ConsortEM

The newsletter for EM LawShare
Autumn 2017

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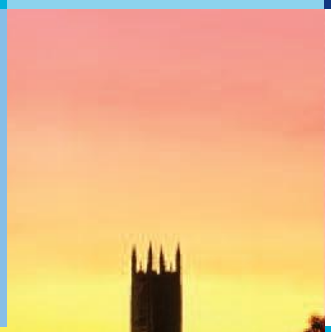

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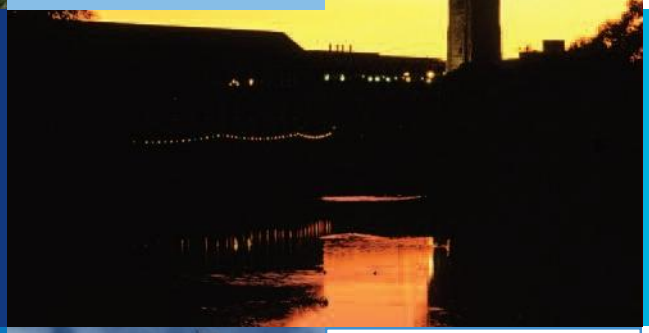

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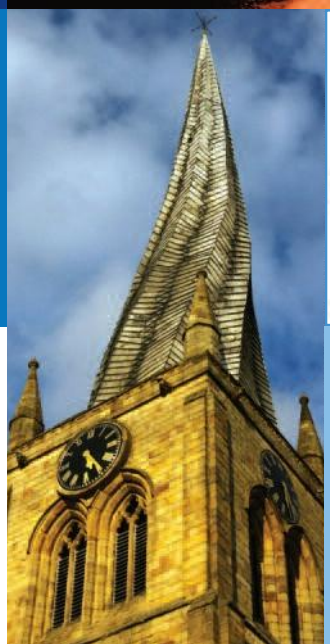

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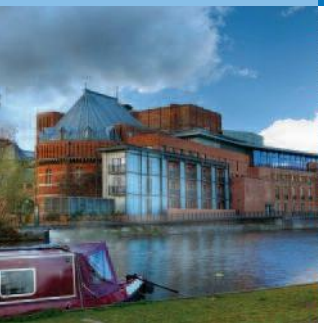

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Welcome

I hope you have returned from the summer breaks refreshed and ready for a busy Autumn. There are certainly plenty of challenges ahead, not least are three key deadlines.

By the end of 2017, local authorities need to have their brownfield land registers in order - see page 7 for an article from Freeths on this.

By the end of March 2108, the first set of gender pay gap reports will need to have been published, and given the publicity surrounding the BBC report, some careful planning is required – see page 9 for an article from Weightmans.

By 25 May 2018, you also need to be ready for the new General Data Protection Regulation – see page 13 for an article from Geldards.

Looking at the lessons which can be learned from recent cases, Sharpe Pritchard consider best practice in consultation after *Moseley v Haringey* – see page 11 - and Browne Jacobson outline the lessons from the Supreme Court decision on *Energy Solution EU Ltd v Nuclear Decommissioning Authority* regarding procurement damages – see page 17.

Bevan Brittan share the findings of a report into City Partnerships and how they can make the most of public asset – see page 15.

Finally we can tell you that we are progressing well with procuring the new four year framework contract that starts in April 2018 and we should be able to announce the new selected partner firms in February 2018.

JAYNE FRANCIS WARD
Chair of the EM LawShare Management Panel

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Member news

New members

We are glad to welcome Dartford Borough Council, Maltby Town Council (Yorkshire), Shepway District Council (Kent) and Rushmoor Borough Council (Hampshire) to EM Lawshare to bring our total number of members to 126.

DARTFORD BOROUGH COUNCIL

MALTBY Town Council

Shepway District Council

RUSHMOOR BOROUGH COUNCIL

A full list is of members is on our website

Telephone advice Spread the word

All the six partner firms currently offer a free telephone helpline service to members seeking quick advice or reassurance on straight forward one-off matters.

In future, any such advice thought to be of general interest (for example appointing deputies for cabinet members) will be summarised in an A4 flyer & sent to members so all will benefit.

Details of the free helplines for each firm and their contacts can be found in the members' area on our website.

If you have difficulty in accessing the members' area, contact the website administrator Senara Shapland at Senara.shapland@brownejacobson.gov.uk.

Precedent bank revamp - any views?

We've had a review of the precedent bank and decided that we are not going to be able to provide a comprehensive coverage on anything like that delivered by the commercial providers such as Practical Law for example.

As an alternative, we are considering a small specialised bank which responds specifically to member's suggestions. If you have any views on this approach we would like to hear from you. Please email Stuart Leslie at SL.emlawshare@yahoo.com or John Riddell at John.Riddell@weightmans.com.

Another Opportunity to Develop Leadership Skills

The EM Lawshare Leadership and Management in Action courses, held for the last 3 years, have been such a success that the 6 panel firms (Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard and Weightmans) have agreed to jointly fund a fourth course next year. This time the course will be held in Nottingham.

This bespoke Institute of Leadership and Management (ILM) leadership skills course, provided by Marlborough Training and Consultancy, is only available for EM Lawshare members.

Feedback from previous participants, all senior lawyers and managers from EM Lawshare local authorities, included:

"Good tailored session. Many such courses are too generic and do not apply to local authority situations. The speaker has a good grasp of the practical problems faced on a daily basis and to give good clear practical advice."

"A fantastic course! I cannot over state the value of the course for local government lawyers in the current environment of perpetual change and challenge."

"Picked up some really useful management tips and made me think if I could / should do things differently."

The course will be running again at Freeths' Nottingham office on:

- 23 January 2018;
- 27 February 2018; and
- 29 March 2018.

The course will be provided free of charge but there will be a one-off registration fee of £74 plus vat, per delegate, which includes membership of the ILM as a studying member and access to online resources through the ILM website.

Delegates who complete the course will receive a certificate of achievement.

Local Government Diploma - Successful candidates

For a fourth year running Browne Jacobson and the other five partner firms are sponsoring two places on the highly regarded Law Society's Local Government course.

