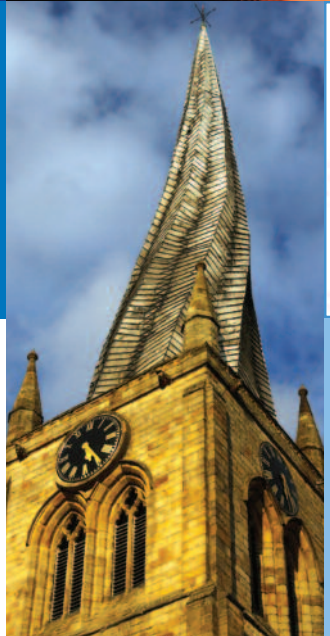
ConsortEM

The newsletter for EM LawShare
Spring 2017





EM LawShare
emlawshare.co.uk

Welcome

It is getting increasingly difficult to come up with new initiatives but we were very pleased with our first EM LawShare sponsored lecture which was held on 15 March in the hallowed halls of Nottingham University and delivered by Professor Stephen Bailey, editor of *Cross on Local Government*.

The lecture, entitled 'Reflections on Local Government over the Past Year', attracted over 40 delegates. They were rewarded with an informative and insightful talk and were also wined (or orange juiced), dined (well pizza and tasty sarnies) and serenaded by a jazz band while swapping gossip. What more could you possibly want from an evening?

Such was the success of the event that we are proposing to make a lecture by a prominent academic a biennial feature of the EM LawShare calendar. Thanks for coming up with the idea and doing the lion's share of the organising must go to John Riddell at Weightmans, ably assisted by Fiona Pritchard at Freeths.

However, we do not pretend that such lectures will rival the LLG Weekend School which many of you may have attended at Warwick University by the time this edition comes out. Hopefully you said hello to the representatives from our six partner firms who had a strong presence there.

We have recently been in contact with LLG local branch representatives in the East Midlands to see how we can positively work together in the same way as we have done in the last year with the North West Legal Consortium. We will try and come up with new ideas. So, the next initiative may not be far off...

Finally, did we mention the Development Network scheme to help recruit, develop and retain hard to find solicitors? Well we must leave something for the next edition!

JAYNE FRANCIS WARD
Chair of the EM LawShare Management Panel

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Member news

New members

We have four new members since out last edition, North Lincolnshire Council, Solihull Metropolitan Borough Council, Leicester University and Welwyn and Hatfield Borough Council. This brings the total membership of the consortium to 118.

A full list of members appears on our website.

Practical Law and Westlaw discount offer

In 2015 we agreed a three-year discount deal with Thomson Reuters for the EM LawShare members who took both Practical Law and Westlaw. To take advantage of the final year of that deal you must be signed up to it before 1 May 2017. Thirty-three members currently subscribe and are benefiting from the reduced rates secured under the deal. If just five more members sign up before May, all those subscribing to it would get even bigger discounts.

If you want further details please contact the EM LawShare Coordinator, Stuart Leslie, by emailing him a SL.emlawshare@yahoo.com.

Please note though that any current agreement you have with Thomson Reuters for Practical Law or Westlaw must have expired before 1 May 2017 for you to be eligible. We hope to negotiate a new deal with Thomson Reuters and are currently in discussions with them about this.

New framework agreement

The current agreement with our six partner firms ends in just over a year and we have already started work on procuring a new four-year framework agreement running from 1 April 2018. On the present timetable, we envisage placing an OJEU notice, alerting interested firms, in May/June this year, inviting selected firms to tender in September/October 2017, interviewing in January 2018 and appointing the new partner firms in February 2018. We will keep you informed through the newsletter or bulletins at each major stage of the process.

Local Government Diploma sponsorship

For the third year running, Browne Jacobson and the other five partner firms have agreed to sponsor two solicitors from EM LawShare members on the Local Government Diploma course which starts in September 2017. If you are interested, please keep a look out for further details which are likely to be sent out in May.

When good companies go bad. How local authorities should deal with companies they control or influence

Local authorities entering joint venture (JV) arrangements, either with other public authorities as part of shared service deals or with private sector partners who possess specialist skills, are becoming increasingly commonplace.

Like a marriage, the creation of a JV is often viewed by authorities through rose tinted glasses. There is an expectation that working together will be a happy and mutually beneficial experience, leading to the generation of commercial income, improved services or regeneration in a blighted low-value land area.

Those who bring JV proposals to the lawyer's door are generally not lawyers and may not have in mind all the issues that need to be considered before a JV agreement is finalised.

The role of the lawyer is to take a long, hard look at the proposed relationship and consider every aspect of how it will work in practice. Some of the issues that need to be considered may be uncomfortable or contentious.

For example:

- What commitments, in terms of management time and day-to-day support, will each partner make?
- What will happen if members of the company seek to make the company act beyond the scope of its role?
- What steps can be taken to ensure nominee directors do not 'go rogue' and act outside an authority's policies?
- What will happen if the service relationship between the company and local authority is not properly handled?
- How can the relationship with the company be terminated?
- What will happen to assets, employees etc if the company is wound-up?

