EM LawShare Lecture 22 March 2017
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Developments in local government law

A. Introduction
I am delighted to have been invited to deliver this lecture this afternoon to an audience of professional local government lawyers. I have had an interest in local government law since I was a student taking a postgraduate law degree course at Cambridge in 1971-72. One of the subjects I chose was Local Government Law. The class was very small. My lecturers were, in different ways, inspirational: Professor Stanley de Smith, author of de Smith's Judicial Review of Administrative Action, and Mr D.G.T. Williams, subsequently Professor Sir David Williams, Vice Chancellor of the University of Cambridge. The recommended book for the course was Charles Cross's Principles of Local Government Law. One aspect I did not appreciate was the price – 4 guineas for a paperback book – at that time a fortune (the equivalent of £53.55p today). The external examiner, who set the examination, was Professor Jack Garner of the University of Nottingham. Unfortunately, the exam he set had relatively little to do with the course we had just followed. Nevertheless, I managed to pass. This was fortunate as, coincidentally, by the time I came to sit the examination, I had been offered and had accepted a lectureship at Nottingham to start the following academic year. Professor Garner, before he became an academic, had had a career as a Town Clerk, at one stage being Town Clerk of Andover. Through him, I got to know Charles, who had been up to 1974 Town Clerk of Prestwich and then practised at the Bar. I was subsequently invited by Charles to revise chapters of Cross for new editions, and in due course took over as Editor. He also invited me to become an Assistant General Editor of the Encyclopedia of Local Government Law, which was launched, in two volumes, in 1980.

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Here too, I succeeded Charles as General Editor. I owe an enormous debt to all these lawyers I have mentioned.

In my lecture this afternoon I propose to start with some general observations about the current position of local government law in England and Wales and then to discuss a number of recent developments which seem to me of particular interest. These can be captured in the summary “Donald Trump, nuisances and standing”. Of course I have had to be highly selective. Finally, I mention some prospective developments.

B. The general position of local government law in England and Wales

1. The constitutional context

The fundamental starting point is that local government does not enjoy any special status in the law of England and Wales. Local authorities and their powers and duties are created by ordinary Acts of Parliament. Their functions can be changed and indeed authorities can be abolished by the same means. The same is technically true of the devolved assemblies and administrations in Scotland, Northern Ireland and Wales, but there are strong constitutional conventions, now enshrined in statute, that inhibit the making of Acts of Parliament at Westminster in respect of devolved matters without the consent of the devolved assemblies. The recent decision in Miller\(^1\) confirms, amid some controversy, that they remain as conventions not as binding rules of law. Brexit will test them severely. Whatever the outcome, no such conventions exist to protect the position of local government in England and Wales. This can in part be explained on the basis that devolution to Scotland, Northern Ireland and Wales has been a move designed to

\(^1\) R (on the application of Miller) v Secretary of State for Exiting the European Union (Appellant); Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review; Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2017] UKSC 5.
help secure the continuation of the Union of the United Kingdom; no such considerations arise in the case of local government.

The nearest we come to at least a symbolic recognition of a special position for local government arises from the decision of a Labour government to ratify, from August 1, 1998, the European Charter of Local Self-Government. Signatories bind themselves to accept at least a proportion of the principles of the Charter. These in different ways require there to be local democratic decision-making bodies providing an administration that is effective and close to the citizen; such bodies should possess a wide degree of autonomy with regard to their responsibilities, the ways and means by which they are exercised and the resources required for their fulfilment.² They should be entitled, within national economic policy, to adequate financial resources of their own.³ (It is to be remembered that the Conservatives had previously declined to sign the Charter, on the ground that local government was a matter for national rather than international decision.) It can be argued that the wording gives sufficient leeway for central government to do more or less what it wants provided there is at the end of the day a recognisable local government sector. If it did not, the willingness of the Conservative government to contemplate withdrawal from the Council of Europe’s flagship convention, the European Convention on Human Rights, suggests that it would not worry too much about withdrawing from the Charter. In any event, the sanctions associated with the Charter are political rather than legal.

² Art.2.
³ Art.9.
2. *The shape of local government in England and Wales*

In 1969 the Redcliffe-Maud Royal Commission on Local Government\(^4\) recommended by a majority a new system of 58 unitary authorities with two tiers in three metropolitan areas (for Merseyside, the Manchester area and the West Midlands). (It is of at least some passing interest to note the names of two of the members of the Royal Commission. Francis Hill was a highly respected local government lawyer, and subsequently became Chancellor of the University of Nottingham. T. Dan Smith, then a leading figure in local government in the North, was subsequently jailed for corruption.)