We received fourteen impressive applications. The appointed panel, made up of a mixture of EM Lawshare representatives and partner firm leads, decided to offer the place to:

Helen Morris, from Plymouth City Council

Sima Odedra, from North West Leicestershire District Council.

We wish them every success!

Spotlight on ...

Lorna McShane

Middle Level Commissioners

In each edition of ConsortEM, we shine a light on a member to show the variety of roles within the consortium.

How long have you been with the Middle Level Commissioners

I joined the Middle Level Commissioners, based in March, Cambridgeshire at the end of 2016.

What does your role entail?

I am Solicitor and Assistant Clerk to the Middle Level Commissioners and also act on a consultancy basis as the adviser and Assistant Clerk for 31 internal drainage boards.

The Middle Level Commissioners is a statutory corporation created under the Middle Level Acts 1810-74 and also operates under the Land Drainage Act 1991 and the Flood and Water Management Act 2010.

The Commissioners' primary functions comprise:

- the provision of flood defence and water level management to the Middle Level Fens; and
- as a navigation authority for the navigable waters of the Middle Level system – 100 miles of our watercourses are statutory navigations from Stanground Lock near Peterborough to Salters Lode Lock near Downham Market in Norfolk.

The Commissioners also have certain conservation duties to fulfil under the Wildlife and Countryside Act 1981 - otters, voles, kingfishers and eels feature regularly in our reports!

As well as specialist knowledge of drainage law and planning law, I undertake a wide range of generic legal work including property, governance, employment law and contracts.

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

I work closely with most members of the organisation which include finance for collection of drainage rates, the Clerks Department which is responsible for the arrangements for meetings of the commissioners and internal drainage boards and the engineers who maintain the watercourses and pumping equipment. I report directly to the Chief Executive who is also the Chief Engineer and the Board of Commissioners.

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

As a navigation authority, the Commissioners are currently concerned that the legal framework which governs the navigation function is considerably out of date and obsolete as it is contained in the Middle Level Acts of 1810-74 and is not suited to the requirements of a modern navigation system and boat owners.

In January of this year we introduced a Private Members Bill – the Middle Level Bill - into Parliament which would align it with the statutory framework applicable to other navigation authorities such as The Canal and River Trust and the Environment Agency.

It will enable us to levy charges and introduce a registration scheme for vessels using the waterways.

The Bill was opposed by six petitioners, but successfully passed the second reading stage without a division in March 2017. However it could not be progressed because of the General Election and now has to be formally revived before it can be progressed to the Committee Stage. There has been an objection to the revival of the Bill which means that the Bill will have to be debated again in Parliament when it returns at the start of September and time can be allocated for the debate.

It has taken a year to get this far and there is still a considerable amount of work to be done to get the Bill through the Parliamentary process.

What regulatory issues are on the horizon?

If the Bill becomes an Act of Parliament, we will then have power to make byelaws and to enforce them on boat owners who have previously used the navigation system without payment and the need for registration. Although we do anticipate some resistance from boat owners, there is considerable support from other users of the system and marina operators who appreciate the need for registration to ensure that boats are insured and have safety certificates.

How does Middle Level Commissioners compare with other places you have worked?

Whilst it still has the feel of a public authority it is a much smaller organisation than most of the local authorities I have worked for in the past. With three main functions (drainage, navigation and conservation) it is much easier to specialise.

I still attend a lot of meetings but there is a very effective scheme of delegation to the senior officers which enables us to react very quickly and efficiently to most situations.

We also have very nice purpose-built offices on the banks of the River Nene and I no longer have to carry out complex and confidential legal work in an open plan office.

What law would you like to see changed?

Without any hesitation – The Freedom of Information Act 2000.

That is not because I do not believe in openness and transparency in Public Authorities – most Local Authorities publish extensive information and only exempt information in exceptional and well justified situations. The Act is very often used for mischievous and ulterior motives and as a research tool to generate stories for the media. The Act creates a very time-consuming burden on under-resourced authorities.

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

Always prepare for meetings and read the reports – that way you never get asked that awkward difficult question you do not want to answer!

Two truths and one lie . . . . . about the Fens

Sir John Popham, Lord Chief Justice, was responsible for the drainage of land around Upwell in the Fens and dug a channel linking the River Nene to the Little Ouse called Popham's Eau which still exists today. His severity as a judge was proverbial – two of his victims were Guy Fawkes and Mary Queen of Scots!

The lowest land in the UK lies immediately south of Peterborough 35 miles from the nearest coastline. It was above sea level 150 years ago but has now shrunk and is now twelve feet below sea level. Rainfall accumulating on this land has to be pumped three times to get it out to sea.

When plans for draining the Cambridgeshire Fens were drawn up it was agreed that those investing in the project would share the land reclaimed from the sea between themselves. Not surprisingly there was significant local objection from those living in the Fens at the time. Oliver Cromwell lent his support to the cause of the residents (or at least he did until he gained power). As the drainage works progressed they were often scuppered by the locals often referred to as 'Fen Lighters' so named because they used the peat dug from the channels to create huge fires destroying temporary works and the barracks the drainage workers were housed in.

Planning permission in principle on brownfield land

Planning permission in principle (PIPs) is now a hot topic for local authorities because they have a statutory obligation to produce brownfield land registers which will grant PIPs by the end of 2017

At present PIP only applies to land in a formal brownfield land register and local planning authorities (LPAs) have until the end of 2017 to prepare their brownfield land registers. The required order has not yet been published regarding local and neighbourhood plans to enable PIPs to be granted on the basis of those plans.

The effect of a PIP is similar to an outline planning permission, where approval is then only needed for details, but with the opportunity to secure any required mitigation and infrastructure contributions. PIPs will be granted when local authorities or neighbourhood groups choose to allocate housing-led development in future local and neighbourhood plans or identify it on brownfield registers. The technical details stage will provide the opportunity to assess and approve the detailed design, ensure appropriate mitigation of impacts and ensure contributions to essential infrastructure are secured.

The main effect of the provisions are summarised below.

Permission in principle

The Housing and Planning Act 2016 introduced the following provisions.

PIP takes effect when the qualifying document (such as local and neighbourhood plan or brownfield register) takes effect, if the land in question is allocated for such development in that document at that time.

