Law Share

Bringing Lawyers Together

ConsortEM

The newsletter for EM LawShare

Welcome

We do appreciate it is very late in the year to say this but, as it is our first opportunity to do so, a Happy New Year to you all! It promises to be an interesting year and not just because of Brexit.

Those who attended last year's conference will know that we have been working on a rebrand for EM LawShare. The royal blue on white logo that we have used since our inception has been judged to be rather outdated and a new modern logo and brand have been designed.

Whist Jayne is naturally devastated that her only attempt at marketing has finally been cast aside, we are both extremely pleased with the fantastic work done by Geldards and particularly Robert Smith in rebranding EM LawShare. You can read more about this later.

We are also incredibly proud to have welcomed our 150th member. Cornwall County Council takes this title and a warm welcome to the team there, along with all our other new members who are listed on page 2.

It's a testament to the success of EM LawShare and the quality support provided by our private sector partner firms that, after all these years, we are still attracting new members and retaining existing ones. Thank you to all.

We met with Deborah Evans from CEX of Lawyers in Local Government just before Christmas and this was a useful meeting with some ideas for future collaboration discussed. We will, of course, keep you updated.

The new management board is working well and our meetings for 2019 have now been arranged for 8 March, 7 June, 13 September and 6 December. If there are any issues you wish to raise, positive or negative, or any ideas you want to suggest please let us or any member of the board know and we will put them on the agenda for one of these meetings.

The new training programme was launched in February. It is packed with interesting courses, which are all free to attend.

We would really like to expand the number of courses where a Local Authority member jointly presents the session so if you are interested in helping us to present a course on your specialist area then again please contact us.

If we survive until 29 March and after, we'll see you in the summer!

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Member news

150 and counting!

Our four new members have taken us up to and beyond the 150 milestone so it's a very warm EM LawShare welcome to Worcester City Council, Cornwall County Council, Lee Valley Regional Park Authority and Reigate & Banstead Borough Council.

Worcester City Council

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Cornwall Council

Lee Valley Regional Park Authority

Reigate & Banstead Borough Council
Banstead | Horley | Redhill | Reigate

Diary date:

It might not seem long since our last conference in October, but we've already started planning for the next one.

As the 2018 venue proved so popular, we have again booked the Pride Park Stadium in Derby and, in a break from tradition, we've gone for a Thursday rather than a Friday as we think this will mean more people can attend. So, put 8 October in your 2020 diary if you've got one yet!

A good idea... we've already had!

Some of you may have received an email from the Local Government Association (LGA) asking for views about establishing a local government and fire & rescue authority legal services framework, in order to obtain 'favourable rates'.

We have replied to the LGA, making them aware of EM LawShare and other well established, though smaller, consortia that already achieve this.

We've commented that when resources are limited it does not seem necessary to replicate something that already exists and is highly successful.

We've therefore suggested that LGA members are signposted to these exiting framework arrangements and have offered to help in any way we can.

A strategy for managing waste post-Brexit?

If and when Brexit will happen is anybody's guess (at the time of writing). Regardless, Government is still planning for Brexit and so as an early Christmas present it published (finally!) its Resources and Waste Strategy (Strategy). Given so much of waste policy in the last few decades has been driven at a European Union level, it is to be welcomed that a UK policy roadmap has been developed.

At 145 pages long (with another 130 pages of an evidence annex), we cannot hope to do justice to the whole Strategy in a single article, but we set out our thoughts on some of the key elements for local authorities.

Planning for the Future

There is much in the Strategy to praise and to assist authorities who are trying to map out future revisions to their municipal waste management strategies and make decisions on future long-term procurements. That said, there is still plenty of detail to be fleshed out (including through consultation) on how the policies in the Strategy will work in practice.

Paying for the Future

Government is committed to embracing and expanding the "polluter pays" principle to ensure that those who produce packaging and materials are responsible for the costs post the end of use.

The Strategy repeatedly makes clear that local authorities will receive additional resources

> *"to meet new net costs arising from the policies set out in the Strategy once implemented."*

We can foresee an interesting debate about what are "new" costs, what is "net" and what exactly are "costs arising from the policies". In the consultations to come, authorities should make clear to central government where they consider the new policies are taking them beyond existing duties.

A Consistent Definition of Recyclable Material

The Strategy highlights the current plateau in the overall recycling rate over the past few years and that last year over 467,000 tonnes of material was rejected by recycling plants.

In our experience, many of these contracts were let to the private sector at a time when the recycling materials market was in a good place and authorities could expect an income rather than having to pay for the service delivered.

The market has changed considerably, and contractors are feeling the pinch. Whereas in previous years higher contamination (and resultant lower quality) in materials might have been tolerated because profit was still made, we are seeing contractors working to rule on what is and is not acceptable under their contracts. Other contractors are going further and seeking to amend contracts to get a better deal so that they either make a profit or at least break even.

With this in mind, together with the confusion that householders sometimes feel about what is recyclable (who has not spent time trying to decide what bin to put things in?), the Strategy proposes, subject to consultation, to "legislate to allow Government to specify a core set of materials to be collected by all local authorities and waste operators... We will consult on which materials should comprise this core set, and which collection systems would be most effective at preserving material quality."[1]

Furthermore, Government will consult on "whether introducing non-binding performance indicators for the quantity of materials collected for recycling and minimum service standards for recycling would support this outcome..."

On the face of it these proposed changes could be very positive for authorities, their contractors and the public. There is, however, a balance to be struck between perceived efficiency /effectiveness and allowing authorities the freedom to tailor their services to local need. Of particular interest here will be what the future consultation has to say on collection systems (including separation requirements) and frequency of collection.

The Strategy also highlights a need to improve urban recycling rates and so we can expect that to be a factor in the proposals that are brought forward.

Whilst we wait for the consultation, authorities will still be managing their existing contracts and planning for any re-procurements for recyclate collections and materials recycling facility capacity. Any changes to these public contracts will, of course, need to comply with public procurement law. Even in a "No Deal" Brexit, the rules are not going to substantively change (at least not right now).

Authorities will need to factor in how far they can push their existing contracts to accommodate any changes both from a public procurement (not so difficult if the change is Government mandated) and a commercial perspective (e.g. will an income generating/no cost contract suddenly need budget allocated - will any Government funding cover it?).

HWRCs and Re-Use

Government is concerned that there may be a perceived barrier to authorities maximising opportunities for re-use through household waste recycling centres (HWRC). We are therefore likely to see proposals come forward in due course to amend legislation and guidance to clear up any actual or perceived barriers in the law together with the possibility of targets and additional reporting.

Collections and Charging

Authorities differ across the country as to whether they collect food waste separately. WRAP has previously identified separate food waste collections as a necessary route to improving recycling rates. Government is now looking, subject to consultation, at introducing separate food waste collections by 2023.

Government will also consult on whether households with gardens should have access to free garden waste collections (some authorities, of course, offer this already for free or at a charge).

Government is concerned about disparities in the charging policies adopted by authorities for waste and the changes to HWRCs (e.g. reduced hours, reduced numbers). So, in addition to new proposals on food waste and garden waste collections, authorities should look out for proposals to amend the Controlled Waste (England & Wales) Regulations 2012 to "ensure that charging arrangements...are clear" and to review the HWRC service offered including whether minimum service standards should be set.

There is the potential for some service upheaval here and we await the funding mechanism that will be attached to any proposals.

Joint Working between Authorities

Effective joint working can be a route to efficiencies, service improvements and cost savings. Government is committed to improving working arrangements between authorities especially in two-tier areas, where collection and disposal/recycling are split.

We know from experience that relationships in two-tier areas need careful management, in particular when it comes to the thorny subject of recycling credits. We can expect further proposals on joint working and potentially reform of the recycling credits system in due course.

Energy from Waste Plants

For now, there is a commitment to energy from waste plants and to working with industry to improve quality. What is particularly interesting here is that Government is not proposing an incineration tax at this time but is keeping it back as an option if new policies do not deliver long-term waste ambitions.

The implementation of the Strategy has the potential to result in a lot of change to how authorities deliver their waste functions. This change is not going to happen overnight, but authorities should keep an eye out for the consultations and further detail coming through and seek every opportunity to actively engage in those consultations to ensure that their voices are heard.

[1] See page 68 of the Strategy

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After Grenfell - authorities face ongoing legal challenges to make tall buildings safe

Twenty months after the Grenfell Tower fire in London, the residents of hundreds of high-rise blocks are still living in potentially dangerous homes where combustible cladding has been used.

This is despite the Government banning combustible materials on new high-rise homes and giving support to local authorities to carry out emergency remediation work on existing buildings, including those in the private sector.

Progress is being made in carrying out remediation work to 160 social housing blocks (owned by authorities or housing associations) that have combinations of aluminium composite material ('ACM') cladding and insulation, which an Expert Advisory Panel on building safety says presents a 'significant hazard' on buildings over 18 metres high.

The Ministry of Housing, Communities and Local Government ('MHCLG') says remediation has started on 118 blocks, and work has finished on 37 of these buildings. Specifically in the case of the council blocks, the cladding has already been removed from a significant majority - with the work underway to remove it from the remaining buildings.

But in the private sector, the task of identifying dangerous buildings and ensuring owners take action to remove combustible cladding systems is more difficult.