A lawyer's presence at the JV marriage is not a popular one, but the very mixed experiences of local authorities and JV entities means that a hard-headed approach needs to be taken.

There is a lack of detailed analysis concerning the rate of success and failure of local authority sponsored companies, with published information tending to focus on the arrangements that have gone badly wrong. Take for example the case of Southwest One, an outsourcing arrangement to deliver back-office services through a company set up between Somerset County Council, Taunton Borough Council, Avon and Somerset Police and IBM, which ended in legal proceedings when a dispute arose as to whether the arrangement was on target to deliver promised costs savings. In situations like this, the terms of the agreement between the parties are absolutely crucial.

Clients from both the public and private sector often say 'we don't need to talk about that' because they believe that their relationship will be successful. In many cases it will be, but it is still important to have a robust agreement in place to cover those occasions where things do not go according to plan.

It is difficult to give generic advice to cover all scenarios, but it is possible to develop a checklist of legal and commercial questions that need to be asked. Below are suggestions for some of the things you need to consider:

- What are the essential reserved matters which need to go into the members or shareholder agreement? At the very least, these need to allow for unanimous agreement on the nominee taking any steps outside of its core business, entering into transactions above a pre-ordained level, entering into major long-term financial commitments, and appointing members of staff above a stated seniority or pay level.
- How are the directors, particularly those who come from a local authority environment, going to be trained to understand their formal duties under the Companies Act 2006 and how to act in the best interests of the company, while at the same time giving attention to their role as local authority members or officers, including when and how to make appropriate disclosures of their roles?
- If the company is providing services to the local authority, how will a service agreement be put together so that it properly describes the service to be provided, the performance indicators that will be used and the mechanism for dealing with failures to provide the required level of service. In so far as this last point is concerned, it needs to be borne in mind that the people who are providing the service might well have worked for the local authority until a few months ago, and it may therefore be unrealistic to expect that they are going to transform themselves just because a different manager is overseeing them.
- How will the JV arrangement be funded? Every organisation needs some cash flow to get it through its weekly obligations so that it can pay employees, rent and external professional services. If this is to be financed by loans, what are the terms of these loans going to be, both to satisfy your treasurer's commercial objectives but also to avoid an unlawful state aid situation arising.
- If the company is going to trade with your local authority, is this permissible in *Teckal* terms without a competition?
- How is decision making going to be made on a regular basis? If there is a board, what will the business of that board be? If there is an equality of membership between local authorities or between a local authority and the private sector, how will a stalemate be dealt with? Will there be a casting vote by the chair, how will that chair be appointed, and does there need to be some additional dispute resolution mechanism for issues that cannot be resolved between representatives?
- How can the company be persuaded to think strategically, rather than just respecting what its individual members are looking for? This is a combination of encouraging directors to think strategically, but it is also worth thinking about whether it is appropriate to appoint an external non-executive director who is not perceived as coming from one side or the other.
- Is there a business plan for the organisation that is comparatively realistic over a period of say three or five years? It has been suggested that if an authority invests in an organisation without having at least some overall objectives and plan, they are not properly discharging their fiduciary duties.
- If the JV arrangement does not go according to plan or if you just decide that you do not want to be involved in it any more, what is the exit plan? If it is a company, what will be the mechanism for buying out the other party's shares or selling your shares to them? Can you trust the valuation methodology?
- What about the workers? Will they be seconded or transferred out under TUPE? If the agreement comes to an end, will they be transferred back and will there be a space for them?
- Will the company be required to join the Local Government Pension Scheme? Has the pricing for this been budgeted for? Will the actuaries recommend that a non-standard pension contribution is applied because of the age profile of your employees? If a guarantee is required, does this work in state aid terms?
- Do you want to allow for other shareholders joining your venture and, if so, when and on what terms?
- How is the company going to report back to the authority? For example, will it do an annual report? How will it go back for approvals in terms of things that are required to obtain shareholder consent?

Thinking about these issues at the outset will not guarantee the success of a joint venture, but it should help you to navigate any problems that may arise and give you the best chance possible of making your relationship work.

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Whose liability is it anyway?

You might be disappointed to discover this article is not about the comedy sketch programme hosted by Sandy Toksvig in the 1990s. Instead, this article is about the rather more serious issue of residual liability for historic landfill sites operated by local government authorities or used by those authorities for the deposit of waste.

It is reported that there are approximately 21,000 historic landfill sites in the UK which date from between 1890 and1990. Many of these landfill sites were constructed and operated using a dilute and disperse approach to contamination; essentially, bury the problem and over time it will go away.

Modern landfill sites are subject to strict controls from sources such as the EU Landfill Directive. They are constructed with impervious cells that include systems to capture and remove any leachate that is processed and to dispose of it appropriately. These systems often operate alongside landfill gas collection systems that collect landfill gas that is then burnt in generators to produce electricity.