The report was not accepted by the incoming Conservative government in 1970. Instead, the Local Government Act 1972 established two tier arrangements throughout England and Wales, with a different distribution of functions by comparison with the rest in six metropolitan areas: Greater Manchester, Merseyside, South Yorkshire, Tyne and Wear, West Midlands and West Yorkshire. As we know, over time these arrangements have been to a considerable extent dismantled. We now have a bewildering mixture of unitary and two-tier authorities in England,\(^5\) and a series of unitary authorities in Wales (where the structure was imposed rather than negotiated by the then Conservative government\(^6\)). In 2013, the government rejected Lord Heseltine’s proposal that all two-tier authorities should move towards unitary status.\(^7\) There seems no current appetite for a top-down review of local government structures in England.\(^8\) It is possible for

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\(^4\) Cmnd 4040.


\(^8\) In 2014 the then Secretary of State for Communities and Local Government, Eric Pickles, commented in response to discussions about establishment of a unitary council for Warwickshire: ”I said before the last general election that any authority official who
mergers to be effected by agreement. For example, if all goes to plan, Suffolk Coastal and Waveney District Councils are to merge to become East Suffolk District Council by 2019. Taunton Deane and West Somerset District Councils have also voted to merge. Proposals for unitary councils are under discussion in a number of areas. However, recent proposals for a substantial reduction in the number of local authorities in Wales have not survived. For the foreseeable future, the only major constitutional reform programme in town will be Brexit. Nevertheless, it seems to me that there are still underlying pressures in the direction of a pattern not that far from the Redcliffe-Maud model. The pressures are both top-down and bottom-up.

Top down, we have the establishment of Combined Authorities. This has been a very interesting development. These are legal structures set up by an order made by the Secretary of State with the consent of the local authorities concerned, and with or without a directly elected mayor. They exercise functions transferred by an order made by the Secretary of State and in addition they may agree to share other functions. They have commonly been established in conjunction with “devolution deals” made, in

came to me with a proposal for a reorganisation would be met with a pearl-handled revolver that I kept in my desk. It sounds as though it is time to oil the thing again. We have no intention of carrying out a reorganisation. Any spending on a reorganisation is a fundamental waste of taxpayers’ money.”

https://hansard.parliament.uk/Commons/2014-03-03/debates/1403033000029/TopicalQuestions#contribution-1403033000173


10 https://www.westsomersetonline.gov.uk/home/News/Councils-say-yes-to-merger

11 See Sandford, op cit n 5 p 11.

12 http://gov.wales/topics/localgovernment/local-government-reform/?lang=en


14 Nine Combined Authorities have been established: Greater Manchester; Liverpool City Region; Sheffield City Region; West Yorkshire; the North East; Tees Valley; the West Midlands; the West of England; Cambridgeshire and Peterborough.
conjunction with Local Economic Partnerships,\textsuperscript{15} with Central Government, although such deals can be made directly with existing councils, as in the case of Cornwall.\textsuperscript{16} These deals significantly can and do include the transfer of control over some central government budgets. In principle, this is to be welcomed. Successive governments over the last 50 years have consistently spoken of the importance of devolving powers to local government and have consistently tended to act otherwise. This development may turn out to be different. Provision for Combined Authorities was first made by the Local Democracy, Economic Development and Construction Act 2009.\textsuperscript{17} This was to enable an economic prosperity board to be combined with an Integrated Transport Authority. One was set up under these powers, in Greater Manchester. However, the provisions were remodelled to a much grander scale by the Cities and Local Government Devolution Act 2016. This enables a Combined Authority to exercise a wider range of local authority powers than under the previous model. The overall political purpose is to promote economic development and regeneration. One feature that is unusual about this is that each Combined Authority has its own bespoke blend of responsibilities, reflected in the order constituting the authority. This can be seen as a virtue, as there is at least a chance that different “deals” will reflect different local priorities and needs. It allows for experimentation, which has not necessarily been straightforward in the past. Particularly important here may be the examples of Greater Manchester and Cornwall where there are to be unified responsibilities in respect of health and social care.\textsuperscript{18} In Greater Manchester, the role of Police and Crime Commissioner has been incorporated as well.


\textsuperscript{17} See LGA, \url{http://www.local.gov.uk/devolution-deals}.

\textsuperscript{18} It is not, however, proposed to provide by order for the formal transfer of NHS responsibilities to local government; the plans have been characterised as involving “delegation” rather than “devolution”: H McKenna and P Dunn, \textit{Devolution: what it means for health and social care in England} (The King’s Fund Briefing, November 2015) \url{https://www.kingsfund.org.uk/sites/files/kf/field/field_publication_file/devolution-briefing-nov15.pdf}.
On the other hand, practical problems have been generated by the haste with which devolution deals have had to be done and these new authorities have had to be established, without much by the way of central guidance. Some secondary legislation, including on arrangements for overview and scrutiny, has recently appeared.\(^\text{19}\) There may be real additional difficulties for those seeking to deal with these new organisations and indeed for public understanding of their roles.\(^\text{20}\) It will be particularly intriguing to see how the representatives of each local authority on the Combined Authority work with each other and (in most cases) the elected Mayor, whether within or across political party lines. It is at least sometimes the case that the nearer the neighbour, the less well they get on. For example, the tensions that can be observed in football matches between Derby County and Nottingham Forest seem from time to time replicated at the municipal level. There are some signs of the overall programme unravelling. The devolution deals reached for the North East and Greater Lincolnshire have collapsed, following opposition from some of the constituent councils. In other areas, work designed to lead to a devolution deal has failed.\(^\text{21}\) There has been a successful challenge by way of judicial review to the consultation process for extending the area of the Sheffield City Region Combined Authority to include Chesterfield Borough Council (part of the area of Derbyshire County Council) and Bassetlaw District Council (part of the area of Nottinghamshire County Council).\(^\text{22}\) There has been criticism of the programme from the House of Commons Select Committees on Communities and Local Government and

