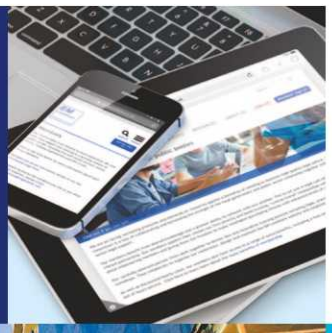
ConsortEM

The newsletter for EM LawShare

Summer 2018

02 Welcome



03 Member news

04 Carillion: Lessons for Local Authorities

By Andrew Tobin and Matthew Mo

06 The changing landscape of assault claims following Weinstein

By Helen Rideout

08 Spotlight on... Gerard Rogers

09 A fresh look at member conduct?

By Simon Goacher

11 New kid on the block – how blockchain could transform local government

By Raj Shah

13 Working with the private sector

By Tiffany Cloynes

15 Peters v Haringey – what lessons for local authorities?

By Olwen Dutton

EM LawShare

emlawshare.co.uk

17 2018 EM LawShare Training Programme

Welcome

As we embark on our fourth four year framework contract it's hello again to Freeths, Geldards, Bevan Brittan, Browne Jacobson, Weightmans and Sharpe Pritchard, who retain their status as partner firms and a warm welcome to our new partner, Anthony Collins.

These seven firms were appointed after a rigorous procurement exercise and we are confident they will continue to deliver the high quality advice at very competitive rates that EM LawShare members have become used to over the 12 years of the consortium's life.

However, we are always looking at ways to offer more to members and, as part of their tender bids, prospective partner firms were asked what added value they could deliver over and above the established benefits; such as the training programme, website, newsletter and conference. They came up with some fascinating and wide ranging ideas and we will be looking at these in more detail in order to take forward the best and most practical.

Inevitably, given the time that the consortium has been running, there are bound to be changes. As some of you may be aware, Jayne Francis-Ward is leaving Nottinghamshire County Council at the end of June. However, she will remain as Chair of EM LawShare.

We will though, be losing the valuable services of John McElvaney from Derbyshire (see 'Members News'). He is stepping down from the management panel following his retirement but we are very fortunate that Simon Hobbs from Derbyshire will be filling his shoes. Welcome Simon!

Equally good news is that we have had an injection of new blood into the Delivery Group over the past year, with Francesca Whyley (Gedling B C), Mona Sachdeva (Nottingham Homes) and Elizabeth Warhurst (N.W Leicestershire D C) all joining to give a fresh viewpoint and new ideas to the group.

If you are interested in playing a part in the running and development of the consortium, please email Stuart at **SL.Emlawshare@yahoo.com**

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visit...

EMLawShare.co.uk

Our website is here to help you get the most out of your EM LawShare membership.

Our full range of website benefits include:

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- access to members pack
- a full range of resources updated regularly, including articles, precedents, training materials and videos
- join group discussions and interact with other EM LawShare members

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

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Member news

A fond farewell to John

John McElvaney, one of the founders of EM LawShare, has recently retired and, after 12 years, has stepped down from his role on the management panel.

We owe John a huge vote of thanks for all his hard work on the consortium over the years. His considered views and wry sense of humour will be much missed, as will his occasional tenancy at interviews to fiercely interrogate firms tendering to become partners.

John's place on the panel will be taken by his colleague at Derbyshire County Council, Simon Hobbs.

Annual conference

Save the date!

Work on this year's EM LawShare conference is already well underway and we are delighted to announce that the event will take place on:

Friday 12 October 2018 at the iPRO Stadium, Pride Park, Derby DE24 8XL

The theme for conference will be:
2020 vision: lawyers of the future

Our exciting new conference venue offers a light and airy contemporary space, with lift access to all floors. The venue itself is in a central location, with close links to the M1 and mainline railway station as well as 300 free parking spaces.

More details will follow but we can promise you a full day of key speakers, breakout sessions and a look into the future.

Please save the date in your diaries and further details will be available shortly on our website: **www.emlawshare.co.uk**

Welcome to our new members

We are delighted to report that we have a number of new members since our last newsletter. So, it's an 'EM LawShare warm welcome' to:

Basingstoke & Deane District Council

Boston Borough Council

Brentwood Borough Council

Marine Management Organisation

Selby Borough Council

Warwick District Council

Wokingham Borough Council

Wolverhampton City Council

In addition, two of our current members have changed their names. Shepway District Council has become Folkestone & Hyde District Council, whilst County Durham and Darlington NHS Trust has morphed its procurement arm into a subsidiary company, known as Synchronicity Care Limited.

Carillion: Lessons for Local Authorities

The collapse of the construction company Carillion this year has had an impact on clients across many sectors, including local authorities.

The insolvency has served as a reminder to all public sector clients of the need for robust procurement processes to test the financial standings of bidders on construction projects. It also emphasises the importance of legal documentation and mechanisms to enable a public sector client to minimise the impact of an insolvency event.