Older sites that do not have the leachate and gas collection systems pose an ongoing threat to the environment in terms of ground water sources used for drinking water and other purposes, nearby surface water courses, nearby residential and commercial properties and development sites, and also coastal waters where some coastal landfill sites are under threat of flooding and erosion.

When such problems are uncovered, whose responsibility is it to deal with them? Is it the current site owner, the owner of the adjoining site that is impacted, those responsible for the deposit of the waste materials or those responsible for the operation of the site both now and in the past?

The answer is it depends on the circumstances. There are numerous legal avenues that need to be considered.

The common areas of potential liability associated with such sites are as follows:

- Where permits and licences continue to exist, then liability typically attaches to those, but as the majority of sites are historic, any permits have often been surrendered and are no longer relevant.
- In the absence of any permits, the UK contaminated land regime comes into play, alongside other regimes such as the Water Resources Act 1991 and the Environmental Permitting Regulations 2010 (as amended). These all contain offences relating to contamination and give regulators wide-ranging powers to address problem sites. It should be noted that regulators are often reluctant to exercise their powers unless environmental harm is being caused or there is a significant risk or threat of such harm.
- Where others have suffered harm, either in terms of their property or some form of personal injury, they might pursue nuisance or negligence claims. To do so, they will need to

show they have suffered some form of harm or loss as a result of something caused by the former landfill site. They will also need to demonstrate that those who operated the site owed them a duty of care, perhaps because the risk of harm to others should have been foreseen. Needless to say, bringing a nuisance or negligence claim in relation to something that has its origins many years ago can be very difficult to establish. Often there have been a number of intervening acts and events that can make it very hard to establish a causal link.

If you are unfortunate enough to face a claim or action in relation to a former landfill site, or you believe you may have responsibility for such a site and you want to take some pre-emptive action, here are some of the things you should consider.

The problem and possible solutions

As a first step, it is important to properly characterise a site and to understand the exact nature and cause of the current problems being experienced. What is the contamination, where is it coming from and why, and where is it going to and how?

Should you go looking for problems? Bear in mind you might find out more than you bargained for and then be under an obligation to take action. Undertaking works might also give rise to a cause for concern on the part of those in the surrounding area. Think carefully before you instruct any intrusive investigation work by an environmental consultant.

You need to consider the scope of any investigations – how much do you do? This will in part depend on the nature of the associated risks. The higher the risks, the more you might want to explore.

You need to determine whether you have access rights to the affected areas. Do you need to apply legal privilege to any such investigations? If you do, what is the best way of implementing legal privilege and ensuring it continues to apply?

You will need to identify potential solutions and evaluate the associated costs.

Land ownership

Who are the current owners of the land? Who were the previous owners of the land? Have there been any leases or licences of the land? Who knew, or should have known, about the nature of the environmental issues being experienced at the site? What do the Land Registry records show?

Corporate identity

If you can identify any entities that have had an involvement with the site, what do searches of Companies House reveal about the ownership of those entities? Have they been acquired by other companies that continue to exist even if the original entity no longer does? Who were the directors? Were they directors of other companies that exist or which were acquired by companies that still exist?

Permits and planning permissions

Were any environmental permits, waste management licences or other consents in place? If so, whose name were they in and what did they allow? Are there any related records, for example waste movement documents and information?

Was planning permission granted for the site to be used as a landfill and, if so, who had the benefit of the permission and what were they allowed to do? Were there any restoration obligations and, if so, what did they require?

Commercial agreements

Are there any commercial agreements relating to the deposit of waste? What period do these relate to and what did they permit? Often landfill sites were operated by county authorities and their equivalents while other authorities deposited their waste at such sites. In the 1970s, private contractors moved into the market and began to operate landfill sites on behalf of authorities.

Strategy

The questions and actions listed above should help to unearth lots of valuable information. As you digest this information, you should start to form a strategy that will dictate how you engage with any other parties and the next steps you take.

Do you accept any responsibility, or contest the claim? Identifying any culpability at a very early stage can help to resolve disputes much more quickly. Be honest and pragmatic.

If settling a claim, consider the best way of extinguishing the associated liability. Do you need some form of settlement agreement that details the transfer of environmental liability and risk? Should any settlement money be placed into an escrow account to fund specific works to ensure the problem is dealt with and your exposure is extinguished? You also need to consider whether in reaching a settlement you are setting a precedent. Do you have other similar sites and should that be a factor in your decision-making process?

The key message is: do not be rushed into making any decisions. Where you can, allow the other party to do the running unless there are any immediate or imminent threats that dictate you should take an alternative approach.

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Successful service delivery models. Where to now for school support services?

The saying goes that 'a week is a long time in politics.' That certainly rings true at the moment in the field of education. Against this fast-changing backdrop some things will always be the same. One example is the need for all maintained schools and academies to have good quality service provision for teaching and learning and the back-office functions that are necessary for successful operation.

This issue is heightened by the still anticipated proposals to introduce a new national funding formula with devolvement of resources directly to schools, rather than via the local authority. This means all schools will need to find ways to continue to access good quality, flexible, cost effective services.

