Law Share
Bringing Lawyers Together

March 2023

ConsortEM

The newsletter for EM LawShare

Welcome

Welcome...everyone to the latest edition of your newsletter.

By the time you read this I am hoping that everyone will be feeling the spirit of Spring after the long Winter months and able to see things in a positive and renewed light.

Speaking of renewal, we have just held our first in person conference since 2018 at the popular East Midlands Conference Centre in Nottingham. The event was due to cover a broad range of issues with keynote speakers and plenary sessions all focussed on the theme of "Reset, Refocus and Reconnect" which all seems truly relevant for our first opportunity to get together for some time.

I do hope that a good number of you were able to get along to the conference and enjoyed what was on offer. You may have gained inspiration from Pam Burrows, People Booster on how to empower positive change and boost wellbeing. Or perhaps Emeritus Professor, Catherine Staite helped you refocus on leadership, governance and relationship management. Maybe you just wanted to network and reconnect with your colleagues from across the Country and attend the workshop sessions to update your knowledge and skills.

We do hope that there was something of benefit for everyone, not least the plenary session developing the dialogue around recruitment challenges and top tips to beat the challenges of the current recruitment market.

We won't have the analysis of feedback from the event until the next edition goes to print so I don't know how you, as members, will have responded to the conference and the carefully assembled agenda, on the day. However, we all felt a great sense of excitement the final touches were being put in place in the run up to the event.

What is really important for the success of all of our membership events is getting your honest feedback. As the saying goes, "you can't please all of the people all of the time", but we can try to iron out issues which can be avoided and make choices as a Board on your behalf which hopefully reflect your broad wishes in future.

Running an event of this nature attracting colleagues from across the country is a significant undertaking and my sincere thanks go to everyone involved in putting the event together, whether as contributors to the sessions, keynote speakers or overall event organisers. Not forgetting the valued sponsors and exhibitors.

Special thanks go to Event Manager, Lauren Bradley-Greer and her team at Browne Jacobson for attending to all of the important details to make the day a success.

Whether you made it to the conference or not, I am sure that there will also be something of interest in this edition of ConsortEM. Do let Deborah know if there are topics of interest on which you would like a steer, and she will feed those requests in as topics for consideration in forthcoming editions.

Best wishes.

Heather

Heather Dickinson

Heather Dickinson

Chair of the EM LawShare Management Board

heather.dickinson@nottscc.gov.uk

Member news

New Members

Our offer continues to attract new members and I'm delighted to welcome Northleach with Eastington Town Council, Thanet Borough Council, Portsmouth City Council, West Suffolk Council, Spelthorne Borough Council, Arborfield and Newfield Parish Council, Trafford Borough Council, and WM5G Ltd (a wholly owned local authority not for profit company) to the consortium.

Training Programme

Colleagues from Freeths have been hard at work with the other nine partner firms putting together an exciting and varied new training programme for 2023 - 2024.

Feedback about the quality of the courses has continued to be extremely positive this year and I know that the training programme is highly valued by our members.

Some of you have asked for more advanced courses so for the new programme we have put some courses together as a series with introductory, intermediate and advanced so that you can scaffold your learning. I'm sure you'll let us know what you think - we love getting your feedback.

We look forward to announcing the full list of training courses for 2023/24 shortly. Please visit our website for more details and to book.

Leadership Programme

We had 15 excellent applications to join this year's leadership programme which is being hosted by Trowers at their Birmingham office. The first session was held on 15 February and the feedback was very positive. The next session will focus on stress management, mental health issues, depression and imposter syndrome. We hope to be able to provide an insight into the programme from some of the delegates in the next newsletter.

EMLS Coordinator's Reflections - one year on...

By the time you'll be reading this I will have been the Coordinator for nearly a year. I'm sure it's true that time speeds up as you age - the year has absolutely flown by! It was daunting to step into a role inhabited by someone else for so long, so I have tried to put my own stamp on it.

It's been a very interesting and varied year; dealing with new member applications, enquiries from members, being involved in selecting the Diploma candidates and preparing agendas and Board papers for their meetings - we even managed to hold an in-person Board meeting just before Christmas!

I'm particularly proud to have been involved (in a very small way!) in putting together our first in person conference since the pandemic - not something I've ever been involved in before so a real first for me. All the hard work paid off.

It was fantastic to meet so many old and new faces in Nottingham and to hear from exciting, thought provoking and inspirational speakers. A massive thank you to everyone who attended, the team at Browne Jacobson who did a wonderful job of bringing the Board's vision for the conference to life, to all our speakers, exhibitors and sponsors. It was a great and memorable day. We've certainly set a very high bar for the next conference!

I'd also like to thank the Board for making me feel so welcome over the year, to all the leads at the partner firms and the members who have got in touch with me.

I've met some lovely people who are really committed to the unique offer of our consortium which I believe helps us to stand out from other legal services frameworks. Here's to another year!

Best wishes.

Deborah

Deborah Eaton

Subsidy control and dealing in land

The UK subsidy control regime became fully operational on 4th of January this year, This includes the Subsidy Control Act 2022 (the Act), statutory guidance and a number of subsidy control schemes (a type of pre-approved consent to grant subsidies in certain circumstances or a UK type of block exemption). Subsidy control, much like the EU's state aid, applies to land dealings where the public sector acquires or disposes of a land interest. The two systems are similar though not identical.

Subsidy control seeks to ensure that the state does not use public resources to give an advantage to a business or enterprise (this includes not-for-profits or the public sector when they engage in market activities). The public sector paying more than the market value for a land interest or receiving less than a market value when disposing of a land interest/charging rent would both be unlawful unless there is an exemption/justification.

Unless relying on a subsidy scheme, the public sector must now assess, against the Act's subsidy principles, which of their policy objectives are being furthered by a subsidy measure and confirm the proposed measure is efficient in achieving the desired outcome. The public sector must also be satisfied that the measure is not prohibited under the Act and that it is consistent with statutory guidance. The UK Government has stated that it prefers the new principles-based system, as this gives the public sector greater flexibility (compared to block exemptions) to respond to market failure and/or to deliver national/local priorities. No doubt this is true, though smaller public sector organisations may lack

the knowledge/expertise to be confident about undertaking the related assessments.