Public procurements: testing financial standing

Carillion's liquidation emphasises the importance of permitting only bidders with robust financial standing to participate in public procurement exercises.

During the prequalification stage, it is possible to impose minimum requirements which need to be satisfied in order to be eligible to be selected to participate in the tender submission stages. Thresholds can be set in terms of common financial metrics to be derived from the accounts such as minimum yearly turnover or ratio measures (such as between assets and liabilities). However, the assessment methodology for any ratios would need to be disclosed to bidders. In setting such metrics, authorities should seek sector specific advice in order for assumptions to take into account industry norms (for example typical profit or gearing levels) so requirements are realistic and appropriate.

Any requirements set will need to be related and proportionate to the subject-matter of the contract so that it does not unduly restrict access in the market to competition. However, procuring authorities enjoy a broad margin of discretion in setting appropriate financial standing thresholds and where the contract is of high value and high dependency for the authority then it is likely to justify more stringent standards being imposed.

Where bidders rely on the financial standing of other organisations (such as parent companies) to pass the prequalification selection stage, authorities should ensure that acceptable guarantees are forthcoming in order to give effect to the financial strength relied upon if they are to win.

It is also possible to continue to vet changes in bidders' circumstances and their ongoing ability to satisfy financial standing minimum requirements when new information comes to light. So if a bidder, having prequalified, goes on to suffer an adverse change in financial standing during the procurement process it would still be possible to reject them to avoid awarding an agreement to a financially unstable contractor.

Construction contracting: importance of security

The "security package" in the context of a construction contract refers to the ancillary documentation and processes which are put in place to protect the client in the event of a major default by the construction contractor. Insolvency is the most significant potential default, not least because it is unlikely to be able to be rectified by the contractor and also because of the serious financial impact. A security package should ideally include the following.

Performance bond

A performance bond is generally regarded as the principal means of client protection in the event of a contractor's insolvency. The bond is given by a third party independent of the contractor, usually a bank or insurance company.

The market standard amount is 10% of the contract value in order to protect the short-term financial impact of contractor insolvency. Such costs would include the overhead of appointment of a replacement contractor, repayment to sub-contractors of interim payments made to the contractor which were then caught by the insolvency and the likely mark-up that a replacement contractor will charge to take on a part-completed project.

The contractor will not provide a performance bond free of charge so it is important at the procurement stage that bidders price for the provision of a bond. A bidder who submits a particularly high price for a performance bond may well require further scrutiny as the bond provider's price may be driven by their own view of the contractor's financial strength.

There are many "standard forms" of performance bond available and the major bond providers each tend to have their own terms. These should be reviewed by lawyers as bond terms are notoriously labyrinthine with archaic language. The most important point to look out for in the context of Carillion is to ensure that the insolvency event automatically triggers a default under the bond and so a financial pay-out by the bond provider.

Collateral warranties: step-in clauses

Collateral warranties provide a direct legal relationship between two parties in a construction project who would not otherwise have a contractual link. One example is the sub-contractors employed by a main contractor such as Carillion, who are each required to provide a collateral warranty to the client.

The principal purpose of the warranty is to provide a contractual form of guarantee to the client that the works and designs of the sub-contractor have been carried out correctly. However, sub-contractor collateral warranties often also include a "step-in clause". This operates when the main contractor defaults in its payment to the sub-contractor. In such circumstances, the sub-contractor would be ordinarily entitled to terminate the sub-contract.

The step-in clause provides that the sub-contractor must, before terminating its contract, give the client the option to step into the sub-contract, taking the place of the contractor, so employing the sub-contractor direct. This potentially enables the project to continue with minimal possible delay. The mechanism is far from perfect. In a large, complex project, the client is likely to have to step into multiple sub-contracts and then manage them. Also, the sub-contractor will still require the client to pay any outstanding sums due from the contractor which may have been caught up in the insolvency. Nevertheless, the step-in provision is useful to have, particularly when the project is approaching completion.

Project bank accounts (PBA)

A PBA is a ring-fenced bank account from which payments are made directly and simultaneously by a client to the numerous parties involved in a construction project, including the main contractor, sub-contractors and professional consultants.

The Government has strongly backed the use of PBAs in all types of construction projects. In the 5+ years since such endorsement, the take-up of PBAs has been low. Reasons cited for this often include the administrative cost and management burden of setting up and running a PBA; there is also undoubtedly resistance and reluctance to change from the way things have always been done.

There is much to be said in their favour. A PBA has trust status which secures the funds in it and can only be paid to the beneficiaries – the supply chain members named in the account. Payments out of the PBA are made simultaneously to all parties. The account is held in the names of trustees, who are likely to be the client and lead contractor (but could also be members of the supply chain). The most significant advantage of trust status is that in the case of insolvency, monies in the account due for payment to the supply chain is secure and can only be paid to them.

Parent company guarantees: a note of caution

A parent company guarantee (PCG) is hugely important in providing long term protection to a client for defective building works through the period of statutory limitation (up to 12 years after the building works are complete). However, a PCG is unlikely to be of any use in a contractor liquidation. If the contractor is insolvent, the likelihood is that the parent company will also be so; therefore the PCG will be unenforceable.