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\(^{20}\) Of course each Combined Authority has its own website with a great deal of information.

\(^{21}\) As in the case of the North Midlands: "Devolution is dead - so what is the plan for Nottingham's future?" *Nottingham Post* 21 July 2016


\(^{22}\) *R (on the application of Derbyshire County Council) v Barnsley, Doncaster, Rotherham and Sheffield Combined Authority* [2016] EWHC 3355 (Admin). Election of the Combined Authority Mayor for the Sheffield City Region has been delayed to 3 May 2018: The Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (Election of Mayor) (Amendment) Order 2017 (SI 2017/432).
Public Accounts, who have expressed particular concern about the lack of detail in the government’s objectives and consequent difficulty in monitoring progress and measuring success.\textsuperscript{23} It will be interesting to see the turnout in the May 4 elections of Mayors of Combined Authorities. However, if things do go well, one can see pressure growing for the pooling of more and more local authority functions. However, the more that is done, the greater the case for the Combined Authorities, and not just the Mayor, where there is one, to become directly elected. If so, perhaps some of them could be renamed Metropolitan County Councils. Now there’s a thought.

Bottom-up pressures include those leading the vast majority of local authorities to engage in shared services. At least 96% of councils across the country are currently sharing services with other councils, and substantial savings have been reported.\textsuperscript{24} Again, if these arrangements work well, this can be expected to add to pressures for council mergers. Mr Pickles presumably took his pearl handled revolver with him when he left office.

\textsuperscript{23} CLG Committee, \textit{Devolution: the next five years and beyond} (1\textsuperscript{st} Report 2015–16 HC 369)  
Government response (Cm 9291, May 2016):  
PAC, \textit{Devolution in England: governance, financial accountability and following the taxpayer pound} (32\textsuperscript{nd} Report 2016–17 HC 866)  
https://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/866/866.pdf  
Government response (Cm 9429 March 2017):  
\textsuperscript{24} LGA, \textit{Services shared: costs spared?} (August 2012)  
http://www.local.gov.uk/c/document_library/get_file?uuid=251f1b46-319f-4bf3-94f4-69d5db4551a&groupId=10180  
LGA, \textit{Stronger together: shared management in local government} (29 November 2016), reporting that around 45 councils share senior management teams in about 20 different partnerships  
http://www.local.gov.uk/documents/10180/7632544/4.16+Shared+Chief+Executive+report_v04.1.pdf/19627d9d-6f44-4199-8b2c-98c393c56fd1
3. General powers

The general power of competence conferred by the Localism Act 2011\(^{25}\) seems to have had relatively little impact, certainly so far as the case law is concerned. It is difficult to see that it adds much of interest to the well-being powers conferred by the Local Government Act 2000. There are of course some documented examples of reliance on it, particularly by parish and town councils. The Welsh Government has chosen to stay with the well-being powers. The GPC does, however, get over the unduly narrow reading of those powers given by the Court of Appeal in the LAML case.\(^{26}\) It is being extended to Combined Authorities.

One curiosity concerns the process for relaxing statutory provisions that restrict exercise of the general power of competence. This is rarely invoked. The recent example is the Harrogate Stray Act 1985 (Tour de Yorkshire) Order 2017. Once again the 1985 Act has been relaxed to facilitate a cycle race. The 40 plus page document\(^{27}\) summarising the complex steps that need to be taken perhaps helps explain why councils by and large do not seek such relaxations. Or maybe there just are no other statutory provisions than the Harrogate Stray Act 1985 that get in the way of progress.