LPAs must specify the site, the type of development and provide an indication of the amount of development the site has PIP for.

As PIP is only available for residential-led development, the permission must state the amount of development permitted through a range of minimum and maximum net numbers of dwellings that are, in principle, allowed on site. Where non-residential development is proposed, LPAs must provide a description of the type of development (by indicating the use classes of the buildings or land) and the scale of development permitted.

PIP granted by a development order is not brought to an end by the qualifying document ceasing to have effect or being revised.

PIP granted by a development order ceases on the expiration of 5 years beginning with the date on which it takes effect or any such other period beginning with the date as the local planning authority (LPA) may direct.

PIP granted by the LPA (e.g. for minor developments) ceases on the expiration of 3 years beginning with the date on which it takes effect or any such other period beginning with the date as the LPA may direct.

Conditions cannot be attached to a PIP and its terms may only include the site location, the type of development and amount of development. The guidance also clarifies that s106 planning obligations cannot be imposed at the PIP stage.

LPAs must have regard to the provisions of the development plan, material considerations and guidance issued by the Secretary of State.

Councils are required to maintain a register of all PIPs in their area.

PIP may not be granted for the winning and working of minerals

Brownfield land registers

Under the recently enacted subordinate legislation, the following brownfield land provisions apply.

A duty is imposed on each LPA to prepare, maintain and publish a register in relation to brownfield land in its area. All registers must be prepared by 31 December 2017.

The register consists of Part 1 (land suitable for residential development) and Part 2 (land allocated for residential development).

LPAs must enter land in Part 1 if the land is suitable and available for residential development and such development is achievable on that land. Additionally, the land in question must have an area of at least 0.25 hectares or be capable of supporting at least 5 dwellings. Relevant terms in the legislation mean as follows.

Land that is 'suitable' for residential development is land that has been allocated in a local development plan, has planning permission, has a grant of PIP or in the opinion of the LPA is appropriate for residential development having regard to adverse impacts on the natural environment, local built environment and local amenity and any relevant representations received.

Land that is 'available' is land which the owner or developer has expressed an intention to sell or develop not more than 21 days before the entry date and the LPA believes there are no issues relating to ownership or legal impediments that might prevent residential development.

Land that is 'achievable' is land where the LPA believes development is likely to take place within 15 years of the date of entry on Part 1 of the register having regard to publicly available information and any relevant representations received.

Where the land has been entered in Part 1, the LPA must also enter it in Part 2 if none of the exemptions apply. Important exemptions include that PIPs (Part 2) cannot be granted for EIA or habitats development under the EU Directives and related UK legislation.

PIP is granted to any land entered in Part 2 only of the brownfield land registers in relation to both housing and non-housing developments and the guidance says the non-housing development should be compatible with the proposed residential development, in which the residential use occupies the majority of the floorspace.

The LPA can set a date when PIP in relation to any particular allocations come into force.

The LPA must consult, notify and publicly notify the brownfield land registers in accordance with the sub-ordinate legislation, including particularly for entries into Part 2 of the register, which grants PIP. Consultation bodies include the likes of the County Council, Mayor of London, Parish Council, Highway Authority, Environment Agency and neighbourhood forums.

Technical details consent

The Town and Country Planning (Permission in Principle) Order 2017 also sets out the following.

An application for technical details consent must be determined by the LPA in accordance with the relevant PIP, development plan and local and national policy.

An application for technical details consent must propose development all of which falls within the terms of the PIP and particularise all matters to enable full planning permission to be obtained.

LPAs must also consult any body they would usually need to consult in relation to an application for planning permission. LPAs must also consult statutory consultees identified in the order where those bodies have notified the LPA, before granting PIP to the site, that they wish to be consulted on a technical details application.

The Secretary of State can call in applications for technical details consent but has no power to call in a decision on whether to enter a site in Part 2 of a brownfield land register that triggers the grant of PIP.

The guidance clarifies that planning conditions and s106 obligations may be imposed at the technical details consent stage provided they meet the existing requirements on the use of conditions and obligations.

The Community Infrastructure Levy may apply to PIP development if technical details consent has been granted. Charges become due from the date of commencement of a chargeable development.

The determination period for an application for technical consent will be 5, 10 or 16 weeks depending on whether it is for non-major, major or EIA development. EIA development cannot be granted PIP through the brownfield land registers.

An appeal in relation to a decision for an application for technical consent must be made within 6 months from the date of the decision notice.

LPAs have powers to modify or revoke a grant of PIP. However, the removal of a site from a brownfield land register doesn't revoke the PIP or technical consent previously granted for that land. Compensation may be payable as a result and the guidance says that such powers should only be exercised in exceptional circumstances where no other alternative course of action is available.

Our view

The procedure appears to be a useful planning tool to kick-start development of housing and brownfield sites.

The programming for the delivery of development can be brought forward if PIP for a development is secured. This will also provide certainty enabling investment in sites which are more difficult to deliver. At this stage, the mechanism can be used for brownfield land and the Government intends to publish the order for PIPs based on local and neighbourhood plans separately. A timetable for this is not yet confirmed.

Whilst the brownfield land registers will involve a significant amount of initial preparation for LPAs to get their brownfield registers up and running by the end of the year, the grant of PIPs should assist councils in boosting housing supply and speeding up the delivery of much needed homes that are clearly high on the Government's agenda.

It is also a golden opportunity for councils to get their own land on to the registers and obtain valuable planning PIPs for their sites that could both enable development of the sites more quickly and increase portfolio values.

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Mind the Gender Pay Gap
The BBC, equal pay and the risks of gender pay gap reporting

Employers should be in a position to know what information they will have to have published by the end of March next year and whether that data is problematic.

When the BBC published its annual report recently, it was the first time that it was required to publish details of its top earners. The figures disclosed showed that two-thirds of its highest paid stars are male, with Chris Evans receiving over £2.2m. In contrast, the highest paid female is Claudia Winkleman who received between £450,000 and £500,000.

What followed was a firestorm of criticism, with a large number of the BBC's female presenters joining together to write an open letter demanding pay fairness, rumours of legal action and defections to rival broadcasters, and MPs saying the situation was unjustifiable. The BBC had been aware that this was coming for a year, since a requirement to publish pay details was introduced in the last Royal Charter review. Yet it faced harsh criticism about its response to the figures.