Insolvency of companies is a commercial risk in all contractual relationships. There is no "silver bullet" that will always protect a client from the risks of cost overrun and delay if a construction contractor goes bust. However, proper consideration of these issues at the outset of a project can help to mitigate the impact of an insolvency significantly.

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The changing landscape of assault claims following Weinstein

The name 'Weinstein' has slipped from the front pages after months of weekly disclosures concerning the allegations made against Harvey Weinstein in the States. More than 70 women have accused Harvey Weinstein of sexual misconduct, including rape and assault. Weinstein has in response denied having non-consensual sex with anyone.

Meanwhile, #MeToo trended for months and was seen at the recent awards ceremonies. However, whilst news reporters may have turned their eye to new stories, the nationwide coverage of the issues have caused many to reflect. For some, it has given them the courage to come forward and make a complaint about their treatment at work.

Consent

This raises the first difficult issue for these allegations when considering them alongside the abuse cases we have seen widely publicised in the last decade. These new allegations are not 'historical' and rarely involve minors. These are claims by adults who were or remain in employment and who were allegedly targeted during the course of their work or associations made at work. As a result these cases raise complex questions about "consent" for the investigating police authority and ultimately for a civil court, should a civil claim for damages be brought.

In criminal law, consent is dealt with in the Sexual Offences Act 2003, which states; "a person consents if he agrees, by choice, and has the freedom and capacity to make that choice." But what about consent in a civil case? One has to look at the 'agency' of the claimant, particularly their lifestyle with regard to their independence as a person, the dynamics of their relationship and how they function as an adult, making choices for themselves. The cases will always be very fact specific. No two individuals or relationships will be the same.

Victims who claim they were sexually assaulted or harassed during their employment, in circumstances where the power difference between them and their assailants made it difficult for them to resist or subsequently complain, therefore raise incredibly complex issues from the outset.

Who is liable for a claim for damages?

If consent is absent, the second difficult question a civil claim will raise is under the principle of vicarious liability. Employers or those in a position analogous to that of an employer of the alleged perpetrator will ultimately be responsible for any wrongdoing in a claim for damages if a court finds the actions of the perpetrator are closely connected to their employment.

This area of law has however been in flux. Most recently in the cases of *NA v Nottinghamshire County Council* [2017], in which the Supreme Court held the local authority were liable for the wrongdoing of its foster carers and *Various Claimants –v- Barclays* [2017] where the Court determined that a bank could be fixed with vicarious liability for the sexual assaults of its independent medical expert, commissioned to carry our pre-employment medicals. This second decision is subject to appeal from the High Court.

In the meantime one needs to look to the judgment in *The Catholic Child Welfare Society v Various Claimants* [2012], which remains the leading case on vicarious liability. In this case Lord Phillips undertook a full review of English and Commonwealth cases before setting out five criteria where it would be "fair, just and reasonable" to hold the employer vicariously liable. The five stage test is:

1. The employer is more likely to have the means to compensate and can be expected to have insured against the liability
2. The tort has been committed as a result of an activity being undertaken on behalf of the employer
3. The perpetrator's activity is part of the business activity of the employer;
4. The employer, by employing the perpetrator, will have created the risk of the tort committed
5. The perpetrator will, to a greater or lesser degree, have been under the control of the employer

So what if the alleged assaults happen at a work social event organised by the employer? Each case is again very fact specific. For example, in the case of *Waters v. Commissioner of the Police of the Metropolis* (1997), the employer was not held vicariously liable for a sexual assault where both the officers involved were off duty and where the assault occurred in circumstances where the male officer was a visitor to a female officer's room outside their working relationship. The Court of Appeal held the officers were in a situation no different to that which would have applied had they been social acquaintances with no work connection at all.

Recovery against the alleged perpetrator

The trauma that goes with a sexual assault can lead to lifelong damage for some. These cases, unlike those involving minors, could include a significant loss of earnings and pension claim, along with the loss of vocation.

Following the allegations surfacing in October 2017 Weinstein was dismissed from Weinstein Co. The Weinstein Co. has now filed for bankruptcy and interested buyers have until 30 April to bid. Money raised from the sale of the company will be used to pay creditors.

Fortunately for those allegedly wronged by Harvey Weinstein, individuals who have sued the company for its role in the alleged abuse will be classed as creditors and receive their damages payment.

This therefore raises the third issue to consider in these new claims. Unlike historical cases, where we often find the convicted perpetrators as 'men of straw' these new cases present a different dynamic and a possible route to a recovery of the damages and costs paid out.

Procedurally there are two ways in which the alleged perpetrator can be brought into proceedings. Firstly, by the Claimant, who names them as a co-Defendant. For a Defendant this will often be preferred because the Claimant carries what little risk applies to Qualified One Way Cost Shifting and secondly, all the evidence is reviewed at the same time.