Many academies choose to receive services from local authorities, so the potential to work collaboratively across the maintained and academy sector remains very relevant. There is a growing trend to establish new organisations for the specific purpose of delivering services to schools that local authorities can no longer guarantee to provide.

The overall driver for a successful school services delivery model is meeting the requirements of the schools themselves. These will be determined by local factors: the strength of the relevant local authority, the number of (particularly sponsored) academies in the area and the prevalence of other quality service providers.

There is no one size fits all solution. This is reflected in the range of models in operation and emerging, including joint procurements or local authority led procurement for specific services, schools' companies, public or private sector ventures and different forms of employee-led mutual.

In a number of areas, school improvement services are being delivered through a body which is separate from the local authority but which can harness existing local authority expertise. Through that organisation, participating parties can collectively agree a financial and practical basis to offer support to all schools in need, be they maintained or academies. Options may seem complicated but exploring straightforward questions, such as the following, can help:

- What services are required?
- Who wants to work together?
- Who should receive the services?
- Where is the current expertise and how is it funded?
- How should the services be funded in the future, for example, top slice contributions, rate cards for pick and mix, grant funding, local authority funding or commercial operations?
- What influence, if any, should the local authority have and should there be a relationship between the local authority and the organisation?
- How should appointment rights to any board operate? How will success be measured, who will be responsible for doing that and what happens if something goes wrong?

Thinking about these things will help to shape answers to more technical questions as to:

- the purpose of any intended organisation, for example, commercial, social enterprise, mutual or co-operative; and
- the appropriate legal form of any intended organisation, for example, company limited by guarantee, community interest company, co-operative and community benefit society or trust.

A good starting point is for all interested parties to explore these issues and to draw up a non-binding memorandum of understanding. Although not legally binding, a memorandum of understanding is a useful tool for focusing constructive discussion and recording common intentions.

It is also important to remember that the timescales for authorisation processes, to enter formal arrangements, will vary between parties depending on individual governance arrangements.

Finally, it is essential to have a clear information sharing strategy so that individual governing boards can make informed choices as to whether the intended model is right for them. Getting this right can mean the difference between an option being viable or not.

So, while the pace of change is fast and the financial backdrop challenging, taking a collaborative approach allows schools to come together to harness expertise and establish service delivery models which can be flexible and bespoke. With a fair wind, that could be a positive opportunity.

This article was first published in *MyAcademy.*

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Language fluency of public sector workers

Local authorities in England are obliged to ensure that every person who works for them in a customer-facing role speaks fluent English. Human resources teams therefore need to ensure that they have adequate systems in place to comply with this requirement without compromising their obligations to employees under employment law or any other duties they have as public authorities.

The duty of language fluency is contained in section 77 of the Immigration Act 2016, which has been in force since 21 November 2016. It applies to public authorities, defined as persons with functions of a public nature, which include local authorities.

The UK government has published a code of practice on the English language requirements for public sector workers, which public authorities must have regard to. The code provides helpful clarification on some of the practicalities associated with the fluency duty, but there are still some points which public authorities may find unclear.

For the purposes of the duty, a person is regarded as working in a customer-facing role if, as a regular and intrinsic part of their role, they are required to speak to members of the public in English. Examples of roles which the code describes as customer-facing include a local government employee working in customer services and a teaching assistant. Roles where interaction with the public is occasional rather than intrinsic to the role, such as street cleaners or people providing internal support within an organisation, are not customer-facing.

Actions which authorities will need to take to comply with the duty include:

- identifying which roles in their organisation are customer-facing;
- identifying the level of language proficiency required for those roles;
- assessing whether all persons in customer-facing roles speak fluent English;
- ensuring that their complaints procedures are adequate to enable a person to make a complaint if they believe that the fluency duty has been breached;
- reviewing their human resources policies and practices to ensure that they comply with the fluency duty, as well as all other relevant legislation. This would include reviewing recruitment processes, selection and appointment processes, advertisements and job descriptions, contracts of employment and staff awareness;

- reviewing their contracts with employment agencies to ensure that these contain sufficient provision to ensure that staff provided by an agency have the same standard of fluency as their own employees; and
- reviewing their contracts with self-employed contractors to ensure they can take action if one of their employees fails to deliver services to customers with the required standard of fluency.

Some issues which may be challenging to deal with, or require particular attention, include:

- In an area where a diverse range of languages are spoken, how can a local authority meet the communication needs of the public? If a person's first language is not English, they will probably find it more helpful to receive services from someone who speaks the service user's first language fluently than someone who is fluent in English. Some authorities may have recruited speakers of other languages in recognition of that. The fluency duty makes specific provision for Welsh but not for other languages. The code of practice says that authorities do not have to ensure that public-facing staff speak only in English or Welsh. They can use all their language skills to communicate with speakers of other languages. This is helpful, but fluency in other languages does not lead to any reduction or exemption in the requirement for fluency in English or Welsh.
- The fluency requirement applies to everyone working for a public authority in a customer-facing role even if the authority employs several people in the same role, for example to serve on a reception. In an area where there are several first languages, it may be most helpful to the public for a reception to be staffed by a mixture of people who are fluent in English and in other languages. The code of practice gives no indication that the legislation can be interpreted in that way. Therefore, while local authorities should consider whether it would be helpful to their communities to encourage staff to have other language skills, all their staff in a customer-facing role will need to speak English or Welsh at least to the level which the relevant authority has identified as the minimum required.
- Authorities will need to ensure that they meet their duties under the Equality Act 2010. When they put arrangements in place to meet the fluency duty, they will need to consider how these arrangements will affect their workers and what implications this may have on those workers' rights under the Equality Act 2010. For example, they will need to ensure that their recruitment processes, their employment practices and their complaints procedures do not discriminate directly or indirectly against workers from particular ethnic groups.
- The legislation defines someone as fluent if they have a command of spoken English which is sufficient to enable the effective performance of their role. This means that individual authorities will need to identify what standard will be sufficient to enable their workers to perform their role effectively. This could result in a variety of different standards being applied and service users believing that they will receive different levels of customer service in different areas.
- Employers will need to take remedial action if their workers in customer-facing roles do not have a sufficient level of fluency. The code suggests that training and redeployment could be considered but that ultimately an authority may need to consider dismissal of an employee as a last resort. Any authority which does consider dismissing employees to comply with the fluency duty will need to ensure it complies with its own policies and procedures, as well as any law applicable to it as an employer. It will need to ensure that any action which it takes in respect of particular employees is fair and does not provide any grounds to be seen as discriminatory. Employers who think that they may need to consider taking remedial action in relation to particular employees should seek advice from specialist public sector employment lawyers.

The intention behind the fluency duty is described in the code of practice as a common-sense approach to meeting the public's reasonable expectation to be able to communicate in English when accessing public services. Local authorities will be keen to ensure they meet the needs of service users effectively but their compliance with this particular duty will require them to devote resources to achieving, maintaining and monitoring adequate levels of fluency without compromising their compliance with other duties.

A copy of the code of practice on the English language requirement for public sector workers can be accessed at: https://www.gov.uk/government/publications/english-language-requirement-for-public-sector-workers-code-of-practice

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Spotlight on ...

Jane Hackett

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In each edition of ConsortEM, we shine a light on a member to show the variety of roles within the consortium. This month, Jane provides an insight into working as a solicitor and monitoring officer in a local council.

How long have you been with Tamworth Borough Council?

I have been with Tamworth Borough Council since July 2007. I started on a temporary contract as a restructure was taking place. I applied for my current post as solicitor to the council and monitoring officer in December 2007 and the rest, as they say, is history. Prior to working in Tamworth I was a senior solicitor in the legal team at East Dunbartonshire Council in central Scotland.

What does your role entail?

Apart from my corporate governance and monitoring officer roles, I am responsible for legal services which include right to buy and land charges, democratic services, scrutiny, election services, member services and mayoralty. I am also the safeguarding officer and RIPA co-ordinator for the council.

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

I report to the executive director of corporate services and am part of the corporate management team made up of eight officers.

My team is small, extremely hard working and busy, comprising 10 people delivering the services mentioned above. We hope to recruit a new team member in the next financial year.

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

The council has embarked on an ambitious commercial investment and regeneration strategy for the borough which will involve several projects operating simultaneously. This will include house building, working with partners in the county and in industry to regenerate the town centre, and setting up a limited company to assist the strategy. With this going on, and the day job, it is a pretty busy time and elections (the annual deputy returning officer role) are only around the corner.

What regulatory issues are on the horizon?

The Great Repeal Act and the Housing and Planning Act will have extensive effects on local authorities and on society as a whole. There is also the West Midlands Combined Authority which will result in changing the status of the Midlands for the better of its residents.

How does Tamworth Borough Council compare with other places you have worked?

I completed my traineeship in private practice and then moved to the public sector and back and forth between the two for a number of years. I have covered a wide range of legal practice areas during my career and as a result my working life has never been dull. When I moved to England in 2007 it was a challenge, but one that I have enjoyed. At Tamworth Borough Council no two days are the same; there is always plenty of variety.

What law would you like to see changed?

The Care Act. I think it is so unfair that a person can work to buy and pay for their home, but are not then free to dispose of it as they see fit because of the risk that their local authority may seek to look behind the disposal so they can claw back care costs. It was suggested some time ago that, to redress the balance, a cap should be introduced on the amount of care costs someone has to pay during their lifetime. However, the introduction of such a cap will not happen until 2020 at the earliest, and there is no certainty that it will ever actually come into effect.

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

Do not be a clipe (tell tales).

Finally, two truths and one lie in any order.

We are all Jock Tamson's bairns.

Good gear always comes in small packages.

No one can tether time nor tide.

Powers for charging and trading. When you need a company

There are a number of urban myths that circulate around activities which involve charging and trading, such as that you always need to form a company if you want to trade and generate profit. While in some circumstances that is correct, in others it could not be further from the truth.