With the first publication date for gender pay gap reporting looming for other organisations it is worth considering the implications for employers.

It is important to note that the gender pay gap reporting requirements which apply more broadly across the country differ to those which apply to the BBC. It was obliged to disclose not only a gender breakdown but specific figures for individual pay alongside the identities of the people involved. In contrast, the gender pay gap reporting obligations under the Public Sector Equality Duty only require employers to publish details of the following:

- the mean and median gender pay gap;
- the mean and median gender bonus gap;
- the proportions of male and female staff paid bonuses; and
- the proportions of male and female staff in each of the quartile pay bands.

The specified snapshot date for the calculations is 31 March each year, with the figures published within 12 months of that date. This means that the first calculations are due to be published no later than 30 March 2018.

In addition, public sector employers must publish information demonstrating compliance with the public sector equality duty. Finally, there is also a requirement to produce and publish at least one objective which the employer considers will assist in achieving one or more of the three main objectives of the duty.

Any objectives must be specific and capable of measurement, and they must be published at least once every four years.

It might seem that the reduced detail, compared to that produced by the BBC, means that there are fewer risks. However, it is clear that the data could cause significant issues for employers.

The stated aim of the obligations, in both the public and private sectors, is to tackle the gender pay gap. In the public sector in particular there might be questions as to why this is still an issue. After all, the Equal Pay Act was introduced in 1970 and effectively re-enacted by the Equality Act in 2010 whilst the Single Status agreement in 1997 required local authorities to carry out extensive and detailed job re-evaluation schemes to achieve non-discriminatory pay structures. In addition to these there have also been multiple waves of equal pay claims highlighting issues and forcing further examination of any problems. Despite all of this, according to Office for National Statistics the gender pay gap for both full-time and part-time workers was 18.1% in 2016. This suggests that there is still a significant problem and explains why the government has taken further action.

It also suggests that when employers come to carry out their calculations and subsequently publish the figures they could be left with details that, at least on paper, make for uncomfortable reading. The implications of this appear to fall into three main areas, all of which will be familiar in terms of the BBC fallout:

- employees, aware at least roughly of where they fall within quartile bands, may question their pay and bonus levels;
- claimant lawyers are almost certain to target employees or sectors where there are potential further equal pay claims which can be explored, particularly now Tribunal fees have been abolished; and
- intense negative publicity.

The importance of properly considering and evaluating the situation at an early stage cannot therefore be emphasised enough.

The relevant pay data for the next publication date should have already been available for some five months and the appropriate calculations can be carried out. Employers will therefore be in a position to know now what information they will have to have published by the end of March next year and, in particular, whether that data is problematic in any respect.

If problems are anticipated, consideration should be given as to whether additional information should be published alongside the minimum requirements. For example, if added context or explanation alongside the raw numbers removes the sting of any initial pay gap then it might be considered prudent to provide that as well. In any event, where there are significant gaps or anomalies in the figures, an action plan should be drawn up to address them and demonstrate that the equality duty is taken seriously. The earlier this process is begun the more time there will be to give it proper consideration, take advice where necessary and hopefully minimise any fallout from publication.

Ultimately, employers who do not take the time to consider their response and leave it until closer and closer to the publication deadline are likely to be the ones who will have claims brought against them.

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Consultation - best practice after *Moseley v Haringey*

The Supreme Court decision in *Moseley* has heightened awareness of the need for authorities to take care when undertaking consultation.

The judgments of the Supreme Court in the case of *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 looked at first glance as if they were going to be frightening for local authorities. The background to the case lies in the government's scheme to replace council tax benefit with local schemes which set out who would be entitled to reductions in their council tax. It was for individual authorities to formulate these schemes and decide who would qualify for reductions under them.

The Supreme Court decided that the consultation, which took place prior to the council's adoption of a council tax reduction scheme, had been unfair and defective. There was less money available for the scheme than there had been for the payment of council tax benefit. The council had carried out its statutory consultation without mentioning that there were alternatives to imposing the burden of this reduction on benefit recipients. The council could have raised taxes or made savings elsewhere in order to meet the shortfall.

The High Court and Court of Appeal rejected the claim but the Supreme Court allowed the appeal and made a declaration that the consultation had been unlawful. Lord Wilson, giving the first leading judgment, rejected the idea that the council had no duty to consult on possible alternatives. He said it could not be assumed that the recipients knew what these were and why they were rejected. He went on to admit that even having read the copious material in the case, he did not know himself.

The lesson then was clear: consultation, in order to be fair, means not just mentioning the chosen option but an analysis of the alternatives. However court decisions since then have made it clear that this is not an absolute rule.

In *R (T) v Trafford Metropolitan Borough Council* [2015] EWHC 369 (Admin) there was a challenge to proposed cuts to adult social care services. The consultation material did not suggest these could be avoided by raising council tax or using the council's reserves. But Stewart J distinguished it from *Moseley* on the grounds that the consultation was not misleading. The judge said that it was one thing 'positively to mislead' and another to put forward after careful and detailed consideration a proposal for cuts in services having rejected other options.

A similar distinction was made in the Court of Appeal case of *R (Robson) v Salford City Council* [2015] EWCA Civ 6. The council was considering the closure of a passenger transport unit. The consultation exercise did not mention the proposal that the unit was to be closed. It concentrated on what alternative means of transport could be provided. Richards LJ came to the conclusion that this was the really important issue, so it did not matter that the proposed closure of the unit was not mentioned. The consultation material was not 'positively misleading' as it had been in *Moseley*.

The case of *R (Morris) v Rhondda Cynon Taf County Borough Council* [2015] EWHC 1403 (Admin) concerned consultation over reductions to nursery provision. In that case the council was criticised for not putting forward options as part of the consultation exercise. Mrs Justice Patterson held that to have required the authority to have done this would have been excessively onerous, that there was no rule derived from *Moseley* that alternative options need to be mentioned. It was only appropriate to include alternatives if these were realistic and what was realistic was highly fact sensitive.

The above three cases all suggest a less onerous approach than the judgments in *Moseley* appeared to indicate. Although Lord Wilson in his judgment said that in his view the consultation material in that case was misleading, it does not follow that in order for a consultation to be lawful it simply has to avoid being misleading.