4. Local government and austerity

Perhaps the major issue to face local government in recent years has been the

http://researchbriefings.files.parliament.uk/documents/SN05687/SN05687.pdf
LGA, *The General Power of Competence: Empowering councils to make a difference* (July 2013)
http://www.local.gov.uk/c/document_library/get_file?uuid=83fe251c-d96e-44e0-ab41-224bb0cdef0e&groupId=10180
\(^{27}\) DCLG, *Temporarily removing restrictions on the use of the Stray, Harrogate, imposed by the Harrogate Stray Act 1985, to facilitate Harrogate Borough Council hosting the Tour de Yorkshire 2017* (November 2016)
unprecedented cuts in local government funding imposed as part of the austerity programme pursued by the Coalition and Conservative governments. Local authorities lost 27 per cent of their spending power between 2010/11 and 2015/16 in real terms.\(^{28}\) The general position seems to be that the first part of this period did not see major cuts to frontline services, much of the shortfall being achieved by such factors as savings in back office functions, increases in charges and property development.\(^{29}\) The efforts of local government here have been prodigious. However, there is also evidence that councils in the most deprived areas have been differentially hit and are clear predictions that in future major cuts to frontline services will be inevitable. The policy of the central government seems to be one of “testing almost to absolute destruction” (TATAD). The recent decisions of central government to allow councils in England to raise additional money through council tax and to inject £2bn into social care should lessen the pressures. Yet another review of the funding of social care is to be held.\(^{30}\) Of course, all this can easily be blown back off course by rising legitimate demand, as is demonstrably illustrated by the NHS.

How does responding to austerity fit within the framework of local government law? One major constraint is that local authorities in England are subject to limits as to how far they may raise council tax without a local referendum.\(^{31}\) Another is that local authorities are required by law to prepare balanced budgets, albeit having recourse to reserves to cover short term difficulties. The chief financial officer must take steps under s.114 of the Local Government Finance Act 1988 to suspend spending for a period of time if he or she judges the council does not have a balanced budget or the imminent prospect of


\(^{30}\) Spring Budget 2017 paras 5.3-5.6.


one. Remarkably, no s.114 report has been made since October 2000, when a report was issued for Hackney LBC.\textsuperscript{32} The next highly relevant legal factor is the extent to which functions are conferred on local authorities in the form of duties rather than powers. In principle a lack of resources is not a reason to justify failure to perform a public duty.\textsuperscript{33} However, there is commonly room for debate as to what precise steps are required by legislation. A further possible legal constraint can arise out of exercise of the Secretary of State’s power of intervention under s.15 of the Local Government Act 1999. However, neither of the recent examples of use of this power has arisen out of a financial crisis.\textsuperscript{34}

The other legal constraints that have come to the fore during the period of austerity are illustrated by the extensive case law on the public sector equality duty (s.149 of the Equality Act 2010);\textsuperscript{35} the contents of an appropriate consultation process, where one is required by legislation, general fairness or as the result of a promise;\textsuperscript{36} and the substantive protection of legitimate expectations.\textsuperscript{37}

It seems to me that, where relevant to the question whether decisions are unlawful, the

\textsuperscript{32} S. Nolan and J. Pitt, *Balancing local authority budgets* (CIPFA, April 2010).
\textsuperscript{33} Cf H Woolf et al, *de Smith’s Judicial Review* (6th edn, 2007, Sweet & Maxwell) para 18-058: “it is submitted that financial considerations ought not to feature in the calculation of a court deciding whether to grant a remedial order to a claimant who has demonstrated to the court’s satisfaction that a public authority has acted unlawfully”.
\textsuperscript{34} See HC Communities and Local Government Committee, 4th Report 2016-17 HC 42, *Government interventions: the use of Commissioners in Rotherham Metropolitan Borough Council and the London Borough of Tower Hamlets* [https://www.publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/42/42.pdf](https://www.publications.parliament.uk/pa/cm201617/cmselect/cmcomloc/42/42.pdf). These arose out of concern over child sexual exploitation (Rotherham) and divisive community politics and the mismanagement of public money (Tower Hamlets).
\textsuperscript{36} See especially *R (on the application of Moseley) v Haringey LBC* [2014] UKSC [2017] 1 WLR 3947; *West Berkshire DC v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923.
\textsuperscript{37} See most recently *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 1 WLR 3383 (especially Lord Carnwath’s concurring opinion favouring, obiter, a narrow rather than broad approach).
judges in practice are fully aware of the budgetary constraints that provide the context of many claims for judicial review, particularly those based (usually as a last resort) on alleged irrationality. But pointing to budgetary constraints is not a trump card.

C. Some particular developments

In terms of local government legislation in England concerning, governing structure and general administration, the last few years have been relatively quiet. This is presumably a welcome relief. The Labour government seemed perennially restless, with the establishment of the Greater London Authority and major Acts in 2000, 2007 and 2009. The Coalition Government was responsible for the Localism Act 2011. The present government has contented itself with the relatively limited Cities and Local Government Devolution Act 2016. The Welsh Government has been more ambitious with a series of Local Government (Wales) Measures in 2009 and 2011 and Acts in 2013 and 2015. There is an increasing number of areas, such as with the promotion of democracy and the support of councillors, where distinctive new ideas have been implemented in Wales. There has been much greater activity in both England and Wales in substantive areas such as planning, housing and education. Similarly, there have been relatively few major cases on aspects of what may be termed local government constitutional and administrative law. I will, however, pick out a few recent cases which seem to me at least have particular interest.