MHCLG has reported there are 268 private high-rise buildings with ACM cladding systems that need to be removed. So far, remediation work has been completed on 30 of them; work is underway on 18; plans are in place or being developed for 164 buildings; while the status of 56 blocks remains unclear.

Some homeowners are being asked to pay bills that could total thousands of pounds to remove unsafe cladding after building owners refused to fund the work. These leaseholders remain trapped in possibly unsafe and unsellable homes when firms and long-gone developers involved in the construction, ownership and insurance of their homes deny responsibility for funding cladding replacements.

Authorities anxious to avoid another tragedy - especially within their boundaries - are being provided a number of legal tools. Councils already have the power under the Housing Act 2004 to assess the outsides of buildings for fire hazards and to take enforcement action if needed.

From the end of January 2019, an addendum to the Housing Health and Safety Rating System ('HHSRS') operational guidance takes effect. HHSRS assessments identify who is responsible for carrying out any safety work that's needed.

Other legal routes that will assist councils taking enforcement action with regard to building owners where unsafe ACM cladding is still in place include the Environmental Protection Act 1990, and Regulatory Reform (Fire Safety) Order 2005 that establishes any person who has some level of control in premises must take reasonable steps to reduce the risk from fire and make sure people can safely escape.

A Written Ministerial Statement has also offered financial support to councils to take enforcement action where it is necessary to carry out emergency remedial work. The expectation is that the council will seek to recover the costs of the work from building owners.

Landlords will no doubt take comfort from The First Tier Tribunal decision in Firstport Property Services Ltd v various leaseholders of Citiscape in Croydon that saw homeowners unsuccessfully challenge their building owner who sought to recover the substantial cost of replacement panels and 'waking watchmen' who monitor for fires while the work is carried out.

The interpretation was based on clauses within the service charge lease on what constituted a 'repair'. The judgment suggested other legal targets including the manufacturer of the cladding, the builder of the tower block and even the local authority if there were issues in the certification process.

However, the Government has written to about 60 building owners and developers, including some of the UK's biggest property firms, explaining they cannot avoid their responsibilities, and the actions they must take to avoid penalties.

The Housing Minister Kit Malthouse says a number of owners and contractors may face "more assertive measures" that could include fines or being barred from accessing other public sector work if they do not obey.

For authorities, there is the added concern about whether or not the ban on combustible materials is sufficient. It was intended to provide helpful clarity for building owners who need to know what they can use to replace dangerous cladding and insulation and help keep buildings safer.

But in many ways, the announcement was a lost opportunity - and the new restrictions don't go far enough.

Combustible materials are banned in external walls of flats, hospitals, residential care homes, school premises and student accommodation - but the ban will apply only to new constructions more than 18 metres tall (the traditional height at which firefighters can tackle a fire externally).

Other high-risk buildings, such as hotels and hostels, are specifically exempted from the legislation.

Combustible doors, windows and seals and thermal break materials are also not included, and the Government says it will keep this under review. The architecture profession says the ban should apply to plasterboard, sheathing boards, insulation, spandrel panels, other cladding products and large systems that protrude from the buildings walls such as balconies.

The Government is already fully funding the replacement of unsafe cladding on existing social sector buildings above 18 metres.

Not including new developments below 18 metres may be a loophole for some builders to use cheaper more risky cladding and other combustible materials. If it makes financial sense to build below 18 metres to accommodate "old" cladding, developers may exploit this loophole.

Cutting corners and taking advantage of any ambiguities in technical specifications to save money would be the wrong thing for the industry to do.

The new restrictions may also have unforeseen consequences for other regulated aspects of the construction industry, including the environment, waste and thermal insulation. It seems that many forms of combustible cladding are also excellent insulators, but this complete ban may have serious ramifications, with landlords facing huge building costs and unable to meet the latest energy performance regulations.

More guidance and legal precedent may emerge when the Moore-Bick inquiry is complete. His report will focus on issues including the cause; the design and construction of the building; the adequacy of building, fire and other regulations; and the response of the authorities.

For now, the advice to owners is to take expert advice to ensure that their buildings comply with both the existing building regulations, the new ban on combustible materials - and the spirit of efforts to make public and private sector buildings safer from further fire disasters.

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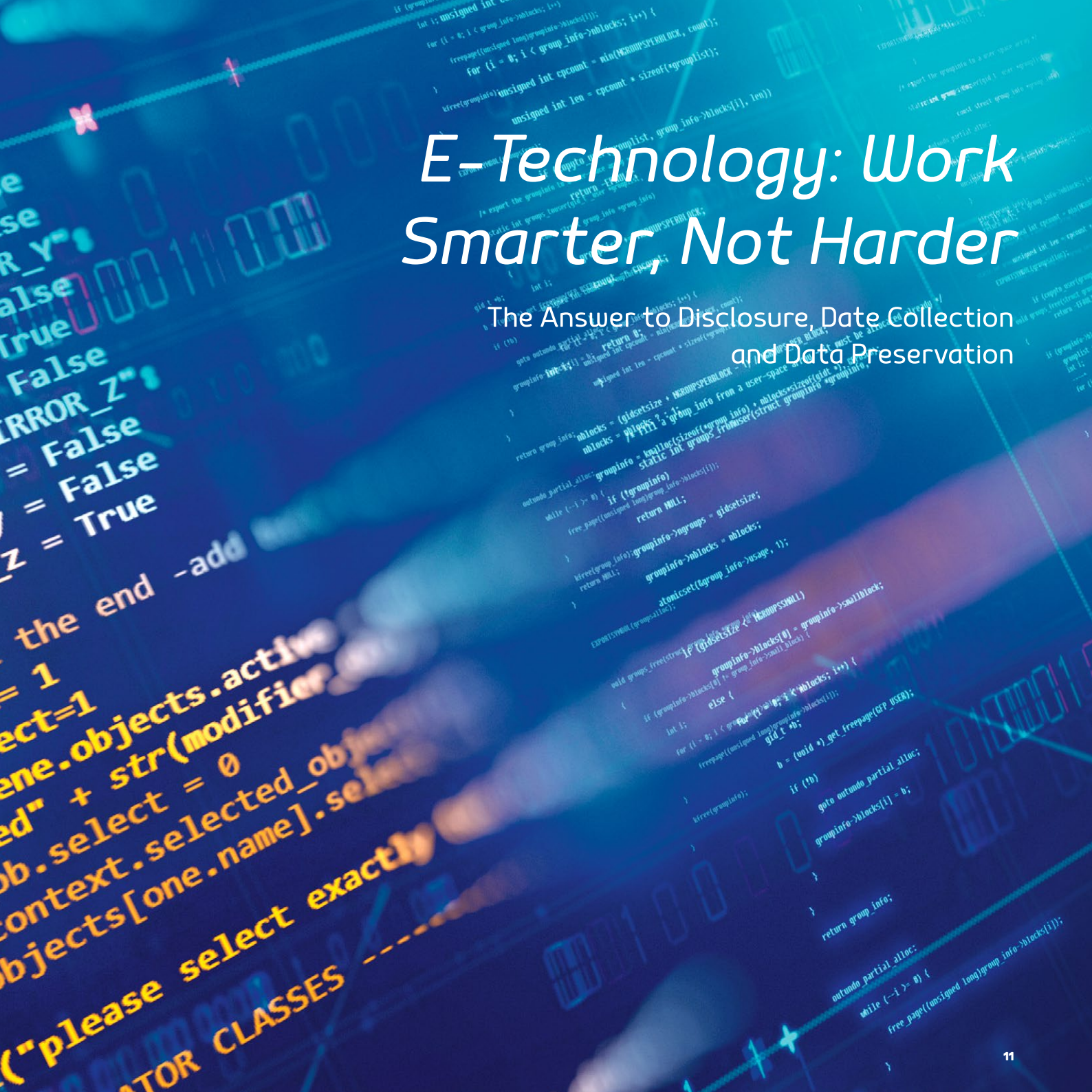

E-Technology: Work Smarter, Not Harder

The Answer to Disclosure, Date Collection and Data Preservation

Introduction

Despite the Jackson reforms attempting to persuade parties to move away from standard disclosure and utilise the menu of options available, reducing the consequential costs of disclosure, there has still been a reluctance to depart from that procedure and make use of the alternative disclosure options available.

As a result, there is currently a potential for disproportionate expenses being incurred by deploying standard disclosure in the electronic era.

The production of documents and disclosure before the English Courts have always presented a challenge; how to prove a case whilst ensuring the costs are proportionate.

Today, this challenge is as relevant as ever before. The sheer number of communications sent and received by businesses throughout a day is considerable. All of which may be disclosable in legal proceedings.

The experience of finding (or not finding) relevant information has led some organisations to enlist the help of e-technology suppliers to help them:

- Routinely preserve data and devices in readiness for an investigation or potential dispute
- Revisit policies governing the use of corporately owned and personally owned data devices
- Keep accurate logs of devices and systems in use, as well as logs of users and times when they would have been users of the same. This is called a data map
- Summarily scope their data well in advance of agreeing any timetables or budgets to find and review any quantity of electronically stored information

E-Technology

As far as technological advancements go, litigation support is evolving at a rapid pace. The last few years have seen major developments in the tools to assist with the disclosure exercise. For example, litigation support databases and software can quickly remove thousands or even millions of duplicate documents and filter emails belonging to the same chain leaving only the single composite file. All of this can be done automatically, before any solicitors start to review work (which in turn dramatically decreases the costs involved in the exercise).