As regards the inclusion of alternatives, whether something is 'realistic' or not is very much a matter of opinion. In *Morris* the council could lawfully have taken one of the steps suggested by the claimants. However, they did not do so as this did not coincide with their priorities. This is coming close to saying that it is for individual authorities to decide which alternatives are realistic provided that their selection is within the bounds of reasonableness.

Of course, this does not mean that authorities always get it right. There is a history of authorities having problems consulting over the introduction of licence schemes for landlords under Part 3 of the Housing Act 2004. The legislation requires authorities to 'take reasonable steps to consult persons who are likely to be affected by the designation.' In *R (Peat) v Hyndburn Borough Council* [2011] EWHC 1739 (Admin) the council's scheme was quashed as there was no explanation of what the effects of the proposals would be. In *R (Regas) v Enfield London Borough Council* [2014] EWHC 4173 (Admin) the consultation was found to be defective as the authority had failed to take sufficient steps to consult with those outside the borough who would be affected.

The lessons of these cases were not lost on the London Borough of Croydon when it undertook consultation on its proposed scheme. The process was still subject to challenge though, mainly on the basis that there were other steps which could have been taken. The court in *R (Croydon Property Forum) v Croydon London Borough Council* [2015] EWHC 2403 (Admin) rejected the challenge saying that the council's consultation had been extensive. Moreover, it was reasonable to assume that those planning to invest in property in the borough would inform themselves as to what was going on. This is a surprising point for the court to make; it implies that in certain circumstances there is an onus on those who have an interest in a matter to find out if there is any consultation taking place and to respond accordingly.

Further proof, if needed, of the more forgiving approach now being taken by the courts to consultation exercises by public authorities, is the response to the attempt by the former police officer and Crimewatch presenter Jacqui Hames to challenge the government's consultation on whether to go ahead with Part 2 of the Leveson Inquiry. This would have examined wrongdoing in the press and the police. The government's consultation referred only to reasons for Leveson Part 2 not to go ahead. However, Ms Hames failed to persuade the judge that she should be given leave to proceed with her application for judicial review.

The Supreme Court decision in *Moseley* has heightened awareness of the need for authorities to take care when undertaking consultation. However, cases since then have conveyed the message that they will not be held to account in too rigorous a fashion provided they do not send out material that is misleading, explain why alternative options are being rejected and are reasonably conscientious about trying to reach those who may be affected by their decisions.

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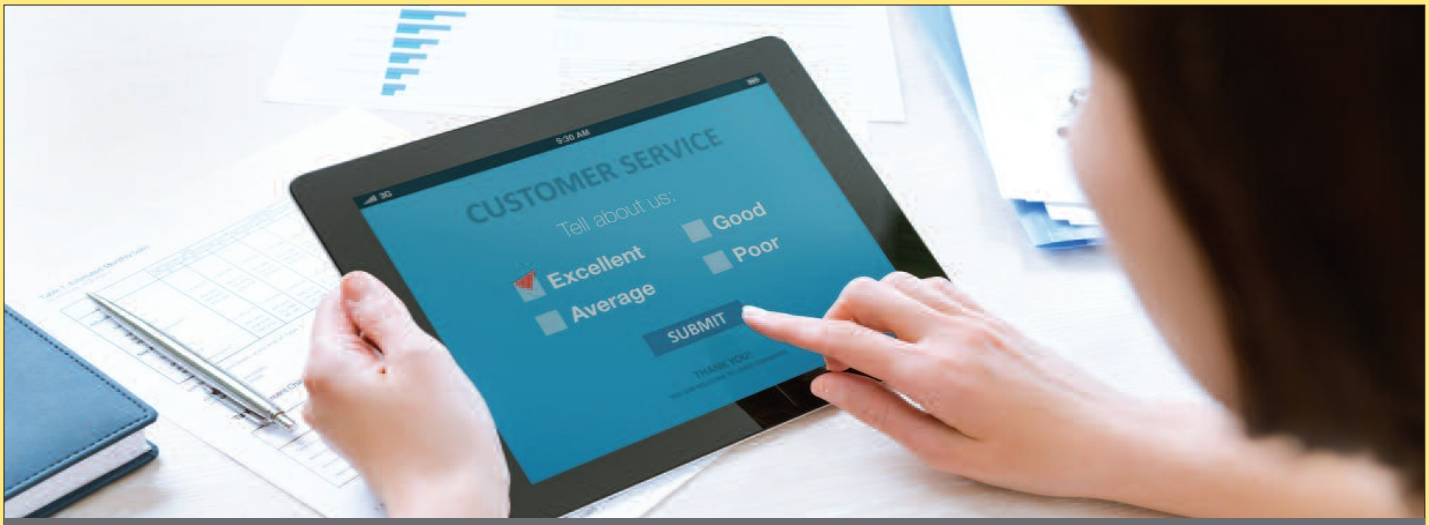
General Data Protection Regulation How to get started on ensuring compliance



The Information Commissioner has described the General Data Protection Regulation 2016 (GDPR) as a 'game changer for everyone, it is the new European-wide data protection framework and will automatically apply in all EU Member States (without the need for national implementing legislation) from 25th May 2018.

It was announced, in the Queen's speech in June, that further to implementing the GDPR a new Data Protection Bill will be enacted. The Bill aims to assist with putting 'the UK in the best position to maintain our ability to share data with other EU member states and internationally after we leave the EU', so it seems a data protection regime equivalent to GDPR will be here to stay.

The GDPR will affect all public bodies. Ensuring compliance with certain elements of the new law will require public sector bodies to make significant changes to the legal basis on which they process data as well as their procedures, policies and, possibly, IT systems.

There is much for local authorities to do to, and here are what we consider to be the key first steps.

1. Appoint a Data Protection Officer (DPO)

The GDPR requires all public authorities or public bodies to appoint a DPO irrespective of what data they process.

The GDPR requires a DPO to have an 'expert knowledge of data protection law and practices' and it is anticipated that the DPO will be at the heart of ensuring compliance with the new legal framework.