Some of the confusion stems from the fact that the general power of competence in the Localism Act 2011 enables local authorities to do 'anything that individuals generally may do', including things 'unlike anything' local authorities or other public bodies may do. Understandably, many people think that the general power of competence is therefore a power of first resort. However, the general power of competence does not enable a local authority to get around any restrictions, limitations or prohibitions in other powers, and there are constraints on charging and trading under sections 3 and 4 of the Act. For this reason it is important to understand what other powers there may be before jumping straight to the Localism Act.

There are many other powers that allow local authorities to charge and trade, some of which enable profits to be made, without setting up a commercial trading company. Ultimately, charging and trading are not mutually exclusive and one person's charging may be another person's trading in the same function, and even in the same authority depending on why and how it is done.

One example of where alternative powers exist is the Local Authorities (Goods and Services) Act 1970, which enables local authorities and a whole range of other organisations designated as public bodies to:

- supply goods or materials;
- provide administrative, professional or technical services;
- use vehicles, plant or apparatus and appropriate staff; and
- undertake works of maintenance.

Organisations designated as public bodies include other local authorities, the governing bodies of educational establishments (including academies), some health bodies, housing associations, community associations and the Environment Agency.

Section 1(3) of the Act states that 'any agreement....may contain such terms as to payment or otherwise as the parties

consider appropriate.' This has been interpreted by the courts in the case of *British Education Supplies v Yorkshire Purchasing Organisation (1988) ELR 195* to mean that a profit can be generated. The downside is that the commissioning authority may need to go through a procurement process, depending upon their constitution or EU rules.

Other specific powers include:

- the power to sell electricity derived from renewable sources under an order pursuant to section 11 of the Local Government (Miscellaneous Provisions) Act 1976;
- catering under the Civic Restaurants Act 1947;
- powers to buy, sell and develop land;
- recreational activities and related support under section 19 of the Local Government (Miscellaneous Provisions) Act 1976; and
- the ability to second staff under Section 113 of the Local Government Act 1972 on such terms (including as to payment) as may be agreed, for example as a consultant.

In addition to the above, the Local Government Act 2003 introduced powers which enable local authorities to charge and trade in function-related activities provided the authority is not under a duty to provide the function. Under section 93, an authority can charge to recover its costs 'taking one year with another' where someone agrees to receive the service. This may be a good starting point for trading where there is no explicit power to charge or trade in the function, as using the charging power can recoup overheads of the service, including central overheads like the corporate and democratic core, not just the marginal extra costs of providing the service.

Where activities take off, it may be that the council wishes to establish a commercial trading company under Section 95 of the Local Government Act 2003. This enables a local authority to trade in function-related activities, where they are not under a duty to provide the function and there is no other explicit power under which they can trade. So, if there are powers to trade with other public bodies, for example under the Goods and Services Act, you are directed to use that power rather than set up a commercial trading company under the 2003 Act.

A commercial trading company is required where the primary motive is trading to make money. Where the council has other powers and the motives are, for example, regeneration and community benefit, there is no obligation to set up a commercial trading company even if it is likely that such activities will generate a financial return. The section 95 powers should be used where the council wishes to act like the private sector and, generally speaking, most of its customers will be private sector customers. The legislation requires the establishment of a company (limited by shares or guarantee) or a community benefit society to provide a level playing field with the private sector. Under the Local Authorities (Best Value Authorities) (Power to Trade) (England) Order 2009 the council must also approve a business case before it sets up the company and must not provide subsidy to the trading company.

Similar powers to sections 93 and 95 are reflected in sections 3 and 4 of the Localism Act 2011. Where an authority wants to do something that it does not already have powers to undertake, but an individual would have powers to do, then it may charge and trade in those activities on a similar basis to sections 93 and 95. Again, the primary motive to establish a commercial trading company under section 4 is the desire to make a commercial return as the primary driver of the activity.

In summary, it is horses for courses. The council needs to be clear what the purposes are of its charging or trading activities and then needs to find the relevant power and exercise that power properly. There may be a number of options in the circumstances, for example, the regeneration of an area could be done:

- under land and development powers by the council itself;
- using regeneration powers under section 1 of the Localism Act 2011 with environmental and community benefits as key drivers as well as improving assets;
- through a commercial trading company as a private sector developer, either wholly owned or as a joint venture; or
- as a joint venture with the private sector through a limited liability partnership or company.

We would always recommend that the council clarifies what it wants to achieve and then explores the various options for delivering those objectives to determine which powers are most appropriate in the circumstances and which procedures and options for structure might need to be considered.

We like to think of this as a hierarchy of powers:

- utilise specific powers first, for example section 1 of the Local Authorities (Goods and Services) Act 1970 or section 11 of the Local Government (Miscellaneous Provisions) Act 1976 or section 113 of the Local Government Act 1972 where appropriate and where there are no limitations on fees;
- then move to general powers, such as charging under section 93 in relation to function-related activity;
- then consider using the general power of competence, especially where the council does not have any existing powers, or to complement or expand existing powers (provided there are no explicit restrictions and limitations); and
- finally, consider trading powers under section 95 of the 2003 Act where the trading is in function-related activities or the general power of competence (where the council does not have any existing powers), provided that undertaking the work is 'all about the money', such as a commercial purpose, rather than for any other reasons relevant to the circumstances.