Alternatively, the Defendant employer can bring in the alleged perpetrator during or after proceedings by way of a Part 20 Claim. Here the risk is carried by the Defendant employer, particularly as the Court made it clear in *Arabella Wagenar v Weekend Travel Limited & Anor [2014] WLR(D) 389* that the meaning of "proceedings" under Part 44.13(1) CPR was held to be a single claim against a defendant or defendants which included a claim for damages for personal injuries. It did not apply to Part 20 Claims.

Employers therefore need to look carefully at the assets, earnings and pensions of the alleged perpetrator. Then, give thought to whether expense should be incurred in pursuing an individual for a recovery and finally balance the risk of a possible adverse costs order should the recovery be unsuccessful. Thought also needs to be given to when such action should be taken. Action for a recovery does not need to be taken during the main proceedings.

The limitation period is two years from the date of liability under Section 10 of the Limitation Act 1980. This two year period applies regardless of whether the limitation period for the claimant to bring proceedings against the perpetrator has expired.

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Spotlight on...

Gerard Rogers

Local Government and Regulatory Law Manager, Monitoring Officer – Chesterfield Borough Council

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

How long have you been with Chesterfield Borough Council?

Almost a lifetime! I began here in 1986 (BC – before computers) as a fairly newly qualified solicitor. I had trained in private practice in York and then spent a few months in a small firm on the outskirts of Manchester before becoming a solicitor at Chesterfield Borough Council. Fortunately, my role has changed many times over the years!

What does your role entail?

I am the Council's senior solicitor, the monitoring officer and SIRO. I manage the regulatory law team and attend corporate management team meetings. Much of my time is focussed on governance, data protection, and regeneration projects. I still also have some time to spend on planning law – a speciality that has interested me since qualifying.

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

I report to the Director of Finance and Resources. I manage a team of specialist regulatory law solicitors.

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

The Council is currently considering the future of an outsourcing contract with a company which has delivered some council services since 2010.

Many exciting economic growth projects are underway, including Peak Resort (300 acre private sector leisure, health and sport destination), Chesterfield Waterside (joint venture scheme, mixed use, canal side regeneration) and preparation for HS2 (trains will stop at Chesterfield and the maintenance depot will be at Staveley).

What regulatory issues are on the horizon?

GDPR looms large, of course.

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

Chesterfield Borough Council is a great place to work and I've constantly enjoyed the variety of projects I've been involved with and the ever new challenges. Chesterfield is a compact borough but has always managed to ensure that economic growth is a priority and has an excellent record for finding funding for projects. Consequently, there are always a variety of schemes to advise on. Much of my time is spent working with senior officers and politicians.

There are excellent member/officer relationships and there is a genuine feeling that all are working together to help improve the area.

Apart from my private practice experience many years ago, some years back I also spent half a year on secondment as Head of Law at the Peak District National Park Authority. As a planning authority devoted to conserving and enhancing the heritage and landscape of the area, this role involved particular challenges and high profile minerals planning cases.

What law would you like to see changed?

Can it be more than one?

Murphy's Law / Sods Law: Anything that can go wrong, usually will go wrong (sometimes badly wrong). Mind you, things usually work out okay in the end with concerted effort and teamwork (ever the optimist).

And Parkinson's Law (the bane of local government life).

Oh, and any TV series with "Law" in the title.

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

"Eat your vegetables!" Thanks mum! But I have been a vegetarian since I was 21, which always disappointed her.

"We only pass this way once." From Bob, former Head of Development Control at Chesterfield and cycling friend. It has justified my purchases of road bikes and mountain bikes ever since.

Finally, two truths and one lie in any order.

- I chatted with Dolly Parton's sister
- I appeared in a Dolly Parton video
- I married a Dolly Parton fan

A fresh look at member conduct?

Since the Localism Act introduced a new ethical standards regime for local authority member conduct in England in 2012 concerns have been expressed about its effectiveness.

So it is to be welcomed that the influential Committee for Standards in Public Life ("CSPL") is undertaking a review of the system and has recently consulted stakeholders on the regime.

In a recent survey conducted by Local Government Lawyer of local authority monitoring officers, insufficient powers provided by the current standards regime was considered by respondents to be the biggest challenge facing monitoring officers in their role.

The ability to suspend or disqualify members was removed by the Localism Act, save for where a member has been convicted of a criminal offence in relation to interests. Errant members know this and without any effective deterrent it can feel as if it is almost impossible to alter bad behaviour.

Whilst, thankfully, members who behave badly represent a very small minority they can create a lot of disruption and have a corrosive effect on the culture of an authority if left unchecked.

What is the CSPL doing?

The CSPL is conducting a review to:

- Look at the structures, processes and practices in place in relation to:
  - Codes of conduct for members
  - Dealing with breaches of codes (investigation and sanctions)
  - Dealing with interests
  - Whistleblowing
- Assess whether these are conducive to high standards of conduct
- Make any recommendations for how they can be improved
- Note any evidence of intimidation of councillors, and make recommendations for any measures that could be put in place to prevent and address such intimidation

As part of its review the CSPL carried out a stakeholder consultation.