The UK subsidy control regime also permits public authorities to adopt their own subsidy schemes, which is useful where a public body is providing a relatively high number of subsidies for similar purposes (i.e. a combined authority making brownfield site grants). The advantage of a scheme is that the subsidy analysis is undertaken once for the scheme and not for each individual subsidy award. Some UK Government schemes have been published such as the Levelling Up Fund Subsidy Scheme, which will be useful to some recipients of recent LUF awards.

A public authority might want to consider its own schemes if it had a focus on certain local needs - e.g. affordable workspaces, or older people's care or other priorities - this might permit subsidies to be given by of a or cash grant equivalent such as reduced rents).

English local authority law regulates the disposal of local authority land primarily through section 123 of the Local Government Act 1972 and sections 32 and 34 of the Housing Act (for "housing land"). Section 123 incorporates the concept that a council should dispose of most land interests for the best consideration that can reasonably be obtained and though this may equate to a market value, in subsidy control terms, it does not automatically do so. For instance, it won't equate to a market value if the authority is relying on a general consent under Circular 06/03. Subsidy control is also concerned about short term lease/arrangements and the acquisition of property interests by a local authority.

Where a land transaction, would under subsidy control, mean that a local authority is deemed to have given a subsidy to an enterprise then it will be necessary for that authority to undertake the subsidy control principles assessment, even if the transaction would be permitted under sections 123 or 32 (or their related consents).

The Act recognises that market transactions do not give rise to subsidy. Statutory guidance[1] refers to this as the Commercial Market Operator or CMO principle. The CMO principle is consistent with much current public sector practice concerning evidencing market values (whether valuations, auctions, or procurement), though the guidance's section on subsidy races[2] is a reminder that in some, rare, circumstances extra steps should be undertaken - the example given in the guidance is authorities vying for new investment.

The Act places a legal duty on public authorities to respond to pre-action information requests about subsidy awards within 28 days of a request being made.

Further, authorities will be incentivised to promptly publish awards over £100,000 on the UK subsidy control database as this then time limits (in most cases) a legal challenge being made about that subsidy to within a month of publication. Though this will benefit public bodies (compared to the much longer challenge period of state aid) it may result in a wave of pre-action information requests being made about public sector property transactions. Having the subsidy control assessments recorded and the information to hand will assist councils deal with these property-based requests.

Subsidy control does not apply to non-economic activity - i.e. a reduced rent for letting out a community hall to a voluntary group is unlikely to be subsidy. The Act also permits enterprises to receive as minimal financial amounts (MFA) of up to £315,000 of subsidy over a continuous three-year period (from all sources) which rises to £725,000 for organisations delivering services such as social housing or social care. MFA involves light touch paperwork. The amounts are the total MFA from all public sources.

[1] *Pages 174 to 177 - statutory.*
[2] *Page 52 - Statutory Guidance.*

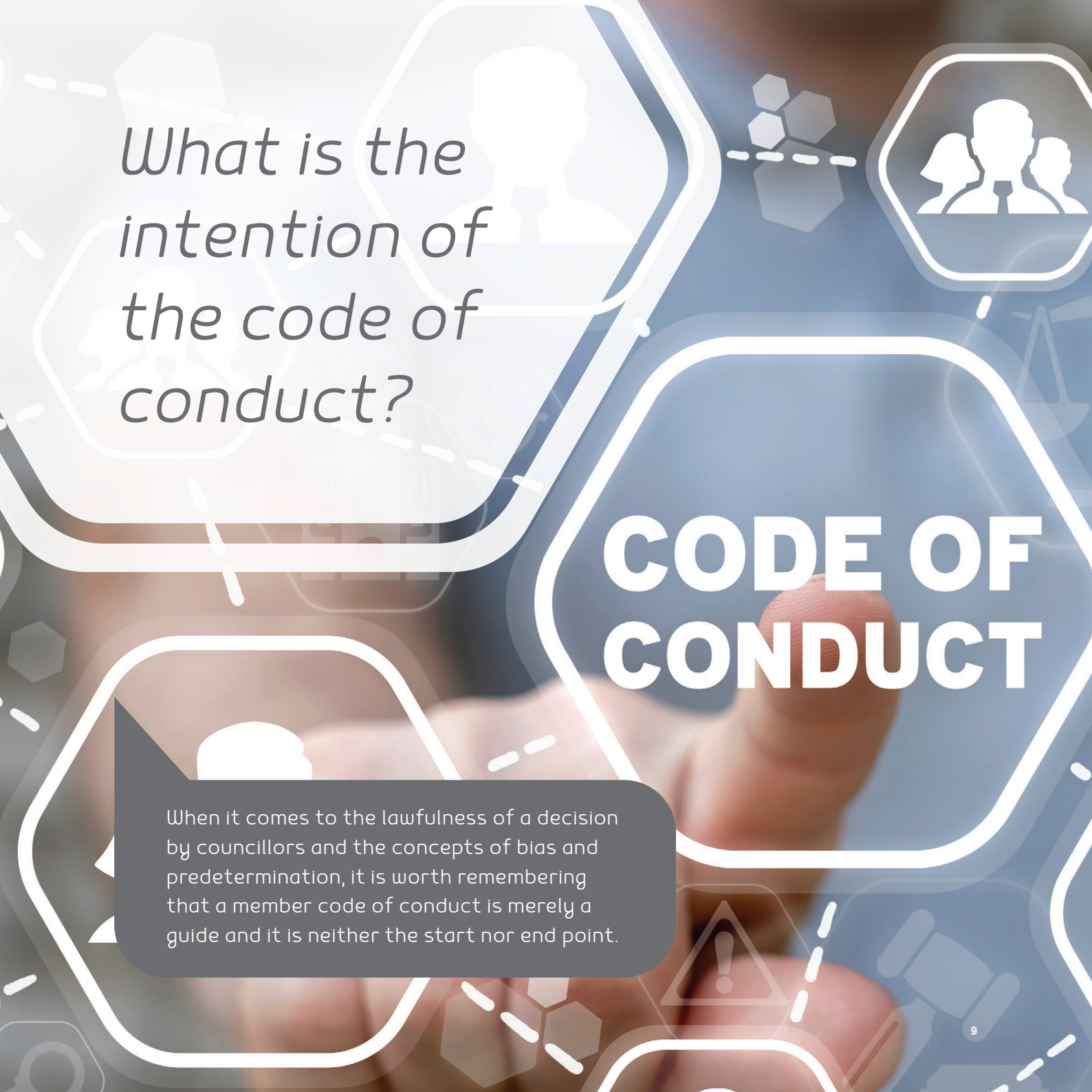
Paul McDermott
Partner
T: 020 7423 8043
M: 07795 962281
E: pmcdermott@trowers.com

Trowers & Hamlins LLP

Amardeep Gill
Partner
T: 0121 214 8838
M: 07917 507675
E: agill@trowers.com

Trowers & Hamlins LLP

What is the intention of the code of conduct?