E-technology suppliers, such as KLDiscovery who we have worked with in the preparation of this article, provide technology-enabled services and software to help law firms, corporations, government agencies and consumers solve complex data challenges. In this article we explain what can be done from the outset of a project to insure against potentially costly mistakes.

Toolkits on the market offer features such as:

- ### Predictive Coding

  This is a process which involves the review of documents using computer algorithms to return likely relevant documents based on a selection of relevant documents. This technology is a 'supervised learning' technology as it uses human input to 'teach' the system which documents (and what type of content) is relevant to various issues.

  Several different types of algorithm are used by different platforms but typically they are designed to identify which documents in an entire document set are most likely to be relevant to certain issues, based on the machine learning achieved by a limited amount of manual human review.

  More and more often, this technology is used to decide which documents will be reviewed and which will be culled from review.

Far more robust, defensible, measurable and reliable than using keyword searches, predictive coding provides statistical measures of effectiveness which indicate how much of the relevant material is reliably estimated to have been found or missed and conversely how reliable it is that the culled-set contains little to no relevant material.

- Email threading
  Determines the relationship between email messages and identifies the most content-inclusive massages to avoid redundant review. This can reduce a document set by 25 per cent.

- Near-duplicates
  Identifies and groups similar records, and highlights the subtle differences for a quicker review. For example, different versions of the same contract or amended versions of a draft set of clauses. The level of similarity is often displayed as a percentage and typically only documents above a certain adjustable threshold (80 per cent similarity or greater) are grouped together.

- Language Identification
  Automatically identifies the primary language on all documents in your data set.

Pyrrho Investments Ltd v MWB Property Limited

This case was the first reported case in the High Court permitting the use of predictive coding in an electronic disclosure exercise. In this case one party had identified 17.6 million potentially relevant documents that needed to be reviewed.

This figure was reduced to 3.1 million by using de-duplication but this still would have taken countless hours to review. The Court therefore approved the use of predictive coding on the basis that predictive coding would allow the documents to be reviewed at a cost proportionate to the value of the claim.

Brown v BCA Trading Ltd

Brown v BCA Trading Ltd [2016] EWHC 1964 (Ch) affirms the Court's view that technology is sometimes a better alternative to traditional methods. In that case, the Court ordered the use of predictive coding over the Claimant's wishes. Over £20,000,000 was being claimed with the cost of predictive coding estimates to be around £132,000 and the cost of a traditional review £250,000.

Public sector - *where litigation is inevitable*

Public sector organisations are intertwined with complex, sensitive data that is subject to elaborate regulations. For a public sector service provider facing legal and regulatory ills, effective planning and cutting edge technology significantly enhances the ability for such data to be stored safely and found easily.

The options that are available on the market are as follows:

- Redaction - With auto redaction technology, confidential information is identified and automatically redacted in a set of documents, providing legal teams with full control to review, approve or reject each electronic redaction.
- Information Governance - Handling Massive volumes of Data - Archive Solutions allow you to gain control and management of every piece of an organisation's information. This allows you to classify and store information more effectively and it makes it easier to identify and retrieve only that information which is relevant.
- Legal hold - This is a process that an organisation would use to preserve all forms of relevant information when litigation is anticipated, having control over every document before it is modified or deleted.
- Collection, Processing & Review - Hosted in a data centre or in the cloud that facilitates smarter ways to cull, process, review and manage your litigation or investigation documents.

When is it best to use E-Technology?

It is without doubt that e-technology provides the solicitor and client with an ability to read cases earlier by reducing review time and therefore can assist with early settlement (as well as reducing costs significantly).

E-technology has been used to assist with large scale document reviews, arbitrations and internal investigations for large corporations and the Public Sector.

Steps can, and should, be taken pre-litigation. The same steps will need to be taken for regulatory or criminal proceedings, merger control and subject access requests under the Data Protection Act (or the General Data Protection Regulation from 25 May 2018), or freedom of information requests.

It is therefore a sensible idea to re-evaluate internal procedures in relation to data mapping, document preservation, review and management.

It will also allow the parties to comply with obligations asserted by the new Practice Direction as they will be able to show that reasonable steps were taken to preserve documentation, it will allow for documentation in their control to be efficiently disclosed and it will avoid disclosure of irrelevant documentation.

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Spotlight on...

Anthony Cross, Head of Law at Leicestershire County Council

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

How long have you been with Leicestershire County Council?

Just over four years.

What does your role entail?

As Head of Law and Deputy Monitoring Officer I manage Legal Services as the responsible budget holder.

I support the Director in dealing with Member related issues and I follow up the more sensitive matters that is the lot of a senior lawyer in local government (often having no or little legal input).

I also undertake the more complex operational work in the planning arena and attend the County Council's Scrutiny Commission as the Council's statutory Scrutiny Officer and also attend the Development Control and Regulatory Board.

Being in the public sector I am never surprised (much like previous contributors to this feature) at the variety of issues that I deal with on a daily basis - you never know what the member of the public who tells the switchboard "it's a legal issue", is going to say when they are put through!

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

I report to the Director of Law and Governance. I have two direct reports at Assistant Head of Law level and am also responsible for the Business Support staff. The Assistant Heads manage our specialist legal teams via individual Team Leaders.

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

These can vary on a day to day basis! Managerially as well as Brexit (the same for us all) they are:

- Bedding in our new Legal Services Management Structure and directing/ harnessing the energy and enthusiasm of staff.
- Working out how to meet a challenging income target the Council has set Legal Services.
- Recruiting the right people. With a funded, growing staffing structure to meet current and forecast demand on Legal Services we now need to secure talented individuals to join us from a relatively small market.

Operationally it is: which matter from a workload that ranges from pension appeals to village green applications can be left until tomorrow and when to read the report and recommendations from the Committee on Standards in Public life following their ethics review of the local government standards regime?

What regulatory issues are on the horizon?

Where do I start? There's quite a bit to choose from. I will go with:

1. What a no-deal Brexit might mean in particular for our Trading Standards colleagues (East Midlands airport is an entry point to the UK).
2. The "dead hand" of the SRA regime with regard to the granting of waiver applications to do legal work of a public sector nature for non-County Council bodies/ organisations. Changes are needed to a regime which appears to be more about protecting the private

sector practitioner than giving a level playing field for the public sector practitioner.
3. Likely changes to the standards regime.

How does Leicestershire County Council compare with other places you have worked?

Very well. As a council, Leicestershire has a justified reputation as a good local government employer.

Legal Services is valued by Members and Chief Officers because of the commitment and expertise of our lawyers and support staff.

This is reflected in our recent success in gaining growth bid funding to increase staff in a challenging financial climate. Despite the challenges, there is a positive atmosphere about County Hall. A big bonus, when I think back to my time in private practice, is the absence of time recording targets.

What law would you like to see changed?

The CIL pooling provisions relating to s106 planning obligations. This is looking promising with the MHCLG consultation on Developer Contributions issued just before Christmas.

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

"Keep it brief, sound and appear confident and if you can get away with it don't mention any law."

I was told this after getting into a bit of a muddle at an Employment Committee meeting over whether employees could be paid only by bank transfer given the then requirements of the Truck Act that prohibited this.

The same occasion was a useful reminder to always be aware that the sensitivities of sound systems require clear diction. One Member thought I had said something inappropriate!

Finally, two truths and one lie in any order.

1. I secured late change of pleas in an animal welfare prosecution by having the carcass of the mistreated animal removed from the storage freezer in the Town Hall and taken to Court to convince the unrepresented defendant there was evidence of the offences.

   I overlooked the fact that there might be a delay in the case starting and didn't foresee that leaving the carcass on the floor in the courtroom on a hot summer day for an hour or so, while discussions took place on the pleas, was not a good idea.

   When the case was ready to start and we all went into the courtroom, the smell emanating from the carcass caused one of the Magistrates to feel unwell and the case had to be adjourned.

2. I attended a site visit at a Council-owned Country Park in connection with a claim about a faulty gear box in a recently purchased Council JCB.

   I asked to understand the problem and was told to climb in the cab, start the engine and engage a forward gear. I was reassured that this was not a wind up and that the JCB would not move.

   I hesitated but on being told I was being a typical negative Council lawyer I decided I had no option but to do the necessaries. The upshot was the JCB lurched forward and in so doing took out a few yards of boundary fence and ended up on private land.

3. To earn some extra cash in my early local government career I doubled up as a casual member of the kitchen staff.

   I didn't realise that the number of chicken pieces on the serving platter I was delivering from the kitchen to the Mayor's parlour for a Civic meal was the precise number of those on the top table who were having the meat option.

   I was overcome by hunger pangs as I pushed the trolley with the result that three out of the 10 Chief Officers (including the Town Clerk) on the top table only had the vegetables and gravy.

An update on contract law

A summary of key commercial cases during the last six months

Employers' liability for employees breaching the GDPR

The Court of Appeal has confirmed Morrisons is vicariously liable to multiple employees for a mass data breach committed by an employee. The first successful UK class action for data breach.

A senior internal IT auditor copied payroll data of 100,000 employees to his own USB stick and shared it with news outlets and data sharing websites, using his personal computer outside of working hours. This was an act of revenge because Morrisons had disciplined him over something else.