Just because something provides a return to the council or generates an income does not mean that a commercial trading company is required. There may be other appropriate powers.

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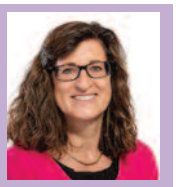

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Brexit update. *Miller/Santos* in the Supreme Court

As was widely predicted, the government lost in the *Miller/Santos* case in the Supreme Court. But what does the judgment say about why the government could not serve notice under Article 50 of the Treaty on European Union (the EU Treaty) without the consent of Parliament? Are there any wider ramifications for public lawyers arising from the judgment? And what is next for the progress of Brexit?

Firstly, it is worth making it clear that the case did not in any way deal with the question of whether or not the UK should leave the EU. It dealt only with the question of whether the UK can give notice under Article 50 of the EU Treaty without a vote being required in Parliament.

The court distilled the arguments before it into two broad questions:

- Could ministers use prerogative powers to serve notice under Article 50 of the EU Treaty without the consent of Parliament?
- Were ministers required to obtain the agreement of the devolved administrations before serving such notice?

The need for consent to trigger Article 50

The court was split eight to three as to whether ministers could use prerogative powers to serve notice under Article 50.

The key point to be determined was whether the European Communities

Act 1972 (the 1972 Act), which was introduced by Parliament to legislate for the UK's accession to the EU, limited what would otherwise be the prerogative power to withdraw from an international treaty without the consent of Parliament. The court accepted that a prerogative power, however well-established, may be curtailed or abrogated by statute, either by express words or by necessary implication. The question was, did the 1972 Act do this?

The Secretary of State argued that the 1972 Act did not just 'copy out' the provisions of EU law as they stood in 1972, it gave effect to 'whatever may from time to time be the international obligations of the United Kingdom under or pursuant to EU Treaties.' He argued that this allowed for the possibility that the UK may leave the EU, in which case there would be no such obligations on the UK.

The majority of the court disagreed, finding that 'there is a vital difference between changes in domestic law resulting from variations in the content of EU law arising from new EU legislation, and changes in domestic law resulting from withdrawal by the United Kingdom from the European Union.'

The judges felt that the latter 'involves a unilateral action by the relevant constitutional bodies which affects a fundamental change in the constitutional arrangements of the United Kingdom', and went on to say that if the Secretary of State's argument was correct this fundamental change would happen 'irrespective of whether Parliament repeals the 1972 Act', which 'would be inconsistent with the long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone.' They added that this was 'all the more so when the source in question was brought into existence by Parliament through primary legislation which gave that source an overriding supremacy in the hierarchy of domestic law sources.'

The majority of the court also rejected the Secretary of State's argument that because the prerogative power to make and unmake treaties can only be limited by express statutory provisions, the 1972 Act – which does not contain an express statement to that effect – cannot limit the prerogative power in that way. In the judges' view, because the 1972 Act is an important source of domestic law through the European law it implements, it would take express words in the 1972 Act indicating that the government could withdraw from the treaties and thus remove the source of domestic law and domestic rights, which is not ordinarily possible using prerogative powers. The Act contains no such express language.

The lack of force in the Secretary of State's arguments was demonstrated by taking the consequences of those arguments through to their natural conclusion. If the Secretary of State was correct, the government could have withdrawn from the EU Treaty at any time after the implementation of the 1972 Act without any kind of referendum or any other vote of Parliament on the matter. This would clearly not have been lawful.

The Secretary of State further argued that subsequent legislation pertaining to Europe demonstrated that there was no intention to limit the government's prerogative powers in respect of withdrawal from the EU. He pointed to the fact that subsequent legislation specifically required votes of Parliament on other aspects and that accordingly, the lack of such a requirement in relation to service of notice under Article 50 was deliberate. Rejecting this argument, the majority of the court fell back on the general principles relating to prerogative powers: if there was domestic legislation on a matter, prerogative powers were removed. They found that it was not possible to reverse this presumption in reliance on a lack of provision in other legislation.

Finally, the Secretary of State argued that the traditional limits on prerogative powers should not apply to a ministerial decision authorised by a majority of members of the electorate who vote on a referendum. The majority view was to decisively reject this contention on the basis that the European Union Referendum Act 2015 did not include provisions which provided that the outcome of the referendum must be acted upon; this was in contrast to the legislation which dealt with devolution in Scotland and Wales. Accordingly, the result of the referendum, while significant politically, had no legal consequence unless and until Parliament decided that it should have.

The minority view in the court was that, while the importance of parliamentary supremacy over domestic law had to be respected, that principle was not applicable in this case because, as Lord Reed put it, the effect which Parliament had given to EU law in domestic law under the 1972 Act was 'inherently conditional on the application of the EU treaties to the UK, and therefore on the UK's membership of the EU'. Accordingly, the 1972 Act did not impact on the prerogative power to exit from the EU Treaty.