1. Donald Trump

It is impossible to keep Mr Trump out of the news. This is likely to continue for up to eight years as regards his current job. However, his name is likely to live on in English law as a result of the decision of the Supreme Court in Trump International Golf Club

See eg Draper v Lincolnshire CC [2015] EWHC 2964 (Admin).
Scotland Ltd v Scottish Ministers. Here TIGC objected to a windfarm development off the coast of Aberdeenshire about 3.5 km from their golf course. The Scottish Ministers granted consent. TIGC took a legal challenge to the Supreme Court. One ground was that a condition to the consent was so uncertain that it was irrational. The condition required a detailed Design Statement to be submitted to the Scottish Ministers for their written approval, prior to commencement of the development. It did not in terms enable the ministers to require construction in accordance with that Statement. Lord Hodge held, first, that the condition, even if unenforceable, was not fundamental to the permission, and that there was in fact a mechanism for enforceability. But he went on to consider the question whether there could be an implied obligation to construct in accordance with the Design Statement. He held, in agreement with Lord Carnwath, that there could. They disagreed with the view of Sullivan J. in an earlier, planning, case that this could not be done. This matter raised questions concerning the proper approach to the interpretation of public documents. Lord Hodge noted the modern tendency to look for more general rules on how documents should be interpreted, rather than having different rules for different kinds of documents. However, in the case of public documents on which third parties might rely, there was only limited scope for the use of extrinsic material in their interpretation. Here the court

“asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Other documents may be relevant if they are incorporated into the consent by reference... or there is an ambiguity in the consent.”

40 Sevenoaks DC v First Secretary of State [2004] EWHC 771 (Admin)
41 Lord Hodge at para.[34]
Interpretation was not the same as the implication of terms:

“While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reasons for excluding implication altogether.”

Accordingly, comments in earlier cases\(^{42}\) that there can never be an implied condition were “too absolute”.\(^{43}\) If necessary, Lord Hodge would have inferred that the conditions need as a whole required conformity to the Design Statement.

These words provide a helpful steer on the approach of courts to the interpretation of public documents and have already been cited in 13 or so cases so far. Trump is likely to be with us for a while.

2. **Nuisances**

From Donald Trump to nuisances. Local authorities have to deal with nuisances in a wide variety of contexts. For example they have a general power to make byelaws for, inter alia, the suppression of nuisances. Parliament has recently made it a little easier for local authorities to make byelaws, although the rules differ between England and Wales.\(^{44}\)

I want here to focus on three cases on different kinds of nuisance problem.

(a) **Nuisances to the general public:**

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\(^{43}\) Lord Hodge at para.[36].  
Local authorities have a number of powers under which they can seek an injunction to restrain unlawful or anti-social behaviour. A general power is available by virtue of the s.222 of Local Government Act 1972. A recent illustration is provided by the decision in Wolverhampton City Council and others v Green and Charlesworth.\textsuperscript{45} In 2014 a judge granted an injunction, against persons unknown, prohibiting car cruising in the Black Country.\textsuperscript{46} This activity involves the racing of cars and the performance of driving stunts and caused a high level of nuisance and inconvenience, damage to life and limb, significant public nuisance and significant annoyance to the public. The injunction was widely publicised with notices in the press and signs throughout the area. It is in force for 3 years. In the present case, the respondents admitted breaches of the injunction by participating in a car cruise of 9 vehicles that ended up in a car park. Here some (not the defendants) performed doughnut and handbrake turns. I understand from Wikipedia that a doughnut in the context of driving is a manoeuvre involving rotating the rear or front of the vehicle around the opposite set of wheels in a continuous circular motion, hopefully generating smoke. Other terms for this "spinning sedys / doing a sedy", "making cookies / cutting cookies", "cyclone", "diffing", or "spinning brodies"\cite{citation needed}. I am pleased to report that my colleagues in the Law School knew precisely what this was. The judge, Holgate J., did not find that either defendant had done these manoeuvres. That did not matter, because they had been involved in a group activity which was to be judged in its entirety.\textsuperscript{47} [Although he did not say this in terms this can only properly be done on the basis that each had encouraged others to do the acts in question. So if the Mayoral car gets caught up by accident in a car cruise while returning from an evening function, the Mayor will not be open to prosecution.]\textsuperscript{48} It was also interesting that part of the evidence against Mr Green had been provided by himself as he had uploaded a film of some of the activity onto social media. Very helpful. This was

\textsuperscript{45} [2017] EWHC 96 (QB).
\textsuperscript{46} http://www.west-midlands.police.uk/docs/latest-news/2014-12-19-injunction-car-cruising.pdf
\textsuperscript{47} Para.[7]
\textsuperscript{48} Cf cases on joint enterprise in criminal law: R v Jogee; Ruddock v R (Jamaica) [2016] UKSC 8 and [2016] UKPC 7.
in fact regarded as a serious aggravating feature. The court passed suspended
sentences of detention (4 and 3 months respectively). Whether this has put an end to
car cruising in the Black Country I have no means of knowing. Of course, more specific
powers to obtain an injunction to restrain anti-social behaviour are available via the Anti-
Social Behaviour Crime and Policing Act 2014\textsuperscript{49} replacing earlier legislation.