Around 5,500 employees brought a claim for damages against Morrisons for breach of statutory duty under the DPA, misuse of private information, and breach of confidence.

The CA held that the DPA does not exclude common law remedies. It found that there was a sufficient connection between his authorised tasks and his wrongful acts; there was an "unbroken thread that linked his work to the disclosure: what happened was a seamless and continuous sequence of events", and accordingly Morrisons would be vicariously liable.

Comment:
The CA recognised that Morrisons could not have realistically prevented the breach, but cited the availability of insurance against such risks. This seems to be on the grounds of public policy; the employer provides a more effective route to redress for the affected data subjects to claim damages. However, there remains a question as to whether insurance is in practice available at sufficient levels to protect employers against this type of liability. The irony is that by allowing the claim the CA are effectively aiding the employee, as the data release was motivated by wanting to cause harm to Morrisons.

Morrisons Supermarket PLC v Various Claimants [2018] EWCA Civ 2339

Agreement to agree - unenforceable?

An "agreement to agree" is generally unenforceable, but sometimes it is unavoidable, and can have important practical implications. The case concerned a consultancy business and an agreement provided the seller would have an option to provide consultancy services to the company for four years after the sale and "for such further period as shall reasonably be agreed between the seller and the Buyer".

Near the end of the period, the seller requested a 'reasonable extension', which was refused.

The Court held the seller did not have an enforceable right to provide services for the further period, as the agreement was at most an agreement to reasonably agree a further period, in which either party would be free to disagree, and hence was void for uncertainty. Interestingly, the Court observed that a requirement to act reasonably to agree did not constitute an obligation for a party to negotiate in good faith or disregard its own commercial interests.

Comment:

This case highlights the uncertainty introduced in leaving matters to be agreed at later dates, or when other wording such as "reasonable endeavours" is used. Without an express good faith provision or similar, either party remains free to negotiate in accordance with its own commercial interests, and the fact that no agreement is reached is unlikely to give rise to an enforceable action. Using an objective standard may assist, but can still leave it open to the court to find that "no agreement" is a valid outcome.

Morris v Swanton Care & Community Ltd [2018] EWCA Civ 2763

Changing customer requirements:

force majeure

This case saw a creative use of a force majeure clause in an (unsuccessful) attempt to address a customer's failure to obtain regulatory approval and changing market conditions. Tullow contracted to hire an oil rig from Seadrill. A territorial dispute led to a moratorium in one area; separately Ghana failed to approve Tullow's plan for drilling elsewhere; and the market rate for hire of similar rigs dropped by 65-75%.

Tullow relied on an exhaustive force majeure clause. This listed moratoriums on drilling, but did not cover the failure to obtain approval to drill elsewhere. Tullow argued that the moratorium led to their failure to provide drilling programmes to Seadrill. The Court agreed the moratorium was a cause of Tullow's failure to perform the contract but because the failure to obtain approval for a drilling plan was also causative, they could not rely on the force majeure clause because it was not the only cause (citing Intertradex v Lesieur [1978]).

Comment:

This case is interesting because it was the customer, rather than the contractor, that relied on the force majeure clause, an eventuality worth considering when drafting force majeure clauses. It also highlights a potentially unintended consequence of using exhaustive lists of force majeure events. Finally, consider whether relatively minor failures (as per this case) should trigger termination rights under force majeure.

Seadrill Ghana Operations Ltd v Tullow Ghana Ltd [2018] 1640 (Comm)

Mistake

Azman attempted to use the doctrine of mistake to deal with a similar problem. Azman contracted for the hire of aircraft for use in the Hajj and Umrah pilgrimages over a five year term. However, four-five hours after signing the contract, Azman received notification it had been excluded from the 2016 Hajj airlift by the Saudi authorities. Azman claimed that the lease agreements were void for common mistake, as at signature both parties believed that Azman would be approved to participate.

Although the Court found that there was a shared mistaken assumption, it was not fundamental to the lease agreements; it did not render them essentially and radically different, particularly given the five year term. Accordingly, the contract was possible to perform even without the 2016 airlift.

Additionally, even if the mistake had been sufficiently fundamental, the lease agreements contained a provision dealing with the consequences of a non-approval scenario, and so a mistake claim would still have failed.

Comment:

Both this and the Tullow case show the importance of anticipating what might go wrong and drafting accordingly. Where particular assumptions are fundamental to a contract, setting out a mechanism for dealing with those assumptions being incorrect will be important.

Triple Seven MSN 27251 Ltd and another company v Azman Air Services Ltd [2018] EWHC 1348 (Comm)

Avoiding inadvertently creating binding contracts

The parties underwent lengthy discussions relating to a collaboration for commercial production of an agricultural herbicide and sought to negotiate data transfer and collaboration agreements. Various drafts were exchanged, although only a NDA was signed. Meeting minutes made it clear that only written, signed documents would become binding.

During discussions various information was given and money paid. A final draft agreement was circulated, but not signed before the defendant discontinued the discussions. According to the Claimant, the 'core terms' of the collaboration agreement had been orally agreed, and the data transfer agreement had been concluded.

The claim was unsuccessful as the defendant understood that any binding contract would be subject to written agreement. Further, the fact that no senior persons with signature authority had attended the meeting when, it was claimed, the oral agreement had come into existence was also relevant. The relationship and discussions between the parties did not demonstrate objectively an intent to create legal relations.

Comment:

This case demonstrates that, to avoid uncertainty like this, it is essential to make clear when a contract is intended to be binding to avoid the possibility of the contract being formed before the intended time.

Rotam Agrochemical Co Ltd v. GAT Microencapsulation GmbH

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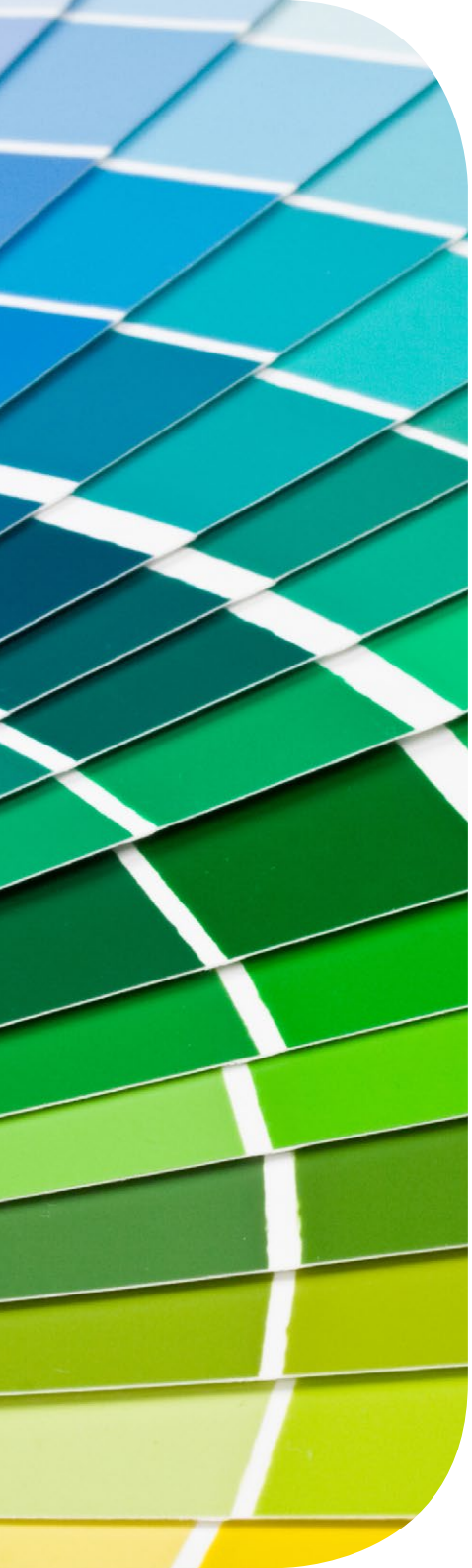


EM LawShare - Creating an identity for the future

By Robert Smith, Geldards

As one of the Partner firms re-appointed to the EM LawShare Panel in 2018, one of the factors we had to carefully consider was what added-value proposition we could offer the consortium.

Having successfully delivered the annual conference in 2014 and 2016 (at St. George's Park and Loughborough University respectively) we were both comfortable and confident in our ability to continue with this delivery; but we also looked very carefully at what would be most beneficial and necessary for the consortium.

Another obvious development opportunity area was the EMLS brand and associated website.

EM LawShare has come a long way since its formation in 2005. Starting as a core group of Authorities in the region, the framework has grown to over 150 participating bodies.

As well as Local Government, members who participate and benefit from the framework include education, housing, health and charitable organisations. Geographically, members emanate from Cornwall to Carlisle, Dartford to Doncaster and all points in between.