The consultation asked a series of questions about the current regime and particularly whether key aspects of the current system are effective. The consultation closed on 18 May 2018.

The review provided an opportunity to engage with elected members and the local community on what maintaining high standards of ethical conduct means in practice and how it should be done.

The addition to the review of the issue of intimidation of councillors is a timely reminder that this is a two way street and it is unacceptable for elected members to be subject to intimidation and abuse simply for carrying out their public function.

What themes are likely to emerge?

There are a number of issues which are likely to come under particular scrutiny as part of the CSPL review.

The lack of effective sanctions, as highlighted in the recent Local Government Lawyer survey, has been a concern since the new regime was introduced. There are no effective sanctions and particularly recalcitrant members know that they can act with impunity. One response to this is to say that the remedy for this is party discipline; but what if the member causing major problems is not in a political group or is a senior figure in a group which is reluctant to take action as a result? Another response is that the remedy should be in the ballot box but how often is member conduct a feature in voting intentions?

The lack of consistency amongst codes of conduct is also likely to be looked at. Of course one person's localism is another's postcode lottery. There is certainly a dizzying array of codes around the country; some of which are easier to understand and apply than others. Some codes are comprehensive in the way they deal with interests whilst others apply a minimalist approach which can lead to significant problems.

In general procedures for investigation work ok; though there are often complaints that processes are slower than they should be. Of course if there were stronger sanctions available then a more robust independent process would need to be put in place and that was one of the features of the old regime which politicians disliked.

There is also a lack of independence in the current regime. The role of the independent person was hastily written into the legislation and ill thought through. The requirement is only to consult the independent person, they are not a decision maker. This means that member conduct is policed by other members and often on a committee with an inbuilt political majority. This does not promote confidence in the regime.

The whistleblowing aspect will be interesting. There has been much criticism across public and private sectors of the operation of whistleblowing procedures but attempts to improve protection for whistleblowers and increase transparency of the outcomes of whistleblowing allegations has had mixed results. It will be interesting

to see what the CSPL makes of this in the context of local government.

The review of the intimidation of councillors follows the CSPL's reviews into intimidation in public life following the last general election. That report was critical of the role of social media in allowing intimidation and the lack of action by social media companies. It is likely to be a similar story in local government.

What will happen?

The CSPL will no doubt conduct a thorough review and carefully consider the responses it received in its consultation and other evidence.

It seems likely that the CSPL will find that there are some flaws in the current regime, particularly around lack of consistency and insufficient sanctions to tackle the most disruptive behaviour.

It is to be hoped that this will lead to recommendations which will strengthen the regime and provide more accountability and higher standards; whether such recommendations will be implemented is another matter.

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New kid on the block - how blockchain could transform local government

With the recent press speculation about the collapse of Bitcoin – the world's first and largest cryptocurrency – you'd be forgiven for thinking that the technology underpinning it, known as blockchain, is unlikely to have much use in the local government sector.

Here, Raj Shah, a solicitor in Sharpe Pritchard's Projects department, explains how in fact blockchain may well transform local government operations:

What is blockchain and how does it work?

Put simply, blockchain is a decentralised database held by all those who use it and which securely records transactions.

It's often described as a digital distributed ledger. Rather than each party to a transaction retaining its own set of balanced books, the ledger is constituted by a continuously growing list of encoded electronic transactions themselves (called 'blocks'), each of which has a timestamp and a cryptographic link to a previous block (known as a 'hash', which is essentially a digital fingerprint). This prevents any block from being inserted between two existing blocks and helps to make blocks tamper-proof.

The blocks are copied across a computer network and regularly updated. So, unlike a traditional ledger book kept in one location, copies of a blockchain can be maintained by multiple parties (with no one copy being the master copy), and each user on a blockchain network can be sure that the same ledger is being shared without requiring the verification of a centralised third party.

The reason for each user's trust in the blockchain is because it is secure. Unauthorised changes to the ledger are extremely difficult to make because the ledger provides traceable records on the asset's history, and identical copies of the database are shared between users. Blockchain's instantaneous nature additionally means there is virtually no opportunity for someone to alter a transaction before it is recorded on to the ledger. The software on which blockchain runs automatically distributes data to the decentralised database as soon as new transactions are made.

Almost anything of value can be tracked and traded on a blockchain network, from tangible assets such as land to intangible assets such as copyrights. This is what makes the technology so attractive to so many different industries – anything from cryptocurrency to medical records can be added to a blockchain.

Fully decentralised blockchains are known as public blockchains – anyone can access them. It's also possible to have consortium blockchains that operate under the leadership of a group, or private blockchains to which access permissions are tightly controlled to certain individuals.

What does this have to do with Bitcoin?