Their role will encompass; informing and advising on the GDPR, monitoring and ensuring compliance with all aspects of the GDPR including record keeping, staff training and the necessity to ensure data protection by design and default. They will be responsible for conducting internal audits and advising on the need for, and the methodology of, data protection impact assessments.

DPOs can have other functions within an organisation, however, they should only be entrusted with other tasks and duties that do not impact upon the DPO's independence or result in a conflict of interest. In particular, the DPO should not hold a position within the organisation that leads him or her to determine the purposes and the means of processing personal data. As a rule of thumb, conflicting positions may include senior management positions, such as, chief executive, finance officer, Head of HR and the Head of Legal.

2. Find an alternative legal basis for processing other than legitimate interests

In order to ensure that data is processed fairly and lawfully (the first data protection principle under both the Data Protection Act 1998 (DPA) and the GDPR) it is necessary for a data controller to have a legal basis for processing that data. There are a number of legal bases for processing data, for example, the consent of the data subject has been obtained, because there is a legal obligation to process the data or because the data controller has a legitimate interest in processing it.

This legitimate interest basis for processing is commonly used because it acts as a catch all ground for processing, which can be applied if the basis for processing is not covered by one of the other options. It involves the balancing of the rights and freedoms of the data subject against the needs of the data controller.

In a significant change for public authorities under GDPR, the legitimate interest basis for processing will no longer be available where the processing is carried out in the performance of the public authority's tasks. Instead, public authorities will have to rely on another ground for processing. Public bodies will instead need to rely on performance of a task in the public interest, as their legal basis. The good news for public authorities is that the GDPR version would appear to be wider in scope than its predecessor under the DPA, applying to any task in the public interests and not limited to merely functions of a public nature.

3. Review and amend the use of consent

The GDPR sets a high standard for consent. In order to be valid, consent under the GDPR must be a 'freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'. The ICO has recently released a draft version of its guidance on consent under the GDPR, for consultation. The draft guidance makes clear that in order for any consent under the GDPR to be valid, it must be separate from other terms and conditions and it cannot be a precondition for signing up to a service. Data subjects should be given the option to consent separately to different types of processing and consent must be as easy to withdraw at any time as it was to give.

One of the most important features in relation to consent under the GDPR from the perspective of public authorities, is the fact that consent is unlikely to be available as a basis for processing if the data controller is in a position of power, and there is a clear imbalance of power between the data controller and the individual.

Public authorities and employers are given as specific examples of such an imbalance in power in the ICO's draft guidance.

This restriction on the use of consent will be relevant to public authorities both in the context of their dealings with the public and as employers.

In such circumstances, public authorities will have to look for another legal basis for processing, given that legitimate interest will no longer be available to public authorities' performance of a task in the public interest is likely to be the best option.

4. Review and amend privacy notices

It is necessary for public authorities to be open about how information is used and ensuring information is only used in a way the individual might reasonably expect it to be used. There is currently a duty under the DPA to provide certain minimum information about data processing activities to data subjects in the form of a privacy notice.

The relatively general requirements under the DPA are in quite stark contrast however to the more detailed and stringent requirements of the GDPR. The GDPR provides for a higher standard of privacy notice which must be provided at the point at which data is collected. The privacy notice must be in an intelligible form and use clear and plain language.

There are additional categories of information which must be provided under GDPR over and above the current requirements under the DPA. The key additional requirements from public authority's perspective will be setting out the legal basis for processing as well as the purpose from processing at the outset. The GDPR also requires the retention period (or criteria used to determine the retention period) to be included in the privacy notice. Public authorities will clearly need to review and amend all privacy notices to ensure they are GDPR compliant.

5. Prepare for enhanced individual's rights in respect of their data

Under the GDPR individuals have the right to obtain the rectification of incorrect data directly from the data controller (currently an application to the court is required). The right to be forgotten, under the erasure provisions. This is without the need to demonstrate unwarranted and substantial damage and distress (which is the current requirement under the DPA). To restrict the processing of data or to object to processing in certain specific circumstances (e.g. where data is being processed on the grounds of performance of a task in the public interest). Individuals will also retain their right of access under the GDPR.

Public authorities will have only one month to respond to requests and will no longer be permitted to charge a fee unless the data controller can demonstrate that the request is manifestly unfounded or excessive in nature.

Public authorities will need to ensure that they have appropriate individual rights, policies and procedures in place, together with template responses to ensure that the nature of the right being exercised can be recognised; to make a determination as to whether the conditions in respect of that right are met and, when required, the ability to comply with the request within the prescribed time frame. Public authorities must be able to manipulate an individual's data according to valid requests and may be required to inform third parties of any changes made to an individual's data.

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City Partnerships - Investing in public assets to generate income and growth

With local government continuing to face a fiscal squeeze, many authorities are looking for innovative ways to deliver high quality services for less. A recent study says metropolitan boroughs and cities should define for themselves a new strategic role in which they not only deliver essential public services, but also have wider responsibility for enabling and facilitating growth across their communities and regions.

Local government spending is now 30-40 per cent lower than it was in 2010, with few signs so far that the financial outlook will improve significantly over the course of this Parliament. Authorities therefore face the choice of continuing to manage decline and dwindling budgets – or instead develop a new vision and thinking about the way they manage their assets and invest in them.

A report from Centre for Cities, with Bevan Brittan LLP and Turner & Townsend, says there is now a critical role for authorities to play in unlocking the latent potential of cities, promoting them as places of investment and regeneration, and constructing new models of delivery and income generation to sustain front line services.

With ongoing uncertainty over the direction of public policy and spending, the study says there is an opportunity for authorities to seize the moment by clarifying their role and identity to create a sub-regional sense of place, employment and growth.

Centre for Cities study

City authorities have access to a wealth of assets - whether land, buildings or other disused resources – and operate at the heart of business networks across the public, private and voluntary sectors. The Centre for Cities report highlights how the Localism Act 2011 and authorities' general power of competence can allow innovative city leaders to seek new ways to fund services, and plug gaps caused by lower budgets.