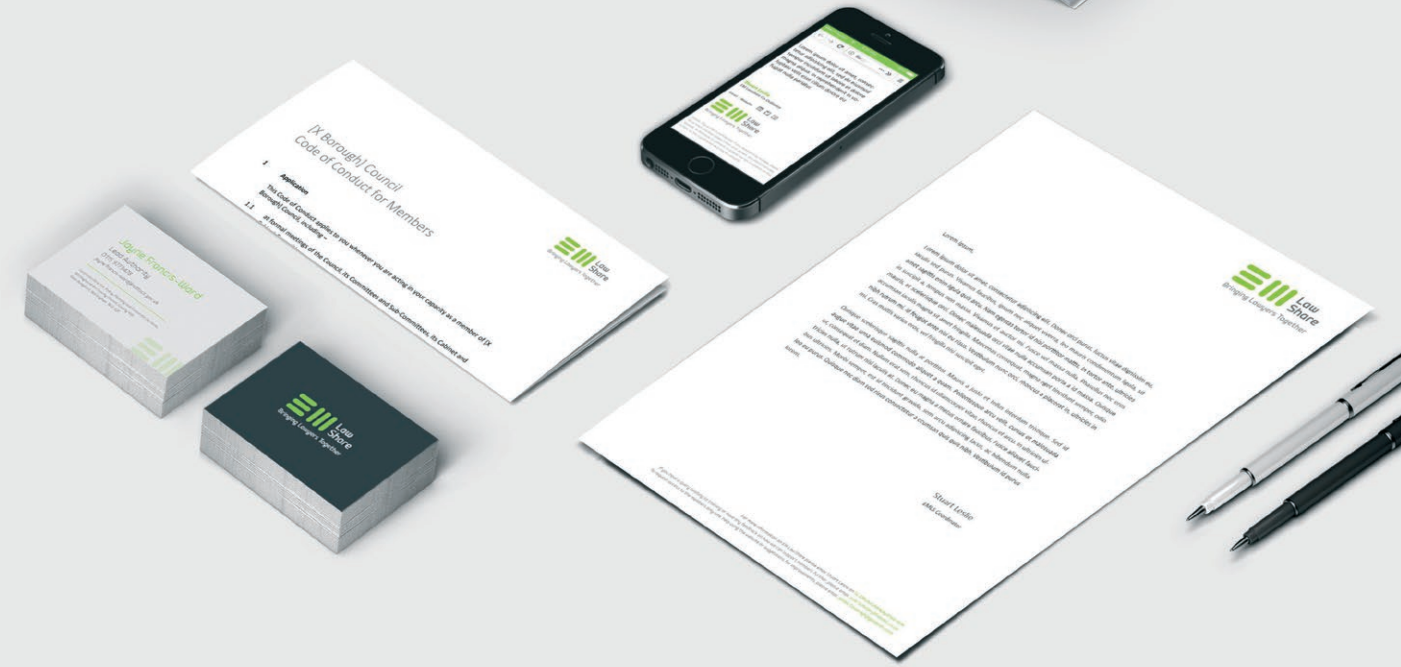
Put simply, the organisation has grown to be one of the largest and important purchasers of legal services in the Country and the brand did not reflect the professionalism and status of the organisation.

In our proposal for re-appointment we, somewhat bravely, stated that the brand "lacks a clear and modern identity that should be in place and working to enhance and grow the reputation of the Consortium" and the website "looks tired and lacks the functionality users expect".

In creating a new identity for EMLS, we set out to achieve a number of factors including;

- A modern contemporary logo and feel, utilising imagery and colours that were fresh and professional.
- The development of a brand that would contribute to a sense of community and belonging amongst the target audience.
- Professionalism and continuity in all marketing material with professionally produced material for all outputs and clear guidance on its future usage.

Law Share
Bringing Lawyers Together



Whilst the development of the brand has been important, possibly the bigger impact and improvement will be seen with the launch of new website.

The existing EMLS website was originally developed in 2012, with further developments in 2014. Whilst the site has worked well and enjoyed good engagement with registered users, the pace of change around web development meant that the site lacked the functionality we are all used to in our daily lives and online engagement.

The results of a user survey conducted in autumn 2018, combined with website analytics, also indicated that visits to the site were infrequent and users were primarily accessing the site to view the events schedule. This indicated that the wider valuable content available to EMLS members was not being properly utilised and overall engagement with the site was lower than would normally be expected with comparable websites.

As well as incorporating the key elements of the rebrand which will provide a more graphical and contemporary feel, the new website will include a range of functionality that will improve overall experience including;

- Better user account experience that enables everyone to manage their subscription, including the frequency and content of updates and manage or change passwords with ease.
- A streamlined booking system with immediate confirmation of bookings, automated reminders and the ability to add appointments to calendars.
- An enhanced search function that enables users to search by keyword, legal area or content type.
- Improved user experience with faster site loading and easier site navigation including greater emphasis and accessibility placed on events and other key areas of content for subscribers.
- New and enhanced content in areas including the East Midlands Development Network and a fully future-proofed site to allow for further development and enhancement.

One other key development on the site is the use of imagery to support the brand and overall feel; the eagle eyed amongst you may recognise some of the faces used.

To further develop the sense of community and benefits of EMLS membership, photography was taken at the recent EMLS Conference and the imagery used features attendees at the event. This was particularly important to the EMLS Management Board to promote the sense of community and broad engagement that EMLS members benefit from.

To ensure the new site is fully compliant with GDPR/data protection requirements, all users are being asked to re-register with the site.

Registration is now open and can be accessed via *www.emlawshare.co.uk/registration*

On successful completion of registration, an email will be sent to confirm, with a further reminder then sent when the site goes live.

If, by the time of launch, you have not registered, you will be directed to the appropriate page to complete your registration. Whilst this is a common requirement for websites, it is new to EMLS and a necessary step that, as well as ensuring we have a legally compliant website, puts the user in charge of their account and site engagement.

The new website began testing in early February and the site is due to go live in early April.

It promises to be an exciting stage in the development of EM LawShare that supports a professional image with a sense of community as well as ensuring all users and members can realise the full and rewarding benefits available from the consortium.

Coming soon.....
The new EM LawShare website

The new EM LawShare website will be launched in early April and is designed to offer an improved experience for all users including;

- Personalised accounts enabling all users manage their subscription, content received and training attendance.
- A streamlined training booking system with automated reminders and the ability to add appointments to calendars.
- An enhanced search function making content easier to find and navigate.
- Faster site loading, easier site navigation and enhanced content.

To allow all users to manage their accounts as well as ensuring the site meets relevant data protection regulations, all users will be required to re-register on the new site before accessing the members area and relevant content including training courses.

Registration is open now and can be accessed via www.emlawshare.co.uk/registration

The art of effective consultation

Local authorities often need to carry out consultation on their proposed decisions and actions.

Case law has shown the importance of carrying out effective consultation and the risk of local authorities being challenged if their consultations are not carried out correctly. They should therefore be encouraged by the outcome of a case in 2018, which confirmed that bodies that carry out consultation have the discretion to set the parameters of the consultation.

The case of R[1] (on the application of Sefton Metropolitan Borough Council) v Highways England was the first judicial review of a decision by Highways England. It involved a challenge by a local authority, Sefton Metropolitan Borough Council, to Highways England's decision not to include in a consultation about a new access route to the Port of Liverpool the option of building a tunnel under the Rimrose Valley.

A predecessor to Highways England had published a feasibility study about road transport access to the Port of Liverpool. That had identified two options which should be considered further but had dismissed the idea of a tunnel on the basis that this would be uneconomical to deliver.

Accordingly, when Highways England carried out consultation, it considered it reasonable to identify the tunnel option as something that had been rejected but not to consult on this in detail.

However, the local authority argued that Highways England had behaved as if it were a private sector developer, despite the fact that it had duties to co-operate with the local authority, to act in accordance with its licence and to consult and take account of the views of others. The local authority considered the lack of consultation on the tunnel option to be in breach of these duties and argued that Highways England's consultation was unfair and unlawful.

The court dismissed the challenge to the decision of Highways England. It found that although Highways England needed to exercise its functions according to a regime established under statutory authority, it did not need to conduct its functions according to a formula.

Furthermore, it was entitled to limit the parameters of the consultation in the way that it did. It was not obliged to spend time and money on detailed examination of a proposal which could not be met within its funding constraints.

The case was helpful in showing local authorities that there are limits as to what can be expected of them when they consult on proposals.

It was also useful in confirming and reminding us of the principles of effective consultation that were established by previous cases such as R v North and East Devon Health Authority, ex parte Coughlan[2], R v Brent London Borough Council, ex parte Gunning[3], R (on the application of T and others) v Sheffield City Council[4] and R (on the application of Moseley) v Haringey London Borough Council[5].

The key principles that must be followed in consultation are:

- Consultation must take place when a decision is still at a formative stage
- The persons consulted must be given sufficient information about the proposal and sufficient time to respond to allow them to make an intelligent response to the consultation
- The decision maker must conscientiously take the consultation into account when taking the decision

The Haringey case showed that the requirements of fairness in a consultation are linked to the purposes of that particular consultation and that the requirements are likely to be higher when an authority is contemplating depriving someone of an existing benefit or advantage than when a consultation is about a future benefit.

A duty to consult on a particular matter does not mean that a local authority is obliged to change a proposed course of action if people who respond to a consultation disagree with the local authority's proposals.

A local authority that takes a reasonable decision after considering seriously views expressed in an effective consultation can be confident about the legality of its decision, even if it goes against views expressed in the consultation.

As long as the authority complies with its legal obligations, adheres to the consultation principles and pays conscientious attention to the views that emerge from the consultation, it will be able to take a lawful decision even if that decision is controversial.