\textit{(b) Nuisances directed to the council}

A second kind of nuisance can be caused to a local authority itself, and its members and
officers. Here, the Protection from Harassment Act 1997 is particularly helpful. An
example here concerns Mr Robert Pickthall.\textsuperscript{50} Mr Pickthall conducted a sustained
campaign comprising the publication of allegations and abusive remarks about
employees, officers and councillors of Cheshire West and Chester Council. The present
proceedings comprised a claim for an interim injunction. Much of the campaign was
conducted via his website, www.thebloodhound.org.uk. Among many features of the
campaign was the decision of the Council in response to the receipt of over 1,000 emails
from Mr Pickthall, to use a single point of contact. Mr Pickthall regarded this as the
unlawful interception of private correspondence and thus a criminal offence. The abuse
was widened to take in Cheshire Constabulary. In the event, Mr Pickthall was unable to
produce any evidence of wrongdoing as required by court directions, and the interim
injunction was granted. Mr Pickthall was subsequently fined and given a 3 month
suspended sentence,\textsuperscript{51} and this was subsequently activated for flagrant and repeated
breaches of the injunction.\textsuperscript{52} Mr Pickthall’s appeal for crowdfunding to “convince the
Court of Appeal I suffered a miscarriage of justice” raised £0 of its £250,000 target by

\textsuperscript{49} See \textit{Birmingham City Council v Pardoe} [2016] EWHC 3119 (QB), Holroyde J.
(injunction against persons who targeted elderly and vulnerable persons and charged
excessive sums for unnecessary and/or shoddy building work).

\textsuperscript{50} \textit{Cheshire West and Chester Council and ors v Pickthall} [2015] EWHC 2141 (QB),
Holroyde J.

\textsuperscript{51} Chester Chronicle 18 December 2015.

\textsuperscript{52} Chester Chronicle 20 July 2016, Michael Soole J.
the time the Just Giving page was closed on 27 January 2017.\footnote{www.justgiving.com/crowdfunding/Robert-pickthall}

\textit{(c) Nuisances within a local authority}

The law on misconduct by Councillors has of course been the subject of successive changes in England. Pt III of the Local Government Act 2000 introduced a centralised system that came to be seen as excessively bureaucratic and was replaced by much narrower provisions in the Localism Act 2011.\footnote{ss 27-34.} Interestingly, the conduct provisions have remained in force in Wales, where investigations are conducted by the Public Services Ombudsman rather than by or on behalf of a central Standards Board. The sanctions for misconduct in Wales are significantly stronger than in England. The position in England is that nondisclosure of a pecuniary interest is a criminal offence. Each authority must have a Code of Conduct, but breaches of the code are a matter for the Council, subject to the need to involve an independent person at particular points. The sanctions open to a local authority are limited. There is no power to suspend, expel or disqualify a member for breach of the Code. However, a finding can be published and an apology or other steps requested. Proper account will still have to be taken of the member’s right to freedom of expression under Article 10 of the ECHR. A recent case addressed the question whether anything else can be done.

In \textit{R (on the application of Taylor) v Honiton Town Council}\footnote{[2016] EWHC 3307 (Admin)} the applicant was found to have disseminated a letter to a number of recipients, at least one of whom sent it to the local press, which published it. The letter concerned the funding for a large building in Honiton. This clearly raised a matter of public interest. However, the letter publicly accused the Town Clerk of a conspiracy to obtain a loan from the Public Works Loans Board by deception. The Standards Sub Committee of East Devon Council found that this involved treating the Town Clerk with a lack of courtesy and respect. It
recommended to Honiton Council that it censure the applicant, publish the findings of
the Sub-Committee and impose a training requirement. On 14 December 2015 Honiton
Council accepted this, but added further sanctions until the training requirement was
fulfilled: (1) a restriction preventing the claimant from speaking at any meeting
including the Council meeting; (2) removal of the claimant from five committees and
working groups; (3) a restriction preventing the claimant from attending and speaking
at meetings as a member of the public; and (4) a restriction preventing the claimant
from attending the Council offices unless accompanied by the Mayor. After
correspondence all sanctions were withdrawn by Honiton on 16 February 2016.
Nevertheless, judicial review proceedings against Honiton were started.

Edis J. held that (1) the relevant legislation (s.28 of the Localism Act 2011) was to be
interpreted as conferring power to determine complaints against a parish council
member only on the district council; the fact that only the district council was required to
involve an independent person in such matters was an indication that only they had the
power to decide. (2) Edis J. was not prepared to decide that the legislation required the
matter of sanctions to be determined by the parish council; the point had not been
argued. [On this it seems to me that the more natural reading of s.28(11) is that the
body that makes the finding as to breach also is the body to determine the sanction.]
(3) Honiton had acted unlawfully in imposing additional sanctions, which included
sanctions beyond their powers. (4) What sanction could be imposed? Edis J. held that,
provided it is lawful, including respect for a member’s rights under Art.10, a sanction
may be imposed which requires that a member does something, provided it is
proportionate to the breach. A requirement that a member be trained in the meaning
and application of the Code of Conduct appeared to the judge to be proportionate. The
only sanction for refusal to comply would be publicity.