When it comes to the lawfulness of a decision by councillors and the concepts of bias and predetermination, it is worth remembering that a member code of conduct is merely a guide and it is neither the start nor end point.

The code is an attempt to codify the law and is not a replacement for it and, frankly, is not and never was the best way to apply or explain the law.

In this arena, its purpose is to act as a guide on these matters, not as a determinant, and is primarily a means to bring about some personal consequences for the councillor when their bias causes a decision to be at risk or even vitiated by the courts on challenge.

This is emphasised in the Guidance on Local Government Association Model Councillor code of conduct. The Guidance allowed the authors to give the Code that greater depth of meaning which needs to explained further.

They also kindly invited a number of colleagues to comment and assist in this and make best use of the greater latitude for discussion and explanation in the Guidance which the LGA Code itself does not.

The comments in the Guidance on the LGA code are a polite version of the phrase I have often used in training on this, which is that, as the monitoring officer and the authority's principal lawyer, I essentially do not care about the Code or the councillor, I only care about the soundness of the decision; that wakes people up.

This was previously part of the argument with those who did not believe in the code of conduct including any element on this area at all and for these reasons. This debate was had with colleagues in the LGA and Government, as well as colleagues in LLG, at the time of the introduction of the Localism Act 2011 and the freedom to draft a code of conduct that, at its lightest, was little more than a restatement of the principles that the code is required to be consistent with and the disclosable pecuniary interest (DPI) regime. The argument went that repeating the provisions concerning personal and prejudicial interests, directly from the previous mandatory code or as another version it, would confuse Members and fellow officers and that it was better to leave this to the developing the law on bias, and to include only in a Code of Conduct the preferred 2012 approach of simply repeating the updated Nolan principles.

I disagree with that view as much now as I did then. The code may be a little crude and simplistic, containing as it does none of the layers of subtlety available on the application of the legal concept in Porter v Magill, but it remains true to its purpose; a way of understanding that law, applying it so that there are real consequences for the individual where there may be otherwise none (or for which they do not care about anyway in the political context); a way of making the law understandable as a training tool to be carried around in the heads of councillors and officers; and, not least, a way of applying that law in time pressured (and let us be honest all other kinds of pressures) moments in a committee or cabinet room.

This is all exemplified in the recent case of CPRE (Somerset), R (On the Application Of) v South Somerset District Council [2022] EWHC 2817 (Admin)[1], which brought this point to bear for those involved. The case highlighted that, whist Section 28(4) of the Localism Act 2011 provides that "a decision is not invalidated just because something that occurred in the process of making the decision involved a failure to comply with the code", that "is not to say that such a failure must be ignored when considering the validity of the decision".

Helpfully, the analysis went on to say that:

"The process of drafting a code of conduct requires the local authority to take a considered view, in advance, about situations which its members are likely to face and decide whether they should, or need not, disqualify themselves in those situations. The draft will be tailored to the circumstances of the local authority in question and can then be the subject of local consultation and debate. This process not only delivers greater certainty, but also promotes good administration by holding elected representatives to reasonably precise standards, adopted in advance with a democratic imprimatur.

"Against this background, it would be surprising if compliance with the code of conduct were categorically irrelevant to the question whether the apparent bias test was met. I accept that it cannot be determinative, but it is surely a matter which the fair-minded observer would take into account in deciding whether there was a real possibility of bias. Providing that the definition of "prejudicial interest" is a reasonable one, and other things being equal, a fair-minded observer would consider that a member who had no prejudicial interest was less likely to be biased; and that, other things being equal, a member who had a prejudicial interest was more likely to be biased."

This brings us back then to how helpful the Code is in any given situation. The arguments as laid out in this case also highlighted the careful way in which a code of conduct, or indeed advice, is to be constructed. As the Guidance to the LGA Code states:

"At heart there is a simple principle - as public decision-makers, decisions must be made in the public interest and not to serve private interests. However, the rules to set out whether you have an interest or not in any given situation can be complex given the infinite variety of issues that may arise."

In the CPRE case, the two councillors concerned were involved in the respective town council and community bodies as planning applicants but, on the committee advisor's reading of the Code as conditional in nature, felt that they had distanced themselves far enough so as not to require them to withdraw.

This meant that the court and its arguments similarly got themselves wrapped up in the extent of the interests and the conditionality of the code of conduct as a guide to that potential bias.

The comments of the court in respect of the reading of the Code of Conduct are somewhat harsh about

its construction, partly because it makes a direct link that is not there I believe. In doing so, however, it was also at pains to not criticise the professionalism or intent of anyone involved; an important thing to highlight and for which those at the sharp end reading the case and commentaries such as this will undoubtedly be grateful.

What it does do, however, is remind the LGA of their commitment to review the code every year and improve it and, as a product that must always pay some heed to political and philosophical compromise over direct explanation, it can always be improved.

In the meantime, the LGA Guidance and its associated flowchart are an important training tool and one which, as now highlighted by the existence of this case as a salient reminder for one and all, is something that should be regularly re-read and referred back to for all concerned.

[1] *CPRE (Somerset), R (On the Application Of) v South Somerset District Council [2022] EWHC 2817 (Admin).*

Philip McCourt
Legal Director

T: 0370 194 5031
E: philip.mccourt@bevanbrittan.com

Bevan Brittan

Cladding -
The position since Grenfell

Since the tragic events at Grenfell Tower there has been a huge surge in claims involving cladding; in particular cladding systems which include Aluminium Composite Materials and High-Pressure Laminates. In addition there is also an increased focus on fire safety risks in buildings.