It has been recognised by courts in case law, for example R (on the application of T and others) v Sheffield City Council[6], that local authorities are democratically elected to make decisions and that, whilst some of these are bound to be contentious, they will be lawful if they comply with the standards imposed by public law.

Highways England was required to undertake consultation in order to comply with statutory requirements.

Local authorities will also often be subject to statutory obligations which require them to undertake consultation on their proposals. There will also be other circumstances in which local authorities have to engage in consultation before taking decisions.

Sometimes, a local authority will have created a legitimate expectation that consultation will take place. This might be because it has made a promise that there would be consultation or it has established a course of practice that there will always be consultation before a particular decision is taken. Sometimes the need for fairness might create a need to consult over a decision.

This is unusual but it might arise in circumstances when lack of consultation would amount to an abuse of power, a failure of good administration and a lack of straightforward dealing. The decision of the Secretary of State in the case of R (on the application of Luton Borough Council) v Secretary of State for Education[7], was an example of that.

In that case, it was found that the Secretary of State's abrupt termination, without any prior consultation by the Secretary of State, of Building Schools for the Future funding for projects that had been approved, must be characterised as being so unfair as to amount to an abuse of power.

Consultation which is carried out effectively in compliance with all relevant legal requirements can be a useful tool for a local authority. It can enable the authority to learn the views of the people it serves and to take decisions which are legally sound and in the interests of its community.

However, if a local authority were to take a decision without consultation when consultation is required or to run an ineffective consultation without adhering to the consultation principles, this could leave the local authority's decision vulnerable to challenge. It is therefore important for local authorities to recognise their consultation obligations and to make provision for these in their decision-making.

[1] 2018] EWHC 3059 (Admin)
[2] [2000] 3 All ER 850
[3] [1985] 84 LGR 168
[4] [2013] EWHC 2593
[5] [2014] UKSC 56
[6] 2013] EWHC 2953, an unsuccessful challenge to a local authority's decision to stop paying subsidies
[7] [2011] EWHC 217 (Admin)

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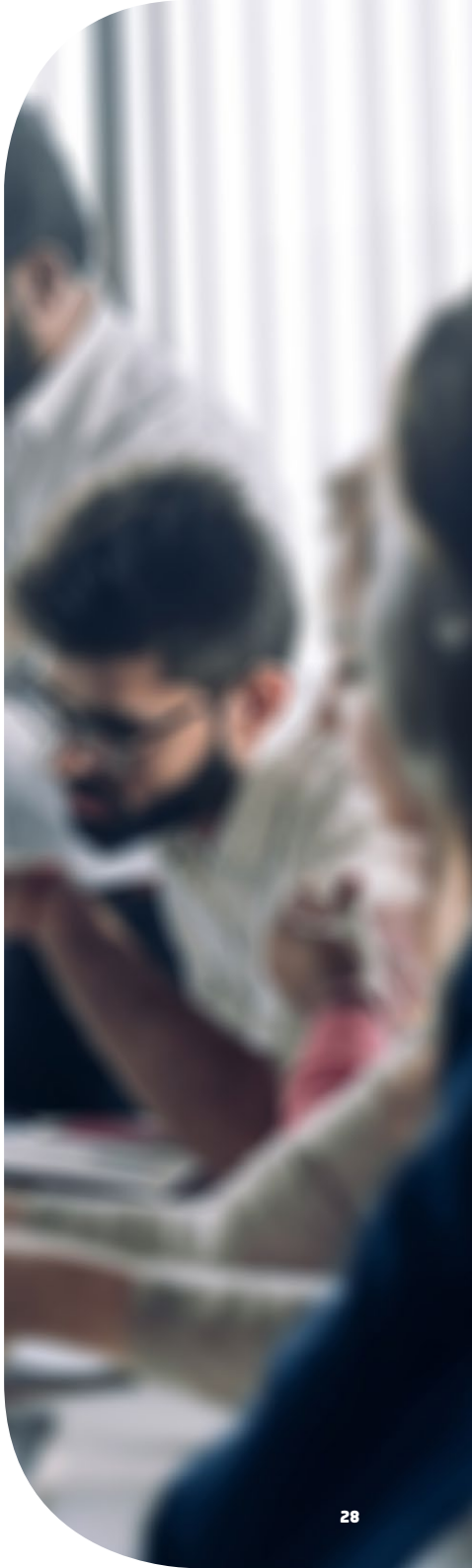

Public procurement: Court of Appeal makes first declaration of ineffectiveness in England and Wales

On 14 November 2018, the Court of Appeal made the first ever declaration of ineffectiveness in England and Wales in respect of a public contract in Faraday Development Ltd v West Berkshire Council [2018] EWCA Civ 2532.

Following the Appeal Court judgment, what are the implications for contracting authorities?

What are declarations of ineffectiveness?

A declaration of ineffectiveness is one of the remedies available under the Public Contracts Regulations 2015 (**"PCR 2015"**) as a consequence of a procurement challenge. Where one is made, those obligations under the contract subject to the challenge which haven't yet been performed won't be, so the contract is ineffective from the date of the declaration.

The most commonly cited ground for a declaration of ineffectiveness, under regulation 99(2) of the PCR 2015, is where a contract has been awarded without the prior publication of a contract notice in the Official Journal of the European Union (OJEU) where this was required under the legislation.

What is the purpose of a VEAT notice?

Voluntary Ex Ante Transparency (VEAT) notices are used by contracting authorities where a contract has been awarded without the prior publication of a contract notice in order to resist challenge on the basis of the ground in regulation 99(2).

Regulation 99(3) of the PCR 2015 states that this ground won't apply if the contracting authority considers the contract award to be permitted by the PCR 2015, publishes a VEAT notice in the OJEU indicating its intention to enter into the contract, and then observes a standstill period of at least ten days.

A VEAT notice must contain the information set out in regulation 99(4) to be valid.

VEAT notices ought only to be used after careful consideration and having taken appropriate legal advice.

The Court of Justice of the European Union held in *Ministero dell'Interno v Fastweb SpA* C-19/13 that, where a contracting authority cannot reasonably justify its decision to award a contract directly without publishing a contract notice, then a VEAT notice will not in itself prevent a declaration of ineffectiveness.

What happened in this case?

The case considered whether West Berkshire Council (the **"Council"**) acted in breach of the Public Contract Regulations 2006 (the **"PCR 2006"**, now superseded by the PCR 2015) when it entered into a development agreement (the **"Agreement"**) with St Modwen Developments Limited (the **"Developer"**).

The Agreement contained obligations on the Developer to undertake regeneration works, and its structure allowed the Developer the choice whether or not to draw down land for redevelopment.

If the Developer did draw down land, it would have to undertake the redevelopment works in accordance with the specification. If it decided not to, there would be no obligation to acquire and redevelop the land.

The award of the Agreement to the Developer was pursuant to a competitive tendering exercise but not a full OJEU process under the PCR 2006, since the Council had considered that the full regime did not apply to the Agreement on the basis that it was neither a public works contract nor a public services contract. The Council therefore chose to publish a VEAT notice following its decision to award the Agreement to the Developer.

One of the members of an unsuccessful consortium bidder for the Agreement, Faraday Development Limited (**"Faraday"**), challenged the Council's award decision.

At first instance, the High Court held that the Agreement was not a public contract for the purposes of the PCR 2006. When Faraday appealed this judgment, the Court of the Appeal was asked to consider:

a) Whether the Agreement constituted a public works contract that should have been advertised in the OJEU and been subject to a fully regulated procurement process under the PCR 2006;

b) Whether it was unlawful for the Council to enter into the Agreement on the basis that it thus committed itself to entering into a public works contract without following a public procurement procedure; and

c) Whether the Council's VEAT notice precluded any declaration of ineffectiveness as a remedy.

Considering the transaction as a whole, the Court of Appeal found that the Agreement did constitute a public works contract that should have been subject to a compliant public procurement exercise.

Even though no public works contract existed at the time the Agreement was signed, as soon as the Developer exercised its option to draw down the land for development, one would have then materialised, at which point it would have been too late to undertake a compliant procurement process.

This, the Court held, contravened the PCR 2006. While the Court recognised that there may have been commercial reasons for why the Agreement had been structured in the way that it was, the commercial reality did not justify the award of the Agreement without a compliant procurement.

The Court consequently declared the Agreement ineffective. The Council's VEAT notice did not preclude this declaration of ineffectiveness, since it wasn't sufficiently detailed (having failed to follow the guidance given in *Fastweb*) and it described the transaction incorrectly, suggesting that the arrangement was a simple 'exempt land transaction' and omitting to mention the contingent obligations to design and execute a large development.

This failed to alert third parties to the true nature of the transaction.

What are the practical implications of this case for contracting authorities?

Contracting authorities should look at transactions as a whole and consider whether at any point these would give rise to a public works, services, or supplies contract subject to the PCR 2015.

Even if a transaction comprises distinct elements at different points in time, it should be considered in its totality at the date it is entered into to establish whether the obligations within it will, once they take effect, give rise to a contract subject to the PCR 2015.

Contracting authorities should be mindful of their procurement obligations, particularly when arranging for land sales and subsequent development arrangements. This decision is highly relevant to local authorities and developers wishing to enter into agreements for development or regeneration of land without first running a compliant procurement process under the PCR 2015.

In addition, contracting authorities relying on a VEAT notice must ensure that it is transparent and contains sufficient detail as to the transaction's true nature. Nothing short of full and unequivocal disclosure will suffice for a VEAT notice to preclude a declaration of ineffectiveness.