Bitcoin is simply one well-known application of blockchain technology. It's a virtual cryptocurrency and each transaction made via Bitcoin is recorded on a public blockchain. This means that each Bitcoin's history can be traced, so users cannot spend Bitcoins they do not own, make unauthorised copies, or undo transactions (since the hash means that each block is linked to the block that came immediately before it, so records cannot be retrospectively altered).

What are the main benefits and drawbacks of blockchain, especially in the context of local government?

The main benefits are accuracy and security of transactions. Beyond this, a key advantage is the time saved in complex, multi-party interactions, since there is no requirement for central verification of a transaction. There are also potential cost savings insofar as less oversight of transactions is required (so intermediaries in transactions can be eliminated) and there is no need to duplicate work since all users have access to a common shared ledger. From the perspective of local authorities, any possible reduction in costs is welcome in the current climate of austerity. The adoption of blockchain technology may also increase efficiency and transparency.

On the other hand, distributing a common digital ledger across networks requires people, computers and servers, so it's fairly resource-intensive from a technological point of view. This, along with other factors such as security, privacy, and regulatory compliance, may make the adoption of blockchain technology more difficult in a local government context.

There are also concerns about the risk of destabilising local government operations through cybersecurity risks and dividing participation in the technology along the lines of age and wealth in the local population.

What potential uses are there for blockchain in local government operations?

The delivery of day-to-day public services by local government could potentially be transformed by blockchain technology. Potential applications might include:

- Ensuring that each voter has only one vote via secure electronic voting administering the collection of council tax
- Confirming certain entitlements of local residents, such as to parking permits or to school places within the local catchment area
- Providing greater transparency in grant allocations
- Identity verification in a more time-efficient and cost-effective manner
- Tracking benefits claimants' receipts and spending patterns to inform subsequent financial management advice
- Using the concept of a distributed ledger to provide access to transparent records of day-to-day activities such waste collection and to enable local residents to record related issues, such as uncollected rubbish.

One particular mainstream application within local government could involve embedding blockchain with code known as 'orders to execute', which will only permit certain financial transactions to proceed once certain pre-defined conditions have been met. These are commonly called 'smart contracts', and they could help to make payment on achieved outcomes or milestones under common works, supplies, and services contracts easier to track and less likely to be the subject of dispute, particularly because the transactions are open, trackable, and auditable.

What are some of the legal issues surrounding the application of blockchain, and what is the future for blockchain in local government?

G-Cloud 9, the current iteration of the Government-led framework agreement for use by public-sector bodies in the UK for IT and digital services, currently includes a limited number of services relating to blockchain, including services offered by a provider of digital ledger technologies. It is likely that the number of relevant suppliers will increase in the next iteration of G-Cloud.

There are a number of legal issues surrounding blockchain technology that will need to be resolved. Legal hurdles include governing law and jurisdictions (there is scope for jurisdictional confusion if a breach or failure occurs somewhere else in the world as a result of the decentralised nature of blockchain), data protection and privacy issues (particularly in light of the imminent entry into force of the EU General Data Protection Regulation), and the legal enforceability of smart contracts.

Nonetheless, it is likely to be only a question of time before this technology permeates local government operations, which it is why it is important that local authorities begin sooner rather than later to explore the value of adopting this technology – for example, by participating in joint pilot projects to understand and recognise better the potential efficiencies that can be unlocked in embracing this technology.

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Working with the private sector

As local authorities strive to meet demands for their services in the face of pressure on their resources and private businesses look for new business opportunities and new ways of working, both the public and private sector may find it helpful to explore ways of working with each other. Arrangements can be made which work effectively for both sectors and can be useful in achieving regeneration or other objectives for particular areas.

There is a variety of arrangements which local authorities might make with private sector bodies, including:

- Disposal of assets – local authorities could dispose of their surplus land by way of a straight forward sale of land at "best consideration" or they could retain the freehold interest in the land and grant a Lease to an occupier for a term at a market rent.
- Development agreements – a local authority may wish to enter into a development agreement with a developer which will contain development obligations on the developer to procure and carry out development within prescribed timescales.
- Joint Ventures Joint Collaborative Agreements / Contractual Joint Ventures – a local authority and private sector party could enter into a joint venture in which they would work together to achieve a common objective. This might involve a contractual joint venture or the establishment of a corporate entity. The arrangements might involve the parties sharing assets, resources, land, capital, staff and investment.

When a local authority looks into working with entities in the private sector, there are a number of key issues which the local authority will need to consider.

- Governance, powers and decision making – A local authority needs to ensure that every action it takes is within its powers or it will be unlawful. When entering into any transaction a local authority must identify the relevant power and ensure it acts reasonably in the exercise of the power. The powers available to local authorities gives them plenty of flexibility to act but they will need to ensure that they comply with any requirements and constraints which apply to particular powers.

- Public Procurement – Local authorities will need to ensure that they are aware of how public procurement legislation will affect the arrangements they make and will need to take account of this when planning transaction. Public procurement legislation sets out rules on the procedures which local authorities and other contracting authorities are obliged to follow when awarding contracts to external contractors for the carrying out of works, supply of goods or provision of services. The need to comply with the legislation can have a significant impact on the timescales and resources of local authorities and failure to comply will make the decisions of local authorities vulnerable to challenge.