The Building Safety Act 2022 is the Government's response to, primarily, cladding safety issues publicised by the Grenfell Tower tragedy. The first instalments of the bill focused on enhancing safety measures in the design and construction of new high-rise buildings.

The bill has thereafter developed to set out a statutory framework for the entire lifecycle of a development ranging from the pre-construction planning stage through to post-construction, occupation, and property management stages.

It has become clear that many residential blocks of flats have serious historical fire safety defects associated with their original construction or a subsequent refurbishment.

Most notably, this has included the use of unsafe cladding on the external walls of these buildings. The Building Safety Act 2022 changes the regulatory regime to ensure that the public can have confidence in building work going forwards. Due to the risks posed by these existing fire safety defects, remediation work can be necessary.

In the most extreme cases entire cladding systems for a building may need to be replaced, or proper fire compartmentation installed between flats. In buildings which do not qualify as a relevant building, more proportionate remedies may be more appropriate, for example, sprinkler systems or fire alarms. Building owners are required to follow the recommendations of a fire safety professional following an assessment of the building.

One of the most important changes in force since the 28 June 2022 is the extension of limitation periods for claims involving dwellings unfit for habitation.

The Building Safety Act widens the scope of liability under the Defective Property Act (DPA) for developers, contractors and construction professionals. The rule changes make it easier to approach and sue property owners and leaseholders, while making it harder for developers and construction firms, and manufacturers to avoid liability.

Previously, claims under section 1 of the Defective Premises Act 1972 had a limitation period of six years following the completion of works, or the completion of any subsequent rectification works (either being when the

cause of action accrued), but that period has now been increased to 15 years for claims accruing after 28 June 2022.

Where the defective works were completed before that date, the limitation period is retrospectively extended to 30 years. This means that claims previously considered out of time may now still be brought and it is likely that a whole new wave of claims will be brought as a result of this recent legislation.

The Act also forms a potential liability for all companies that may have ever been part of or associated with a group of companies engaging in the construction or development of a building.

The High Court can now issue a Building Liability order (BLO) under section 130, effectively extending liabilities under the DPA 1972, s. 38 BA 1984, or for "building safety risks", to all companies associated with corporate body.

The aim is to reduce the practice of using temporary corporate structures which are later closed down after completion of works in order to escape potential liabilities.

A case to note is Martlet Homes Ltd v Mulalley (2022) which is the first case to consider the issue of combustible cladding since the Grenfell Tower fire. In this case the judge ruled against the contractor, awarding the building's owner approximately £8m in damages.

The case highlighted the need for parties to follow the Government issued guidance and concluded that reasonable steps taken to mitigate risks, such as waking watches, will also in principle be recoverable. The ruling in July has the potential to set a precedent in future combustible-cladding claims.

We would suggest that now is the time to review retention policies for contracts, documents, and records for evidential purposes in relation to potential future claims. We would invite you to reconsider live contracts in existence, or those that are due to be signed, and to revisit liabilities in historical projects that had previously been considered statute barred. It is important to bear in mind that prospective claims are not restricted to safety matters and may encompass a far wider remit than principal contractors, designers and developers.

We would also suggest reviewing the cover provided under the terms of any public liability insurance. This is likely to contain exclusions and is unlikely to cover the cost of replacing defective cladding. Since Grenfell insurers have introduced exclusions, including blanket exclusions, more restrictive coverage, and write-backs that provide some restricted cover for cladding claims and sub-limits.

Reasonable steps taken to mitigate risks, such as waking watches, will also in principle be recoverable.

Natalie Simpkins
Partner

T: 020 8780 4696
M: 07552 617344
E: natalie.simpkins@capsticks.com

Capsticks LLP

Combined County Authorities -

Key differences to Combined Authorities

What are Combined County Authorities?

The Levelling Up and Regeneration Bill (LURB), createsza new type of combined authority for England. The new Combined County Authorities (CCAs) are designed for more rural areas, whereas the existing Combined Authorities (CA) typically cover cities.

CCAs are made of upper tier authorities only, and any district or borough councils in the area of the proposed CCA may not be members (or Constituent Councils as they are known).

The LURB states that CCAs must meet two conditions.

1. The area consists of the whole of the area of a two-tier county council, and the whole of one or more of (i) the area of a two-tier county council, (ii) the area of a unitary county council, or (iii) the area of a unitary district council.

2. No part of the area forms part of the area of another CCA, the area of a combined authority or the integrated transport area of an Integrated Transport Authority.

These requirements contrast with the requirements for existing CAs created under the Local Democracy, Economic Development and Construction Act 2009 (as amended by the Cities and Local Government Devolution Act 2016) which require only that they are comprised of a minimum of two or more local government areas in England.

The amendments introduced by the Cities and Local Government Devolution 2016 Act meant that it was possible for a county area, or part of it, to be included, but only one of either the county council; or the district or borough council for the area in question can be a constituent council.

The provisions prevent the district or borough council from blocking a proposal in which a county wants to participate and vice versa. During the passage of the 2016 Act, the Parliamentary Under Secretary of State for Communities and Local Government (as it then was), assured MPs that the Secretary of State would seek a consensual approach from councils.

Despite the legislative provisions preventing blocking by one or other type of council, and these assurances, in practice several areas considering devolutions deals, have foundered where districts/boroughs and counties have taken a different approach.

By effectively excluding district/borough councils from participation in the new model, such blockages will be removed. However, most county councils will want to keep their district/borough councils close and involved, and there are ways that that can be achieved.

Constituent councils, non-constituent members and associate members.

Constituent councils are those which have been part of the group of county councils/upper tier councils who have made the proposal for a CCA to the Secretary of State. Members appointed by constituent councils are voting members of the CCA.

Non-constituent members are individual members of the CCA who are nominated as members by a body designated by the CCA. Non-constituent members are non-voting unless the voting members resolve otherwise.

Similarly, the LURB defines associate members as individuals appointed by the CCA. Again, they are non-voting, unless the voting members resolve otherwise.

There are provisions within the LURB through which district and borough councils can be represented on the Board of a CCA. However, it will be interesting to see what, if any, restrictions are placed on the apparent freedom inherent within these provisions by the Department of Levelling Up, Housing and Communities (DLUHC).