Always take into account and ensure that the requirements of regulation 99(4) of the PCR 2015 have been followed when drafting a VEAT notice, as well as the guidance in *Fastweb*, i.e. that a contracting authority wishing to rely on a VEAT notice to justify a direct award must be able to show that it has a bona-fide belief that using a VEAT notice is justified.

This might include, for example, taking and retaining appropriate legal advice, internal notes, and board minutes that record the contracting authority's reasons for its belief that a VEAT notice is justified in the circumstances.

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Sharpe Pritchard

Don't solve problems – pursue opportunities

Helping you gain, train and retain your team's skills and experience.

By **Elizabeth Warhurst**, *North West Leicestershire District Council*
and **Sam McGinty**, *Loughborough University*

What's the problem we are trying to solve?

Despite the quote which heads up this article, the reality is that we do all face problems, or as we are encouraged to call them... 'challenges'. One of the perennial challenges that public sector teams face is recruitment.

Let's face it, at one time or another, we have all found it difficult to recruit and retain the high calibre lawyers we need, including trainees, newly qualified and highly experienced professionals.

It would be a reasonable bet that a number of us will have had experience of recruitments which haven't worked out well and how that can impact on the individuals, the team and the organisation.

The attraction of private sector salaries and the bright lights of the city can often eclipse the benefits of working in the public sector. Lawyers across the sector are involved in exciting and high-profile cases and projects on a daily basis, adding enormous value to their community and achieving huge professional satisfaction. Yet, it can still be difficult to tempt the right lawyer to join or, indeed, stop your existing in-house talent from heading off to pastures new.

Budgets are at the tightest they have ever been and teams are being asked to do more with less - in this landscape, it is nearly impossible to secure significant investment to tackle the issues.

What is the EM Development Network?

The EM Development Network is a way of looking at the issues around recruitment, training, development and retention of staff as opportunities rather than problems.

The Development Network consists of local authorities and private sector law firms specialising in advising local government and has a track record of success.

The approach is adaptable to your specific circumstances - but at its core, it is about thinking creatively to meet the challenges you face.

It could be that you are struggling to recruit a lawyer in a particular legal specialism but feel your post would be more attractive to the market if you could offer some extra training and development with a firm or another local authority.

You might have a member of your team who needs to spend some time working in another area of law to qualify or someone who has expressed an interest in retraining.

It is not possible to write down all the scenarios where the Development Network could help as every team and every organisation has different issues. The Development Network enables you to tap into a pool of experienced professionals who all share a desire to create and support opportunities for talented people to thrive.

The Development Network is a two-way street - you might have an issue with recruitment, training or development and need to call upon the support of colleagues in the network.

Equally, you might be able to offer support, time or an opportunity to a colleague from a firm or local authority facing those same challenges.

It is a new way of thinking to bring skills to employers and individuals which will support and create a talented pool of local authority practitioners.

What are the benefits to employers and employees?

> *"Train people well enough so that they can leave. Treat them well enough so that they don't want to"*
> - Richard Branson

The Development Network can help you to recruit the right lawyer for your team, retain talented individuals within your team and help team members to take the next step in their professional development.

Sharing expertise and experience, organisations have engaged in joint recruitments, mentoring schemes, secondments, lawyer-swaps and supported learning.

The employer benefits by recruiting and retaining quality individuals, maintaining flexibility for the individuals and enabling the team to change with the varying needs of the organisation.

The individuals benefit from development within a supportive and familiar environment, while sharing the experience and knowledge of peers and mentors in the sector.

Those offering support to employees have found it to be a valuable and rewarding experience, both in terms of

the greater benefit to the profession and the individuals involved.

How flexible is it?

"If you don't ask, you don't get it"
- Ghandi

Completely. The Development Network brings together a group of like-minded, collaborative employers and employees, but how you use these contacts to achieve your recruitment, development and retention goals is entirely up to you.

Working with the private sector or with another public sector body, means a bringing together of experience and expertise to apply to the challenge.

Each of the future editions of ConsortEM will include case studies to demonstrate the many ways members are taking advantage of this collaborative spirit. These will hopefully inspire even more new and creative ways of working together.

Case Study - Development Transformation Plans

Coventry City Council's new Planning and Highways Lawyer, Clara Thomson, was buddied with North West Leicestershire District Council's Principal Solicitor, Anthea Lowe.

Clara joined with limited practical experience of managing Committee, having previously worked in private practice. She shadowed Anthea over the life cycle of a meeting of Planning Committee at NWLDC (including checking reports, attending briefing and the meeting of Committee) to broaden her understanding and learn from Anthea's experience.

This opportunity meant that Clara confidently stepped into advising Members and Officers at Planning Committee at CCC. The two Solicitors went on to develop a relationship whereby Clara felt able to pick up the phone and bounce ideas and tricky queries of Anthea.

"NWLDC were pleased to be able to support the development of a talented lawyer. We were proud to see the outcome of our work in Clara's increased confidence in dealing with planning committee. This is exactly what the EMDN is all about."

- Elizabeth Warhurst, Head of Legal and Support Services, NWLDC

If you would like to know more about the EM Development Network, discuss an idea or share a success story, please contact Elizabeth or Sam.

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Environment Bill and Clean Air Strategy – an update

It's been a busy few months in the environmental arena. December saw the publication of the long awaited Resources and Waste Strategy, as well the draft Environment Bill. January then saw the publication of the Government's Clean Air Strategy.

Here's a quick synopsis of the key issues arising from the draft Bill and the Air Quality Strategy.

Environment Bill

On 19 December 2018 the Government published the draft clauses on governance and the environmental principles, which will eventually form part of the full Bill, along with a related policy paper.

The draft Bill lays the foundations for a full Bill to be published later in 2019. The full Bill will include provisions relating to air quality, nature conservation, water management and waste.

The draft Bill is currently subject to scrutiny in the House of Commons by both the Environmental Audit and the Environment, Food and Rural Affairs Committees.

The Government's planned timetable will see the Bill becoming an Act prior to the end of 2020.

The OEP's jurisdiction will apply to the whole of the UK, as will the environmental principles.

Office for Environmental Protection (OEP)

One of the most significant and interesting aspects of the Bill is the creation of the OEP. The OEP will be an independent body (in as far as it can be) whose role will be to provide the scrutiny and oversight that had formerly come from the European Commission.

The Government will appoint the Chair of the OEP which will be funded by DEFRA. Once outside the EU the high level governance framework for the protection of the Environment is lost. The OEP is being established to partially fill that gap. Two of the OEP's key functions will be:

- Monitoring the implementation of the Government's environmental improvement plan (EIP) and providing strategic oversight and direction in relation to the EIP - the first EIP will be the Government's 25 year environment plan.

- Undertaking enforcement action against the government/its institutions.

It is worth noting that the definition of "public authority" against whom the OEP can take action is very wide - local authorities will seemingly be caught by the definition. Note the OEP will not have power to issue fines against public authorities.

Environmental Principles

The key environmental principles are as follows:

- Precautionary principle
- Polluter pays principle
- Sustainable development
- Public access to environmental information
- Public participation in environmental decision making
- Access to environmental justice

The Bill requires the Government to publish a policy statement on the environmental principles. The statement is required to explain the principles and to set out how ministers should apply the principles to their decision making. We expect the draft policy statement to be published later in the Spring. It will be subject to consultation before it is finalised.

Critics of the Bill say that it undermines the principles it is seeking to transpose by placing them purely in a policy setting as part of the planned policy statement as opposed to making them true legal obligations.

Minister are only required to have regard to the policy statement which references the principles as opposed to the principles being legally binding as they currently are in the EU.

The Bill includes an escape clause that means the principles will not apply to spending decisions or any other matter the Government specifies.

Planning for Better Air Quality

The negative impacts of poor air quality on the health of those who live and work in the worst affected areas of the UK is now well recognised with air pollution ranking alongside cancer, heart disease and obesity as a major public health risk. The legislative regime governing air quality is European. Directive 2008/50/EC (the Directive) includes limit values and alert thresholds on pollutants. The Directive also sets out information to be included in local, regional or national air quality plans for the improvement of ambient air quality.

The 2008 Directive was implemented in the UK by means of four sets of regulations, one for each of the home nations.

In England the Air Quality Standards Regulations 2010 provide that when the levels of nitrogen dioxide (amongst other pollutants) exceeds any limit value, the Secretary of State is obliged to draw up and implement an Air Quality Plan (AQP) to ensure a reduction of NO2.

Against this legislative backdrop the government has made a number of attempts to tackle poor air quality through the publication of AQPs, the first of which appeared 2011. The first two AQP's were both quashed following court action by the non-profit environmental law organisation ClientEarth.

It was also not a case of third time lucky for the government as AQP no. 3 met the same fate in February 2018.[1] In giving his judgment in the High Court Justice Garnham was clearly unimpressed with a strategy that involved "polite letters from the government urging additional steps by individual local authorities..."

In May 2018 the European Commission turned up the heat on the issue by stepping up enforcement proceedings against the UK government (together with six other Member States) to secure compliance with the Directive.

In the same month Defra launched consultation on its Clean Air Strategy 2019 (The Strategy). The Strategy was published on 14 January 2019.