The study *Delivering change: How city partnerships make the most of public assets,* sets out five ways in which cities have worked with other public, and private, sector partners in order to achieve the best social and financial returns from their assets:

- Know your assets and share that knowledge – if cities or potential partners are not aware of what a city owns or controls and the opportunities they present, then actions cannot be taken.
- Have a clear evidence-based vision of how assets can help deliver your economic vision – e.g. providing clarity on where land for both housing and employment and transport infrastructure will be needed.
- Have a commercial mindset when thinking about the value and potential of public assets – cities should have a clear focus on the gap in the market, the scale of risk and any competition, and set targets.
- Ensure collaborations and partnerships are well resourced – having sufficient funding, tools and people to allow projects to succeed.
- Make partnerships last by building strong personal relationships - separate organisations that have different goals, cultures, incentives, and timelines require clear structures on how assets will be used from the outset.

Not every city has the same resources, relationships or entrepreneurial flair to optimise their assets and, without the right mix of networks and commercial know-how, the report says there is a risk that using assets to support growth and revenues could fail.

But the report concludes that as an entrepreneurial mindset and practice spreads, more cities will be able to support their economies and raise revenue, irrespective of political and policy gridlock within central government.

Strategies for change

We should recognise that, in many cases, authorities are already doing what the Centre for Cities report recommends. Birmingham, Manchester and other unitary authorities with new directly elected Mayors have taken the lead.

Local government leaders are the chief custodians of our cities. With 54 per cent of the population and 60 per cent of jobs, much of the responsibility for the UK's increased prosperity lies with the metropolitan areas they control. The considerable public assets they manage

give local authorities the 'clout' and leverage to take the lead in driving local economic development.

But in having a clear and shared vision for the future local economy, it is important to choose the right model to deliver the desired policy objectives and outcomes.

Some authorities are using new legal structures to draw in assets, resources and expertise from their wider regions, expanding the opportunities available and raising the scale of development. This is leading to greater service integration, cutting down on wasteful duplication and enabling a greater focus on end-user need.

A range of other models is available to support authorities in achieving the strategic change they desire, including corporate structures, joint ventures, private sector partnerships and procurement, all of which can leverage investment into local economies.

Housing

Critical is the need to link improved housing with economic development and a local industrial strategy. An economic regeneration strategy identifies the businesses and jobs to be attracted; a similar coordinated approach should be required to the quality of housing available to those workers.

Across the country, the pace of council house sales is accelerating, with homes being sold off three times faster than authorities can replace them. There is now growing frustration that receipts generated from tenants buying their homes at a discount under the Right to Buy scheme cannot be fully utilised to meet the housing needs of local communities.

But in developing house building strategies to help needy people, authorities in many cases already hold the key asset: the land on which homes can be developed.

A growing number of authorities are now pursuing housing development ambitions using the general power of competence in the Localism Act by establishing subsidiary companies.

A clear option is the setting up of a for-profit registered provider alongside an investment partner. This would allow the purchase of completed properties on council-led housing development schemes, in which ownership can be retained and managed with the use of contracted managing agents. The council would hold its interest as an investment in a company that has an objective of investing in affordable housing.

For any city hoping to make the most of its land and property assets, ensuring each of the five Centre for Cities criteria has been met may lead to much improved asset management, more effective revenue raising, and an opportunity to better fund services and economic development opportunities.

Inclusive economies

For some authorities, a key objective is an equitable distribution of both growth and opportunity. In June 2017, Bevan Brittan, Centre for Cities and the Business Services Association met with a group of public and private sector representatives to discuss how economic growth can be developed locally in each area of the country – and which can also benefit all sections of society at the same time.

As leaders of local economies and place, local government has the opportunity to hardwire better equality from the start. For example, some authorities are championing social value and building this into their entire procurement process.

As a result, some authorities have decided only to work with partners and contractors who are innovative and proactive in offering relevant, achievable social value commitments, covering areas such as employment conditions, apprenticeships and training, support for young people and work with SMEs.

Conclusion

As centuries-old governance models start to break down, embracing change and making the most of working in partnerships would seem to be the right way forward.

Whether or not public sector austerity will be eased following the 2017 election, authorities can tackle historic financial difficulties by better management of their estates to create value.

By working across public, private and administrative boundaries, authorities know they can amplify their influence over economic development and achieve far more with partners than they can alone.

Partnerships bring the experience, expertise and opportunities of other organisations to the table, improving ways of working. This helps to deliver greater long-term returns, reduces the risks for councils and stimulates innovation in the delivery of public services.

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Procurement damages – recoverable only if breach is sufficiently serious

By unanimous decision, in April 2017 the Supreme Court confirmed the circumstances in which a party could claim damages for failure to comply with the requirements of the Public Procurement Directive (2004/18/EC) as given effect in the UK by the Public Contracts Regulations 2006 (SI 2006/5) (the '2006 Regulations').

Katie Scott examines this judgment and explains the practical outcomes that both contracting authorities and those bidding for public sector contracts must be aware of as a result.

The decision came in the case of *EnergySolution EU Ltd (now called ATK Energy EU Ltd) v Nuclear Decommissioning Authority [2017]* UKSC 34. The Nuclear Decommissioning Agency (NDA) is a non-departmental public body responsible for ensuring that previous nuclear generation sites are made suitable for other uses once decommissioned. ATK Energy EU Ltd (ATK) provides integrated waste management and decommissioning services to the nuclear industry.

In this case ATK were pursuing a claim against the NDA for breach of the Public Procurement Directive and the 2006 Regulations in respect of the award of a contract for the decommissioning of the 12 Magnox power stations. ATK had tendered for this contract as part of a consortium known as RSS and claimed that the NDA had failed to award the contract to the tenderer who had submitted the most economically advantageous offer.

ATK's claim was heard by way of split trial, with the trial in respect of NDA's liability taking place prior to the trial on quantum. As part of its defence to the action, the NDA sought that a number of points were dealt with by way of preliminary issue, prior to the hearing on liability.

On hearing the trial on liability, Fraser J had held that the NDA had erroneously concluded that the most economically advantageous offer had been submitted by a consortium known as CFP. In his judgment Fraser J [2016] EWHC 1988 (TCC) found that:

(i) CFP should have been disqualified from the competition for failing two threshold requirements; and

(ii) in any event RSS (a consortium of which ATK was a member) would have won the competition had the NDA not made 'many manifest errors' in its assessment of the tenders, but for which the NDA would have awarded RSS a score of 91.48% and CFP a score of only 85.56%.