The LURB does allow the Secretary of State to make regulations prescribing the constitutional arrangements of a CCA, and such regulations could well place a limitation on the otherwise broadly drafted provisions.

Early indications suggest that DLUHC are not willing to allow new CCAs to have all their district and borough councils nominated as non-constituent member nominating bodies. DLUHC have been accepting of district and borough Councils collectively creating a nominating body which can appoint some Non-Constituent Members to the Board of the CCA.

Other interests do also need to be captured within the available non-constituent member/associate member spaces, including business interests. In addition, the White Paper on Levelling Up indicates that LEPs should be integrated into CCAs, so identifying a way for this to happen within the structures available is important, for example, creation of an advisory business board.

The concepts of non-constituent and associate members have been adopted from the operating models of many CAs. Although there is no concept of non-constituent members in the 2009 Act, it is a concept which appears in Orders creating CAs, as do associate members.

Proposals to create a new CCA

The LURB states that one or more authorities may prepare a proposal for the establishment of a CCA, to be submitted to the Secretary of State.

Prior to submitting a proposal, a consultation must be carried out across the proposed area of the new CCA.

Any proposal submitted must specify the purpose to be achieved by the establishment of the CCA.

Clause 44 of the LURB provides that the Secretary of State may only prepare regulations for the creation of a CCA only if they consider that to do so:

- Is likely to improve the economic, social and environmental well-being of some or all of the people who live or work in the area;

- Is appropriate, having regard to the need:
  - To secure effective and convenient local government, and
  - To reflect the identifies and interests of local communities.

- Will achieve the purpose specified to be achieved in the application from the authority;

- The Constituent Councils consent; and

- A consultation has been carried out.

These provisions are quite different from the tests which had to be met to create a CA. For traditional CAs the process was that the group of councils would carry out a governance review, including consultation, in order to decide whether to proceed.

Subsequently, having decided to proceed, the councils were required to prepare and publish a scheme for the combined authority. Finally, the Secretary of State would create the Order establishing the CA.

However, the Secretary of State is still required to consider whether it is appropriate to create a CA to "secure effective and convenient local government", which might be regarded as equivalent to the governance review stage in respect of previous CAs.

However, the tests in respect of CCAs go much further to include a specifically identified "purpose" for the CCA, as well as the Secretary of State satisfying themselves that creating the CCA is "likely to improve the economic, social and environmental well-being of some or all of the people who live or work in the area" and "reflects the identities and interests of local communities".

It will be interesting to see whether in practice this leads to a different approach by DLUHC in terms of rigour for assessing proposed CCAs.

Conclusion

As well as the key differences identified above, there are a myriad of other smaller differences between the provisions in the LURB relating to CCAs, and the existing legislation used to create CAs.

It feels like the LURB has taken a lot of the learning from CAs and is seeking to put it on a statutory footing, but as there is a framework element to the provisions, we will start to know more as regulations begin to be released for consultation.

Laura Hughes
Partner & Head of Public Law

M: 07824 370102
E: laura.hughes@brownejackson.com

Browne Jackson

Discrimination claims against service providers

Here, John McWilliams, Principal Associate at Weightmans, considers discrimination claims against service providers:

In the period since the start of lockdown, there has been a marked increase in claims against service providers by individuals claiming that they have suffered discrimination in the provision of services. In virtually all of the claims that I have seen, the claim has another element attached, most commonly: defamation; harassment; or breach of contract.

None of the claims that I have dealt with to date have succeeded but, due to the nature of the action and the rules and law which govern it, these actions can be protracted and therefore costly. There is also the potential for adverse publicity. As such, I would urge that when a claim which includes any claim in discrimination is intimated you:

- Gather together and preserve any and all documents (including electronic documents), notes and video evidence that you may have in relation to the matter;
- Where you consider that you wish to defend the matter, you take urgent specialist advice; and
- Consider undertake a risk/cost/benefit analysis of defending the claim.

Discrimination claims are governed by the Equality Act 2010 (the "Act"). This runs to over 650 pages including amendments and its various schedules. I hope that the following provides an easy guide through the Act in

relation to these claims but I do stress it is an overview and that it is not intended as an advice on specific matters.

It should first be noted that by S149 of the Act where an organisation or a person is not a public authority but who exercises public functions must have due regard to the need to: eliminate discrimination, harassment, victimisation and other conduct; advance equal opportunity; and foster good relations between those who share a protected characteristic and those who do not.

These are positive duties and will be the background in which any claim of discrimination against those caught by claim will sit. At S4 of the Act, it sets out a list of protected characteristics, which includes: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. It is discrimination in these areas that is governed by the Act.

By S29 of the Act, a service provider to the public must not discriminate against a person requiring the service by not providing the service and must not discriminate in the provision of the service or subject the person to any other detriment.

The definition of discrimination is set out at S13 and S19 of the Act and is broken down into direct and indirect discrimination. Direct discrimination is less favourable treatment of a person because of the protected characteristic. Indirect discrimination is the application of a provision which is discriminatory in relation to a protected characteristic of the person.

Importantly, S20 of the Act imposes a duty on the service provider in relation to a disability to make reasonable adjustments to accommodate the protected characteristic so that the disadvantage is avoided.

It should also be noted that by S26 and S27 of the Act, discrimination includes harassment and victimisation. Recent examples of claimed discrimination in claims that I have seen include: race; disability and unconscious discrimination.

I believe that discrimination because of race is self-explanatory. The claims I have seen in relation to disability have been based on an alleged failure to make reasonable adjustments.

Unconscious discrimination is where there is an unconscious bias against a person because they fall into a group that is thought of negatively. A recent example is where a claimant claims discrimination as they allege that they were treated less favourably because the organisation found out their full name, realised that they were from a different race and therefore treated them less favourably because of this.

When considering any action brought against a service provider it is crucial that S136 of the Act is considered. This transfers the burden of proof where the facts would permit the Court, in the absence of any other explanation, to find that a person contravened the Act.

The Court must hold that the contravention occurred unless the defendant shows that they did not contravene the Act. As such, it is for the defendant to show (on the balance of probabilities) that it did not contravene the Act.