Which of the four additional sanctions, subsequently with drawn, were unlawful? This
was not specified. Prevention of attendance at a meeting as a councillor clearly was, so
prevention of attendance as a member of the public would be irrelevant. Removal from
committees and working groups seems in principle lawful, subject to any statutory restrictions. Limitation of access to council offices unless accompanied is debateable.

3. **Standing**

Here I will mention the very recent decision in *Wylde v Waverley BC.*[^56] In this case, Dove J. held that five claimants, including two members of the council and members of local civic societies, did not have standing to challenge by way of judicial review the council’s decision to amend an agreement with developers concerning a redevelopment scheme in Farnham. They claimed there had been non-compliance with the applicable Public Procurement Regulations.[^57] After the judicial review proceedings were commenced, the council issued a Voluntary Ex Ante Transparency Notice which enabled economic operators to challenge the decision to vary without holding a procurement competition. No operator did so. The claimants alleged that decisions should be quashed as the variation would involve a loss to the council and that this would provide an opportunity for the whole project, to which they were opposed, to be reconsidered. The council and the developer (or interested party) claimed that the decision of the Court of Appeal in *R (on the application of Chandler) v Secretary of State*[^58] was to be interpreted as limiting standing in public procurement cases to non-economic operators only if they could demonstrate that a competitive tendering procedure would have led to a different outcome having a direct effect on the claimant. They recognised that a broader approach had been adopted by Mrs Justice Lang, in *R (on the application of Gottlieb) v Winchester City Council,*[^59] a case similar to the present one on the facts. She had applied the normal liberal approach to standing in judicial review cases. This, they said was wrong. Dove J. agreed with them. A narrower approach was appropriate.

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[^56]: [2017] EWHC 466 (Admin), 9 March 2017
[^57]: Here the Public Contracts Regulations 2006.
[^58]: [2009] EWCA Civ 1011.
because of the policy, aims and objectives of the procurement regulations and their focus on the interests of the economic operators. Dove J. also stated that, albeit not the most important point in the case, the claimants had difficulty in showing that any competitive tendering exercise would have produced a different outcome.

It is submitted that the outcome is entirely understandable but the reasoning is unfortunate. One difficulty arose from the fact permission had been granted and trial of standing as a preliminary issue ordered before the council published the VEAT notice and had no response thereto. The modern authorities demonstrate that standing has to be assessed in the context of the nature and strength of the substantive claim.60 By the time Dove J. had to decide the preliminary point on standing, the chances of showing that competition would have made any difference had in effect been eliminated. So the case was rightly stopped at this point, even though the claimants could show that it was arguable that there had been breaches of the procurement regulations. Dove J’s interpretation of Chandler as limiting standing in procurement judicial review is in fact contestable. In my view, the reasoning in Gottlieb is to be preferred.61 In that case Lang J found there to have been a “serious breach of the procurement regime,” in fact the second in the lifetime of the project. Adoption of Dove J’s reading of Chandler in other cases would mean that what are in effect serious breaches of the law could too easily become unchallengeable. This is an unwelcome inroad on the rule of law.

Having said that, it can also be seen that this narrower approach will be welcomed by councils, developers and presumably the government. This is not to say that the outcome was wrong. In my view the claimants might well not have had standing under the wider, Gottlieb, approach: the strength of their case was yet to be determined and arguable that they were using the breach of regulations as a relatively small peg for their broader opposition to the project as a whole.

60 R v Inland Revenue Commissioners Ex p National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617.
D. Future developments

Looking to the near future there is a range of significant developments to be anticipated.

1. Leaving the EU

The dominant issue in British politics over the next few years is obviously Brexit. There are understandably major concerns over how the process will go, whether a “deal” will be done at all and, if so, how favourable the outcome will be for the UK. There are equally major concerns about the impact the preoccupation with Brexit will have on all the rest of the work of central government. As to the process, the White Paper on *The United Kingdom’s exit from, and new partnership with, the European Union* makes substantial mention of the involvement of the devolved administrations in the process. It notes (para 3.4) that, as rules are repatriated, “we have an opportunity to determine the level best placed to make new laws and policies on these issues, existing power sits closer to the people of the UK than ever before”. It adds: “3.8 We will also continue to champion devolution to local government and are committed to devolving greater powers to local government where there is economic rationale to do so”. The Local Government Association is working closely with the Associations of Scotland, Wales and Northern Ireland, and with ministers, to develop the detail of what is called “double devolution”. Priority areas for local government in any review of the post-Brexit framework have been identified as public procurement, regulatory services,