The planning system will have a vital role to play in realising the aims of the Strategy. The case of Gladman Developments Ltd v SSCLG & CPRE (Kent) [2017] EWHC 2768 confirmed that planning decision makers are entitled to form their own judgments on future air quality and not simply assume that the UK will comply with its Directive obligations.

The case also confirmed that Directive is not a "parallel consenting regime" to which paragraph 122 NPPF (now para 183 in NPPF2) is directed.

There is no separate licencing or permitting decision after the grant of planning permission to address the air quality impacts of the development so they should be properly addressed at the planning consent stage.

In terms of specifics, the Strategy promises guidance for local authorities explaining how cumulative impacts of nitrogen deposition on natural habitats should be mitigated and assessed through the planning system.

The Strategy also refers to strengthened planning practice guidance on air quality to ensure planning decisions help to drive improvements in air quality.

The final version of the Strategy appears to have rowed back from the May 2018 draft which referred to the possibility of 'statutory' planning guidance, so there is no immediate prospect of air quality being elevated beyond the status of a 'bog standard' material consideration that can be displaced by other policy imperatives.

Having said this, the impact on air quality is increasingly likely to be a significant factor when it comes to future development proposals which must be addressed before schemes can be safely consented.

[1] R. (on the application of CLIENTEARTH) (Claimant) v (1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD & RURAL AFFAIRS (2) SECRETARY OF STATE FOR TRANSPORT (3) WELSH MINISTERS (Defendants) & MAYOR OF LONDON (Interested Party) (NO.3) [2018] EWHC 315 (Admin)

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Launch of the EM LawShare Training Programme 2019/2020

As we approach the end of the current Programme, we are delighted to confirm the launch of the EM LawShare Training Programme 2019/20 commencing 1 April 2019.

You should by now have received an email with details of how to access the full programme of 67 courses for 2019/20. If you have not received this email please contact julie.scheller@freeths.co.uk

The programme is presented by lawyers from our seven partner firms - Anthony Collins, Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard and Weightmans - each of whom are specialists in their field. Presentations are made by the host firm unless stated otherwise. Some sessions will be jointly presented by lawyers from member authorities.

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

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

Video conferencing for most courses hosted by Browne Jacobson will also be available in their Birmingham and London 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 *www.emlawshare.co.uk*

For information about the EM LawShare Training Programme please contact julie.scheller@freeths.co.uk

New for 2019/20

EM LawShare will shortly be launching a new website and this will include a quicker and easier way to register and administer courses on the EM LawShare Training Programme. In order to register for courses through the website you will need to be registered on the new website (please see page 24 for details).

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.

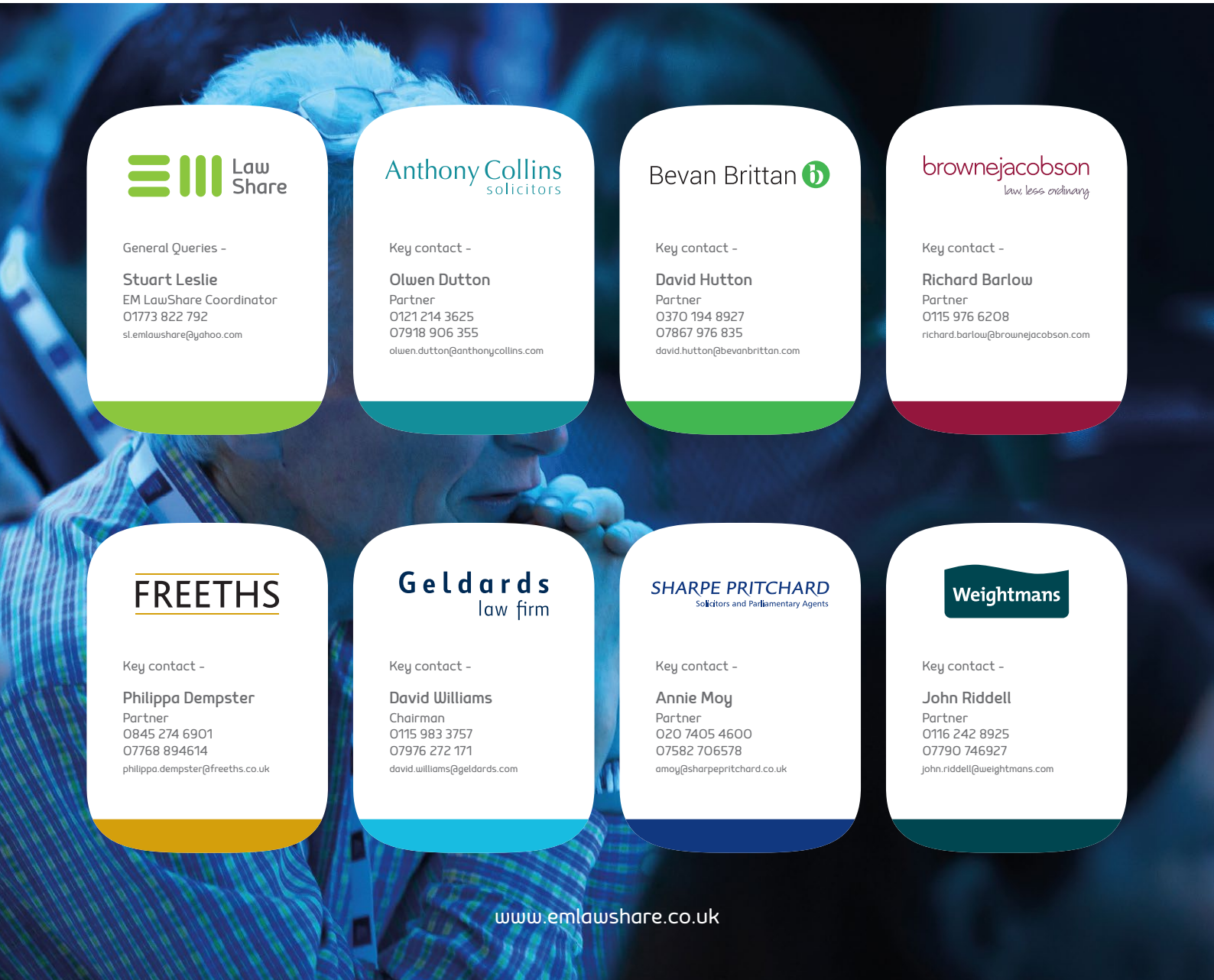
Continuing Competence

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 2019/20 training programme is fit for purpose under the revised approach.

Course date	Course (Title and Description)	Law Firm Leading course	Co-presenting Law Firm	Location of Course
8 April 2019	**CPO Update – Part 1**	Freeths	Sharpe Pritchard	Freeths, Nottingham with VCE
10 April 2019	**Microsoft Training for Lawyers**	Freeths		Freeths, Nottingham Training Room
24 April 2019	**Smart Places**	Bevan Brittan		Browne Jacobson, Nottingham with VCE to Birmingham and London
13 May 2019	**Local Government Pension Scheme Update**	Freeths		Freeths, Nottingham with VCE
14 May 2019	**Abuse Claims**	Browne Jacobson	Bevan Brittan	Browne Jacobson, Nottingham with VCE to Birmingham and London
15 May 2019	**GDPR Update and data breach management workshop**	Weightmans		City Rooms, Leicester
17 May 2019	**A Beginners Guide to S106 Planning Obligations**	Geldards		Geldards, Derby
22 May 2019	**Fundamentals of Local Government Law (to include decision making)**	Geldards	Sharpe Pritchard	Geldards, Derby
23 May 2019	**CPO Update – Part 1**	Freeths	Sharpe Pritchard	Sharpe Pritchard, London
4 June 2019	**Investigations without tears?**	Freeths	Anthony Collins	Freeths, Nottingham with VCE
5 June 2019	**Contracting and procurement post Carillion, what do you need to know and what do you need to change?**	Browne Jacobson	Weightmans	Browne Jacobson, Nottingham with VCE to Birmingham and London
13 June 2019	**Going corporate? Key issues in forming Local Authority and JV Companies**	Anthony Collins		Browne Jacobson, Nottingham with VCE to Birmingham and London
18 June 2019	**TUPE Workshop**	Bevan Brittan		Geldards, Nottingham
20 June 2019	**Fundamentals of Local Government Law (to include decision making)**	Geldards	Sharpe Pritchard	Sharpe Pritchard, London
21 June 2019	**GDPR Update and data breach management workshop**	Weightmans		Sheffield City Council
26 June 2019	**CPO Update – Part 2 (Compensation)**	Freeths		Freeths, Nottingham with VCE
27 June 2019	**A Beginners Guide to S106 Planning Obligations**	Geldards		Committee Room 3 at the Town Hall Sheffield City Council
4 July 2019	**CPO Update – Part 2 (Compensation)**	Freeths		Freeths, London
11 July 2019	**Public procurement litigation**	Browne Jacobson		Browne Jacobson, Nottingham with VCE to Birmingham and London
16 July 2019	**Going corporate? Key issues in forming Local Authority and JV Companies**	Anthony Collins		Anthony Collins, Birmingham
17 July 2019	**TUPE Workshop**	Bevan Brittan		Bevan Brittan, London
18 July 2019	**Investigations without tears?**	Freeths	Anthony Collins	Freeths, Birmingham

Law Share



Law Share

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