A claim brought under the Act against a service provider claiming discrimination is, generally, subject to a limitation period of six months, starting

with the date of the act to which the claim relates by virtue of s118 of the Act but this may be extended by application to the Court on the basis that it would be just and equitable to do so. The award that a Court can make on a successful claim are provided by S119 of the Act. They can include: an award for personal injury, generally described as psychiatric injury; an award for injury to feelings; and an award for special damages (that is any other loss directly attributable to the loss, e.g. losses from any breach of contract).

The damages for psychiatric injury will be by reference to the Vento Guidelines. As at April 2022, these are split into four bands: the lower band is £990 to £9,900 and relates to one-off/isolated instances of discrimination; the middle band of between £9,900 and £29,600 for cases that do not merit an award in the upper band; and the upper band of between £29,600 to £49,300 for the most serious cases. In the most exceptional cases, the Court can make an award exceeding £49,300 but this will relate only to the most serious and long-standing instances of discriminatory behaviour.

In addition, a claimant may claim aggravated and/or exemplary damages. Aggravated damages are damages to compensate for mental distress and injury to feelings caused by the manner or motive in which the discrimination was committed or by a defendant's conduct after the discriminatory act.

Exemplary damages can be awarded in excess of a claimant's loss and are a punishment of the defendant. They are only available in limited circumstances, such as oppressive or unconstitutional conduct, or where the defendant has calculated that the money to be made from their wrong doing will probably exceed the damages payable.

I would add a final note on costs. As mentioned above, a claim in discrimination can be a protracted and costly action. Many of those that I have seen have been brought by individuals, which increase the work that needs to be conducted, so increasing the costs.

In a majority of these cases, the litigant in person does not have the financial wherewithal to pay for the costs awarded in a successful defence, meaning that any victory can be a pyrrhic victory.

John McWilliams
Principal Associate

T: 0113 213 4097
E: john.mcwilliams@weightmans.com

Weightmans

Compulsory Purchase Orders -

A practical guide and key issues including recent case law

The power to compulsorily purchase (CPO) land is an essential tool for Councils in assembling land for development. Based on recent experience we set out below some key issues to bear in mind in preparing to use CPO powers.

How important is it to follow the Guidance?

The guidance referred to here is, *"The Guidance on the Compulsory Purchase Process and Crichel Down Rules"*. It specifically covers most CPOs, one major exception being those made under the Highways Act 1980.

The Guidance covers a mix of policy, technical information, and practical advice. In terms of policy, local authorities must follow the Guidance very closely as a failure to do so may jeopardise the confirmation of a CPO. For these purposes, recommended reading includes chapter one, which sets out the core requirements for making and confirming a CPO and then the relevant parts of the Guidance that cover the specific powers to CPO.

What legal power should I use?

CPO powers are found in statute. In practice Councils, when seeking to assemble land, will rely on section 226 Town Country Planning Act 1990, the general power to acquire land for the purposes of bringing about its development, redevelopment and/or improvement because it thinks this will promote the economic, social or environmental well-being of the inhabitants of its area. This is known as the Planning Power.

However, where the proposed redevelopment will mainly involve delivering new housing, for example, a more appropriate option would be to rely on section 17 Housing Act 1985 (the Housing Power), the power to acquire land for housing purposes, the test for which is that the acquisition will give rise to a quantitative and/or qualitative housing gain.

It is often difficult to decide which of the two powers to use given that in most cases either could be used. The Guidance provides that a local authority should use the most appropriate power and not use the Planning Power in preference for the more relevant power. The risk of getting this wrong is that the Secretary of State will not confirm the CPO if the wrong power is used.

However, in the context of deciding as between Planning or Housing Powers, the Guidance gives comfort in the sense that if the Planning Power is used the policy relating to the Housing Power will also be applied where this is relevant.

Do I need planning permission?

As a matter of policy, the Guidance does not require that planning permission is granted either before a CPO is made or the decision taken to confirm the CPO.

The Guidance at paragraph 15 provides that where, *"...planning permission will be required for the scheme, and permission has yet to be granted, the acquiring authority should demonstrate to the confirming minister that there are no obvious reasons why it might be withheld"*. In theory, therefore, permission is not needed, however, it is not recommended to pursue the confirmation of a CPO without planning consent.

How important is the viability of the proposed scheme?

Financial viability is key to promoting a CPO as without it the scheme it supports is unlikely to happen. This point and others arose in a CPO promoted by Barking and Dagenham LBC. In the case the Inspector appointed to consider whether to confirm the CPO declined to do so primarily on financial viability grounds. This was because:

- There was no budget for business extinguishment costs (these can be significant and may have undermined the financial viability of the project); and

- The only publicly available information on viability was a review carried out in 2016 which said the scheme was not viable.

The Council and its development partner argued that this was out of date and cited a more recent, but confidential, assessment which had not been disclosed. The inspector criticised the non-disclosure of this information which could have been provided on a redacted basis.

The Council defended its position arguing that the viability issue had only been raised at the CPO inquiry. The Inspector reminded the Council that irrespective of whether an objector to a CPO raises the issue of viability the Guidance placed a positive obligation on the Council to supply evidence that the scheme supported by a CPO is viable.

CPO as a last resort

The exercise of CPO powers should only ever be as a last resort. It is easy to forget in the rush to assemble land for an exciting new project, that the power to take land, aside from the entitlement to compensation, is Draconian.

The Guidance expects those affected by a CPO to be treated with 'kid-gloves'. In the Barking and Dagenham LBC case there were a number of criticisms levelled at the Council:

- Notification that the CPO powers were about to be used only communicated to landowners 10 days before the CPO was made.
- Full information was not provided at the outset of the process, in particular spelling out what the CPO process would entail.
- The process of engaging with landowners was not what is should have been, evidence of which included not appointing a specific case manager, not keeping delays to a minimum and not offering advice and assistance to affected occupiers about relocation options and providing a "not before date" i.e., providing certainty as to when the land was likely to be taken assuming the CPO were confirmed

The lesson here for Councils is the need to remember that the CPO process is very stressful and that they are expected to 'go the extra mile' in how they deal with those directly affected by a CPO.

Do I need always need to conduct an Equality Impact Assessment (EqIA)?

The Guidance reminds local authorities in promoting CPOs to have due regard to their obligations to meet the aims of the Equality Act 2010. This applies to all proposed CPOs regardless of how remote the possibility of an issue arising. An early consideration in the CPO making process should be to conduct and EqIA.