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63 LGA Briefing: *Brexit* (December 2016) [http://www.local.gov.uk/documents/10180/5533246/December+2016+-+local+government+and+EU+briefing.pdf/ebabb7b4-2386-47c9-81f8-0a0c6fc0ecea](http://www.local.gov.uk/documents/10180/5533246/December+2016+-+local+government+and+EU+briefing.pdf/ebabb7b4-2386-47c9-81f8-0a0c6fc0ecea)

LGA Briefing: *The United Kingdom’s exit from and new partnerships with the European Union* (February 2017) [http://www.local.gov.uk/documents/10180/5533246/parliament+-+briefings+and+responses+-+February+2017+-+The+UK%27s+exit+from+and+new+partnership+with+the+EU+-+13+Feb+2017/86856b7a-426e-47a6-9ac7-2bd3944532eb](http://www.local.gov.uk/documents/10180/5533246/parliament+-+briefings+and+responses+-+February+2017+-+The+UK%27s+exit+from+and+new+partnership+with+the+EU+-+13+Feb+2017/86856b7a-426e-47a6-9ac7-2bd3944532eb)
environment, waste, transport, employment, planning, economic development, local
government finance, and data and public information. In 2016, the then Secretary of
State for Communities and Local Government, Greg Clark MP, promised local
government a place in Brexit talks.\textsuperscript{64} However, exactly how and to what extent the voice
of local government will influence the Brexit process very much remains to be seen.

2. Local Government Finance Bill 2017

This Bill, originally announced as the “Local Growth and Jobs Bill,” is currently before
Parliament.\textsuperscript{65} It provides the framework for 100\% retention of business rates by local
authorities in place of most central government grants and powers to set an
“infrastructure supplement” to be conferred on Combined Authorities and the Mayor of
London. It is obviously of fundamental practical significance, and is designed to help
deliver central government’s vision that local authorities become “self-sufficient”. There
are obvious concerns that the whole process will leave areas of relative deprivation even
worse off. A substantial amount of development work is being done between local and
central government.\textsuperscript{66} It has been suggested that the new arrangements will see a break
with the long-established principle of “funding following duties”.\textsuperscript{67} The outcome of the
strand in the current developmental work on “Needs and Redistribution” will demonstrate
the extent to which this turns out to be the case.

3. Other Westminster Bills

\textsuperscript{64} M Sandford, \textit{Brexit and local government} (HC Library Briefing Paper No.07664, 20 July
M Sandford, M Everett and G Bartlett, \textit{Local Government Finance Bill 2016-17} (HC
Library Briefing Paper No 07873, 19 January 2017)
\textsuperscript{66} See LGA, http://www.local.gov.uk/business-rates; DCLG, 100\% Business Rates
Retention Further consultation on the design of the reformed system (February 2017)
100__Business_Rates_Retention_-_Further_Consultation.pdf.
\textsuperscript{67} M Sandford, “Public services and local government: the end of the principle of ‘funding
following duties’” (2016) 42(4) Journal of Local Government Studies 637
http://dx.doi.org/10.1080/03003930.2016.1171753
Other relevant Bills the 2016 Queen’s speech include Bills on planning, bus services, children and social work, education and policing and crime, and a Bill of Rights. However, the final reform, here, apparently to involve what will be a highly contentious withdrawal from the European Convention of Human Rights, has been kicked into the post-Brexit long grass. The Wales Act 2017, already enacted, does devolve a further range of local government-related powers to the Welsh Assembly. There is also a plan to combine the Parliamentary, Health Services and Local Government Ombudsman into a single Public Service Ombudsman model. A draft Bill was published for consultation in December 2016.68

4. Upcoming cases

Among cases of interest to local government currently before the Supreme Court are Armes v Nottinghamshire County Council69

This case has been heard and will address issues about whether a local authority may be held vicariously liable or subject to a non-delegable duty in respect of abuse of a child by a foster parent.

Isle of Wight Council v Platt70

This case has also been heard. It concerns whether, when a parent is charged with an offence of failure, over a specified period, to secure that his or her child attends school regularly, contrary to s.444(1) of the Education Act 1996, the child’s attendance outside the specified period is relevant. The High Court said yes. There has been much publicity on this question.

Permission has been granted on 3 March 2017 for an appeal to the Supreme Court in R

(on the application of CPRE) v Dover DC,\textsuperscript{71} which promises to be a major case on reasons required for the grant of planning permission. The Court of Appeal had quashed a grant of outline permission for a scheme including 521 dwellings in the Kent Downs Area of Outstanding Natural Beauty on the ground that the council had failed to give legally adequate reasons.

E. Concluding remarks

In this lecture I have touched on a range of issues. Some are among the most fundamental and far-reaching to affect local government for many years. Local government lawyers will continue to make a vital contribution to meeting the challenges or (to use non-George-Orwell-speak) the major, possibly insoluble, problems and difficulties that lie ahead.

\textsuperscript{71} On appeal from [2016] EWCA Civ 936.