- If a local authority is considering a development agreement, it will be essential for it to assess whether this will involve public procurement. It is possible for local authorities to enter into agreements which are outside the scope of public procurement legislation but they will need to analyse the details of each particular arrangement to assess whether it may be subject to public procurement legislation.

- State Aid – Local authorities will need to ensure any transaction they enter into is compliant with State aid rules and does not amount to unlawful State aid.

If land is sold for at least its full market value, then this is unlikely to amount to State aid. However, if a local authority is intending to make a disposal of land for less than the market value, it will need to analyse whether there are any State aid issues and, if so, how to address these.

If a local authority is proposing to enter into a corporate entity with a private sector partner, the local authority will need to consider whether it is behaving in a way which satisfies the 'market economy operator principle' or 'MEOP', in order to ensure there is no State aid. The purpose of the exercise is to establish that the local authority is investing in the vehicle on terms which would be acceptable to a private market operator. In other words, a local authority will be trying to show that the investment is on market terms, meaning that there is no State aid.

- Best Consideration – A local authority has the power to dispose of land under section 123 of the Local Government Act 1972 provided that the local authority obtains the best consideration that can reasonably be obtained unless the disposal is for a short tenancy or the consent of the Secretary of State has been obtained.

The consideration which a local authority takes into account when assessing best consideration needs to have an economic value and local authorities will often run a competitive exercise or obtain an independent valuation to show that best consideration has been achieved. The case of R (on the application of Faraday Development Limited) v West Berkshire Council and Another contains a straightforward analysis of how best consideration is presently viewed by the courts.

A general consent has been issued which allows a local authority to disposal of land for less than best

consideration without the need for specific consent if the local authority considers that the disposal will contribute to the promotion or improvement of the economic, social or environmental well-being of its area and the extent of the undervalue is no more than £2million.

There may also be other relevant powers to consider if the land is held for a particular purpose and in such case, there may specific requirements which will need to be complied with, for example housing, open space, playing fields or allotments.

When local authorities consider working with private sector bodies, they will need to devote sufficient attention to considering the important issues to ensure that the arrangements will be legally compliant and will achieve the objectives of the local authorities. If they do this, they will have the potential to make arrangements which will be effective for all parties involved.

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Peters v Haringey – what lessons for local authorities?

The decision in February 2018 in the case of Peters v London Borough of Haringey [2018] EWHC 192(Admin) is a significant one for local authorities. Whilst there were four grounds of challenge in the case, the one which is likely to have the most impact on councils, is the decision about operating for a commercial purpose.

This was a case which involved a group of Haringey residents who were opposed to the creation of a partnership between the Council and the private sector aimed at developing some of the Council's land and achieving their objectives in relation to affordable housing, regeneration, homes, jobs and other "socio-economic benefit". In order to do this, the Council had created a LLP with a 50/50 split between itself and the private company, Lendlease Holdings Limited, who had been chosen following a long procurement process.

There were four grounds of challenge:

1. That the Council's decision to take part in the LLP was ultra vires, as the Council was acting for a commercial purpose and so was required to use a company
2. That the Council had failed in its statutory duty of consultation under section 3 of the Local Government Act 1999 (broadly the "Best Value" provisions)
3. That the Council had failed in its public sector equality duty under section 149 of the Equality Act 2010
4. That the decision was a Council and not Cabinet decision

All of the grounds of challenge failed, although Ground 2 failed on the grounds of delay rather than merits.

Haringey relied on the general power of competence (GPOC) under the Localism Act 2011; (although it was argued that if necessary they had other powers). Whilst GPOC enables "a local authority to have power to do anything that individuals generally may do; section 4, (1) and (2) qualify this:

i) "The general power confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in the exercise of the general power, do otherwise than for a commercial purpose; and
ii) Where in the exercise of the general power a local authority does things for a commercial purpose the authority must do them through a company"

"A company" is defined in section 4(4) and excludes an LLP. An LLP, to be incorporated requires 2 or more persons to be associated for carrying out a lawful business -"with a view to profit". In this case the Council relied on the general power of competence as the source of its power to enter into the HDV and contended that section 4.2 did not apply because it was not "doing things for a commercial purpose".

Anything that the HDV LLP was intended to do could have been done by a company but an LLP was used because of the VAT and Corporation Tax advantages provided especially the flexibility to cope with the differing regimes applicable to the partners which is not possible under a company structure. In an LLP the profits are passed through to the partners to be taxed in accordance with whatever tax regime is applicable to them, so an LLP has potentially significant advantages for a local authority, as whilst local authorities do not pay corporation tax; local authority companies do.