Nathan Holden
Partner

M: 07501 226139
E: nathan.holden@freeths.co.uk

Freeths

Procurement pitfalls and challenges: 2023 and beyond

Local Authorities ("Authorities") naturally strive to ensure that public procurement processes are robust. Nonetheless, no process is 100% flawless and there are common areas that open Authorities up to criticism. This can result in court proceedings being issued, which negatively impacts the public purse and local budgets, whilst delaying the procurement itself.

With that in mind: what are common procurement pitfalls; how can you identify a prospective challenge; what options do you have once proceedings are issued; and how might the Procurement Bill change the position?

Read on to find out...

Common pitfalls

Throughout a procurement process, the core principles under the Public Contracts Regulations 2015 ("PCR 2015"), namely transparency, proportionality, and equal treatment between bidders, must be complied with. Common areas for challenge, and how they might be avoided, are set out here.

Tender documentation

The tender documentation should objectively set out how bids will be assessed. In particular:

- Distinctions between scores/grades in the scoring methodology should be clear, e.g. include a description, which is sufficiently short to allow flexibility.

- There should be clarity in respect of word limits, submission requirements and the evaluation methodology that will be carried out.

- All criteria and sub-criteria for evaluations should be published.

Evaluation of bids

Top tips for ensuring robust evaluation are:

- Evaluators should be checked for any conflicts of interest and provided with adequate training.

- Evaluations should be undertaken strictly and consistently in accordance with the award criteria and scoring methodology.

- Knowledge of bidders or incumbent performance should not be considered.

- Records should be made of scores and reasoning, including how award criteria and scoring methodology was applied. Similarly, bidder feedback should be objectively clear, and consistent with the tender documents.

Moderation of scores

Moderations should include discussion of evaluators' scores and reasonings, followed by dialogue to agree moderated scores. Considerations include:

- No one evaluator should be allowed to have 'undue influence'; an impartial chair to facilitate discussions (without expressing opinions) may help.

- Rationales for moderated scores should be agreed and recorded. These shouldn't copy-and-paste evaluators' original reasonings, as the moderated score and/or rationale may be different.

- If concerns arise after moderation, the panel should be reconvened for further discussion, with moderated scores either confirmed or changed. Amended score(s) and rationale(s) must be agreed and recorded and fully signed off by evaluators and the moderator.

Reacting to a prospective challenge

Bidders may not state that they are considering proceedings. Therefore, Authorities should try to identify warning signs in correspondence, e.g. references to "escalation" if no satisfactory reply is received, or that they have/are seeking (legal) advice.

If a prospective challenge is identified, Authorities should consider whether there could be merit to the concerns raised and if corrective action should be taken to resolve matters (which must comply with the PCR 2015). If there appear to be low merits, then a robust approach may see off the claim. Obtaining early legal advice is important to support this assessment.

There are very short timescales for legal proceedings to be issued, namely 30 days from and including the date on which the bidder knew or ought to have known grounds for challenge had arisen (or 30 days from the date of the contract award notice with a longstop of 6 months from date of contract, for a claim of ineffectiveness). Initial concerns can therefore quickly escalate with little warning.

In any event, all documentation from the procurement should be preserved. There should also be a clear understanding of the detail and timeline of the evaluation and moderation processes, with documents to evidence them.

Due to the timescales and potential consequences, Authorities should seek legal advice as soon as they are aware of a risk of proceedings being issued.

Can an Authority let the contract once a claim has been issued?

Under the PCR 2015 an automatic suspension, which prevents the contract from being entered into, applies as soon as an Authority is aware that proceedings have been issued in respect of its decision to award the contract.

This applies even where the standstill period has expired, as long as the contract has not yet been signed.

If the suspension applies, an Authority will be concerned about the prospect of protracted litigation and may believe the only option is to concede and agree to re-run the process. However, an urgent application can be made at Court to lift the automatic suspension.

The Court will consider three factors: whether there is a serious case to be tried; whether damages would be an adequate remedy if the suspension were lifted or retained; and consideration of where the balance of convenience should sit in ensuring justice between the parties.

Although the outcome of the application will be fact-specific, the Court often favours lifting the suspension. This is therefore an option that should always be considered; Authorities do not necessarily have to bow to the pressure of challenges, unless the process was so fundamentally flawed that a defence may prove difficult.

Procurement Bill – impact on the automatic suspension

The Procurement Bill (as of 16 January 2023) includes significant changes to the automatic suspension mechanism. The Bill provides that the suspension only applies where Proceedings are issued in relation to the contract and notified to the Authority, within the applicable standstill period. Timescales for issuing proceedings and invoking the automatic suspension are therefore much tighter under the Bill, which includes a mandatory standstill period of eight working days.

The wording also means the automatic suspension applies to any claims relating to the procurement (for example, a decision to exclude), rather than only claims relating to the decision to award the contract itself. Although this may appear to provide greater confidence in letting contracts, in practice, bidders often request an extension to the standstill period to raise questions or concerns. In some cases, dialogue during an extended standstill period can prevent proceedings being issued.

Eight working days is unlikely to be sufficient for bidders to digest the outcome, seek legal advice, request and receive information/disclosure, issue proceedings and notify the Authority. In the context of high-value contracts, this may increase the likelihood of proceedings being issued within the standstill period.

To offset this risk, Authorities could voluntarily adopt a longer standstill period, or carefully consider extension requests, to provide sufficient time for any concerns to be addressed.

Amy Callahan-Page
Associate

T: 0121 214 3553
E: amy.callahan-page@anthonycollins.com

Anthony Collins

Private prosecutions -
An alternative avenue to justice

An increasingly under-resourced Criminal Justice System, throttled by COVID-19 and stringent policing priorities, has led to a growth in the number of cases that the police simply cannot investigate.

With 333,887 outstanding cases at the Magistrates' Court reported in June 2022[1], it is not surprising to learn that there has been a steady rise in the number of private prosecutions.

We outline below what private prosecutions are and what challenges private prosecutors face today.

What is a private prosecution?

A private prosecution is a criminal prosecution started by a private individual or body, who is not acting on behalf of the police or any other prosecuting authority[2]. Private prosecutions offer victims of crimes, which are of little interest to police or which exceed police resourcing, an alternative avenue to justice.