Lord Carnwath added that alongside the principles of parliamentary sovereignty, and the exercise by the executive of prerogative powers, sat the principle of parliamentary accountability. He pointed out that Parliament could hold the executive to account in a variety of ways, including politically. He referred to the government's intention to publish a Great Repeal Bill, and indicated that as long as the bill was passed before the Article 50 process was concluded then there would be no breach of the various constitutional principles. In the interim, Parliament could and would keep the executive to account in ways other than through legislation.

The need for agreement from devolved administration

The court was in unanimous agreement that, although the devolution legislation had been entered on the assumption that the UK would remain a member of the EU, because foreign affairs are not devolved matters in any of the devolved administrations there was no requirement on the UK government to engage on these issues with the devolved administrations.

The court had also heard arguments on the application of the Sewel Convention, which records the understanding between UK government and the devolved administrations that the UK government would not normally legislate with regard to devolved matters without the consent of the devolved administrations. The devolved administrations argued that the existence of the convention meant that the UK government could not remove rights derived from European law and enshrined in devolved legislation without the consent of the devolved administrations. Rejecting this argument, the court relied on the well-established doctrine that courts cannot adjudicate on political conventions.

Although both the Scotland Act 1998 and the then Wales Bill 2016-17 included a phrase which essentially enshrined the Sewell Convention into legislation, the phraseology of the provisions made it clear that there was no intention to make the agreement justiciable.

Wider ramifications

From a constitutional perspective, this case is hugely significant but for most public and administrative lawyers it will not be a case which they reference daily. The case restated broad constitutional principles and applied them to a specific set of facts. However, there is one area which is more relevant.

The comments of the majority on the status of referendums, while in some respects obvious, are a helpful reminder of the role of Parliament, elected representatives and the electorate. Simply because a referendum occurs and a majority of people vote in favour of a proposition does not mean that government or Parliament are bound by that outcome, at least legally speaking; that is unless the legislation providing for the referendum states otherwise. This is likely to be relevant in the future if more referendums occur in relation to devolution or independence of the devolved administrations.

What next for Brexit?

The government has already passed the European Union (Notification of Withdrawal) Act 2017 and served notice on the EU of Great Britain's intention to leave the EU.

From there it will be a matter of seeing what deal the UK can secure with Europe.

Remainers will undoubtedly think that the Miller/Santos case has not fulfilled its potential. Even informed remainers, who recognised that the case would not stop Brexit, hoped that the requirement to pass legislation would allow Parliament to try to dictate terms for our departure and lead to a softer exit. It is undoubtedly a political triumph for the government that Parliament was given a 'blank cheque' authorisation to serve notice under Article 50, and thus in relation to the negotiations with the EU.

This case is a stark reminder that the courts can only adjudicate on the law in administrative law cases – it is for Parliament to legislate and hold government to account. In this case, for political reasons, Parliament has seen fit to give government the freedomit argued for in court, and which so many of our elected representatives had publically said it was inappropriate for the government to have. If nothing else, the Miller/Santos judgment has shown us the strength of the whip system in UK politics.

No doubt there will be further twists and turns before the UK departs the EU, but there can be now be no doubt that service of notice under Article 50 has taken us one step closer to exit.

Case reference: *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

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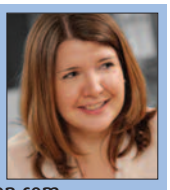

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2017/18 EM Lawshare Training Programme

We are delighted to offer a diverse programme of over 60 training events in 2017/18 from our partners Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard and Weightmans.

Courses are 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 are held in the East Midlands, Leicester, Nottingham and Derby, with some courses repeated in Birmingham, Sheffield and London.

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

Date	Title	Location
18 Apr	**Common Disputes affecting Services Users' Finances** (All levels)	**Nottingham**
27 Apr	**CPO Masterclass** (Advanced)	**Nottingham**
5 May	**State Aid for Local Authorities and its impact on Alternative Service Delivery Models** Repeated from East Midlands (Introductory/Intermediate)	**Sheffield**
11 May	**Common Disputes affecting Services Users' Finances** Repeated from East Midlands (All levels)	**Sheffield**
16 May	**Drafting Commercial Contracts - Standard Form Contracts** (Introductory)	**Derby**
18 May	**CPO Masterclass** Repeated from East Midlands (Advanced)	**Birmingham**
23 May	**Effective Project Management from a Legal Perspective** (Introductory/Intermediate)	**Nottingham**
7 June	**Academies Issues** (Intermediate)	**Nottingham**
13 June	**Effective Project Management from a Legal Perspective** (Introductory/Intermediate)	**London**
13 June	**Planning and Environmental Law Update** (Intermediate/Advanced)	**Nottingham**
19 June	**Drafting Commercial Contracts - Standard Form Contracts** Repeated from East Midlands (Introductory)	**Birmingham**
20 June	**Housing Delivery Models** (Intermediate)	**Nottingham**

Detailed course outlines are 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 2017/18 training programme to be fit for purpose under the new approach.

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