The HDV LLP was to do business with a view to profit. But, whilst the Council was open to the financial returns which were expected, it was clear from the Cabinet reports that the proposal was viewed as significant in achieving the Council's strategic ambitions for regeneration, new homes and mixed communities. The development vehicle would "deliver regeneration and achieve new housing, jobs and social and economic benefits". Accordingly, whilst the ability to make money from the HDV was considered by the Council and was a benefit, the dominant purpose was not a commercial one; this was regeneration and the other benefits flowing from that; any commercial component was ancillary to this "dominant purpose".

Following the judgement if a Council's dominant purpose is not commercial, it would not matter that the Council choose to structure its proposals in a way that was designed to give the maximum financial advantage. However, what it does emphasise is the importance of ensuring that the various benefits that a Council hopes to achieve are very clearly spelt out throughout the decision making process. Council lawyers and Monitoring Officers should ensure that they are fully involved in this process and can advise accordingly throughout.

Does the case mean that councils may be advised not to use companies as much in the future; or that some of the structures set up could now be altered? This really depends upon what a Council is hoping to achieve. Our view is that it is likely that the majority of cases relating to housing development and other investments will continue to be set up via companies due to the additional benefits that this may bring.

The case also raised the question of the Duty to Consult under section 3 of the Local Government Act 1999. This challenge failed upon timing rather than merit. It reminds authorities who are considering entering into a significant JV or other structure that it would be wise to consider consultation at an early stage.

The challenge under the PSED failed as thee court was able to find that the PSED had been considered throughout the decision making process. This did not require the Council to consider other means of providing for regeneration, but only at the equality impacts of the proposal –the HDV- it took forward.

Finally, the question of whether or not this was properly a Council or an Executive decision arose. The Local Government Act 2000 established that decision-making is the responsibility of the Executive unless there is a specific provision which makes a decision one for the Council, provided of course that the decision is within the budget and policy framework set by the Council. The size or importance or controversial nature of a decision is irrelevant.

It is not possible for full Council to subvert the legislation by requiring micro-management against different budget allocations; plan and strategies which are the responsibility of full

Council must operate at a general level and not descend to small and individual decision-making. This point was so clear in the Peters and Haringey case that the Judge said "Upon analysis it is not realistically arguable".

Does this mean that Council lawyers should never agree that a proposal for a company or LLP (within the budget and policy framework) should be taken to full Council for decision in an authority operating a Leader and Cabinet or Elected Mayor and Cabinet model? Probably, yes, as decisions taken by full Council when they are properly the responsibility of the Executive are capable of being challenged. There is no harm in full Council "having its say" in relation to a proposal, but the decision must be that of the Executive at the end of the day.

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2018 EM LawShare Training Programme

Most of you should have recently received an email from our training administrator, Julie Scheller at Freeths, giving details of the courses up to 31 July.

A brochure with the full programme of 62 courses will follow shortly if you haven't yet received this.

The majority of the courses will still be held in the East Midlands but we will continue to have repeats of some in Sheffield and Birmingham, along with an increasing number in London.

Video conferencing for those courses hosted by Freeths will also be available in their Birmingham, Leicester, Manchester, London and Sheffield offices.

The courses remain **free to anyone** working for a member organisation, not just legal staff and can be booked on the EM LawShare website.

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 clearly state 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 12 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 start of the course. If you do not, you will be deemed to be absent for the purposes of this policy.

Date:	Title:	Location:
18 June	**Carrying out Investigations – Skills** (intermediate)	**Nottingham** (video link to Leicester, Birmingham, Manchester, London and Sheffield)
19 June	**TUPE Masterclass – Managing a TUPE Transfer** (intermediate/advanced)	**Leicester**
22 June	**Dealing with Contractual Breaches – Drafting Commercial Contracts** (intermediate)	**Nottingham** (video link to Leicester, Birmingham, Manchester, London and Sheffield)
27 June	**Commercial Landlord and Tenant Update – Land Acquisitions, Appropriation and Disposal** (introductory/intermediate)	**Nottingham** (video link to Leicester, Birmingham, Manchester, London and Sheffield)
28 June	**Introduction to Procurement and Procedure – Public Procurement and State Aid** (beginner)	**Nottingham** (video link to Birmingham and London)
29 June	**General Governance Course – Local Government Law** (intermediate/advanced)	**London** (video link to Birmingham) (repeat of 16 May East Midlands event)
2 July	**Carrying out Investigations – Skills** (intermediate)	**London** (repeat of 18 June East Midlands event)
4 July	**Local Authority Housing Delivery Vehicles/Residential Development – Acting Commercially** (intermediate/advanced)	**Leicester**
11 July	**TUPE Masterclass – Managing a TUPE Transfer** (intermediate/advanced)	**London** (repeat of 19 June East Midlands event)
25 July	**Environmental Law Update – Planning, Environmental and Highways Law** (all levels)	**Nottingham** (video link to Leicester, Birmingham, Manchester, London and Sheffield)

Detailed course outlines are available on our website: www.emlawshare.co.uk

Continuing Competence

You will be aware that in 2016, the SRA removed the requirement for solicitors to undertake 16 hours per year 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 revised requirements in details. As such, the 2018 training programme is fit for purpose under the revised approach.

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