Therefore, he held that the NDA had acted in breach of duty and that ATK was entitled to move on to the second part of the trial in which an entitlement to damages, together with the level of such damages, was to be determined.

Before the parties reached the quantum part of the trial, they were able to reach a settlement on the issue of damages. However, the parties wanted the Supreme Court to provide judgment on a number of points which had arisen from the hearing of the preliminary issues. It was these points that had led to an appeal determined by Lord Dyson MR, Tomlinson LJ and Vos LJ in the Court of Appeal.

Three main points which were determined by the Court of Appeal were the same points (although slightly reformulated) that the Supreme Court determined in this case.

1 (a) whether the directives which provided ATK with the right to seek that an award is set aside and compensation paid (the 'Remedies Directives') only required an award of damages to be made in circumstances where the breach of the Public Procurement Directive was 'sufficiently serious', and (b) whether the answer to this question was acte clair, so that there was no need to refer it to the Court of Justice?

2 whether the 2006 Regulations conferred a power to award damages in respect of any loss or damage suffered by an economic operator (a) in the case of any breach, or (b) only in the case of a sufficiently serious breach?

3 whether (and if so when) an award of damages under the 2006 Regulations may be refused on the grounds that an economic operator, who issued a claim form in respect of the contract award decision within the 30 day time limit, failed to inform the contracting authority that it had done so prior to the contracting authority entering into the contract?

Determination of the first issue

In the Court of Appeal Vos LJ had concluded that (based on EU case law) in order for breaches of the Public Procurement Directive to be actionable (in light of the provisions of the Remedies Directive) they must meet the following three conditions (the Francovich conditions):

- the rule of infringement must be intended to confer rights on individuals;
- the breach must be sufficiently serious; and
- there must be a direct causal link between the breach of obligation and the damage sustained by the injured party.

The Supreme Court agreed, stating that the Court of Justice case law cited by ATK in its appeal was sufficiently clear in its wording, and provided that a party's entitlement to damages for an infringement of the Public Procurement Directive was to be assessed with reference to the Francovich conditions.

In coming to this conclusion, the Supreme Court found that it was safe to rely on the clear language and ruling in the case of Spijker (Case C-568/08 [2010] ECR I-12655) as setting out the position. Therefore the court did not feel this matter called for a reference to the Court of Justice.

Accordingly, the Court of Appeal's decision stood and the Francovich conditions were to apply.

Determination of the second issue

In respect of the second issue, the question for the Supreme Court was whether in introducing the Remedies Directive to UK law the UK legislators had gone beyond the European law requirements and introduced a directive that provided that damages were payable regardless of whether the Francovich principle, of the breach being sufficiently serious, applied.

In considering this question the Supreme Court found that while it was within the powers of the UK legislators to impose a regime that allowed damages in circumstances where the breaches were not sufficiently serious, this had not been the government's intentions in this instance. In fact, the Supreme Court stated that had it been the UK legislator's intention to go beyond the Remedies Directive then it would have made this intention expressly clear in the legislation.

The Supreme Court therefore supported the Court of Appeal's finding that the legislator's intention in implanting the Remedies Directive was not to gold plate but to simply give effect to the minimum EU requirements regarding damages - meaning that under UK law, damages should only be awarded in circumstances where the Francovich conditions had been met.

Determination of the Third Issue

The final point for the Supreme Court to consider was whether a claim for breach of Public Procurement Directive and 2006 Regulations had to be brought prior to the contracting authority entering into the contract with the winner.

In this case, the NDA had informed ATK of its decision by telephone and letter on 31 March 2014. It also informed all bidders that it would voluntarily observe a standstill (to allow any challenges to its decision) until 14 April 2014. Shortly following receipt of this notice, RSS (the consortium which ATK formed part) wrote to the NDA requesting various information relating to its decision and ultimately requesting that the NDA extend the standstill period until 23 April 2014.

The NDA was not willing to extend its standstill period and on 15 April 2014 entered into the contract with CFP. On 28 April 2014 (so within the 30 day period provided by UK law, but after the NDA entered into the contract) ATK (as opposed to the RRS consortium) issued the claim form and the proceedings commenced.

In defending ATK's claim, the NDA had asserted that ATK had failed to mitigate its loss by deliberately deciding not to issue a claim form until after the NDA had entered into its contract (meaning its losses were much higher).

In respect of this point the court found that, in circumstances where a contracting authority (the NDA) was viewed to have acted in breach of duty then, it was up to the authority to decide whether or not it was exposing itself to risk by entering into the contract before any issues in respect of the contract award had been determined. On this basis the Supreme Court held that, although ATK had not issued a claim form until after the NDA had entered into the contract, this was not an unreasonable failure by ATK.

Conclusions

So where does this leave us?

For those who tender for public sector contracts, this case has made it clear that under both EU and UK domestic law damages for a breach of duty by a contracting authority will only be paid in circumstances in which the breach is deemed to be sufficiently serious as against the Francovich conditions.

For contracting authorities; this case is clear authority that a bidder has 30 days from notification of an award to bring a claim challenging that award. So by choosing to enter into a contract ahead of the expiry of this period, then a contracting authority may be exposing itself to a far greater claim for damages then might otherwise have been the case had the contract not yet commenced.

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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
27 Sep	**Mediation Workshops** (Beginner/Intermediate)	**Gedling BC**
05 Oct	**Civil Litigation Update** (All levels)	**Nottingham**
11 Oct	**Data Protection** (Intermediate)	**Nottingham**
12 Oct	**Public Procurement Workshop** (Intermediate)	**Birmingham**
17 Oct	**Property Case Law Update** (Advanced)	**London**
1 Nov	**Data Protection** (Intermediate)	**Birmingham**
09 Nov	**Difficult Employment Issues** (Intermediate)	**Derby**
14 Nov	**Local Authority Commercialisation** (All levels)	**Nottingham**
14 Nov	**Effective Contract Mobilisation** (Introductory)	**Nottingham**
16 Nov	**Civil Litigation Update** (All levels)	**Sheffield CC**
21 Nov	**Legal Research Refresher** (Basic/Intermediate)	**EMCC**

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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