Anyone can bring a private prosecution under section 6 of the Prosecution of Offences Act 1985[3]. The burden of proof lies with the prosecutor, who must gather evidence and prove that the defendant committed the alleged offence beyond a reasonable doubt.

Lord Wilberforce stated that private prosecutions go 'back to the earliest days of our legal system and remain a valuable constitutional safeguard against inertia or partiality[4]. A famous example of a private prosecution was the *2019 prosecution of Boris Johnson* for misconduct in a public office, which was funded and brought by members of the public. What are the obstacles to private prosecution? The absence of a regulatory framework for private prosecutors, combined with the intermingling of financial and public interests has raised concerns of partiality.

Commentators have criticized that private prosecutions put a price tag on justice, endangering the balance of power between corporate and individual litigants. In response, the Courts have developed safeguards to protect private prosecutions against abuse.

Those seeking private prosecutions must carefully navigate these safeguards to avoid unsuccessful applications and wasted costs orders.

The Code for Crown Prosecutors

Private prosecutors must consider the evidential test contained within the *Code for Crown Prosecutors*[5] before laying information before the Court. Where the test has not been met, the Director of Public Prosecutions (DPP) may take over and discontinue the case.

The evidential test requires that prosecutors consider whether there is sufficient evidence to found a realistic prospect of conviction. This includes assessing the reliability and credibility of available evidence.

The *2020 Post Office Horizon Public Inquiry* has highlighted both the importance of ensuring that evidence is reliable and the problems that can arise when the lines between victim, investigator and prosecutor become blurred.

The Post Office privately prosecuted more than 700 Post Office employees based on information from their Horizon computer system. It was subsequently established that the computer system, and therefore

the prosecution was flawed, leading to claims for compensation against the Post Office totalling £58 million.

Those seeking a private prosecution must carefully review the evidence available to them. Private Prosecutors should consider sending prospective defendants a PACE compliant interview letter or an invite to a voluntary interview to collect as much evidence as possible.

Standards of conduct

A private prosecutor must maintain the same standards of conduct as a public authority, including a duty of full and frank disclosure. The Courts will proactively safeguard the integrity of private prosecution proceedings against misconduct.

A private prosecutor who issues proceedings with good cause will generally recover costs from central funds pursuant to section 17 of the Prosecution of Offences Act 1985[6]. However, costs can be awarded against a prosecutor if the court decides that the prosecution was vexatious or improper.

This was the case in R (on the application of Kay and another) v Leeds Magistrates' Court[7], where the court held that 'compliance with the duty of candour is the foundation stone' upon which decisions to issue a summons are taken and its 'importance cannot be overstated'.

Alongside considering whether the essential ingredients of the offence are present, the Magistrates must ascertain:

1. That the offence alleged is not time-barred.
2. That the Court has jurisdiction to hear the application.
3. That the informant has the necessary authority to prosecute.
4. Most importantly, that the application is not vexatious, an abuse of process, or otherwise improper.

For this reason, it is important that private prosecutors carefully observe their duties of disclosure and self-assess whether their application could be perceived as an abuse of process. The safest option for private prosecutors is to closely follow CPS guidance.

Discontinuance by the Director of Public Prosecutions

Private prosecutors are always at the mercy of the DPP, who has the power to take over any prosecution under section 6(2) of the Prosecution of Offences Act 1985, and discontinue it under section 23. The DPP will normally discontinue a case where the evidential stage or the public interest stage of the Full Code Test has not been met; or where the prosecution would be damaging to the interests of justice.

Further guidance on when the DPP will and will not exercise its discontinuance powers is available on the CPS website . Of 50 private prosecution referred to the CPS between April 2019 to March 2020, the CPS continued three per cent, declined to take over 37 per cent, and decided to discontinue a shocking 60 per cent. This highlights the importance of ensuring that applications for private prosecutions are professional, organised and supported by the same standards of evidence seen in public prosecutions.

Wasted cost orders for failures to disclose

When it comes to disclosure, private prosecutors are subject to the same obligations as public prosecuting authorities. A wasted cost order may be made against a private prosecutor should they fail to discharge their duty of disclosure. In (Holloway) v Harrow Crown Court, the Court made an adverse costs order against a private prosecutor as they had withheld evidence that "presented a picture flatly contradictory to the prosecution case". Section 19A of the Prosecution of Offences Act 1985 also allows cost orders made against private prosecutors to focus on "any improper, unreasonable, or negligent act or omission on the part of any representative".

Prosecutors should consider the Attorney General's Guidelines on Disclosure , which provides prosecutors guidance on discharging their duty of disclosure. Private prosecutors should also only begin a prosecution when they have their case in a "trial ready" condition.

Another difficulty for private prosecutors is how to manage the disclosure of unused material. The CPS employs a disclosure officer to ensure impartiality and to safeguard the disclosure process. If a private prosecutor wants to reduce the risk of wasted costs orders, they should consider whether it is appropriate for them to identify relevant and unused material, or whether an independent party would be better suited to manage this process.

In relation to third party material, private prosecutors lack the investigatory powers and authority of the CPS, and so may face more difficulties compelling third parties to share documents with them.

Conclusion

Private prosecutions are an attractive way for victims to obtain justice when the police will not act. However, those seeking to step into the shoes of the CPS must be prepared to meet their high standards in relation to evidence, disclosure and conduct.

1 *'Criminal court statistics quarterly: April to June 2022', Ministry of Justice (September 2022).*
2 *'Fraud Facts Fraud', Advisory Panel (April 2013).*
3 *Section 6 of the Prosecution of Offences Act 1985.*
4 *Gouriet v AG [1978] AC 435.*
5 *'The Code for Crown Prosecutors', Criminal Prosecution Service (26 October 2018).*
6 *Section 17 of the Prosecution of Offences Act 1985.*
7 *Kay & Anor, R (on the application of) v Leeds Magistrates' Court & Anor [2018] EWHC 1233 (Admin).*

Simon Belfield
Partner
T: 0161 838 0472
M: 07703 745764
E: simon.belfield@dwf.law

DWF Law

Ethnic pay gap reporting - How public bodies can ensure they follow their duties

In this article, we explore the current status of ethnicity pay gap reporting, recent proposals for change and how public authorities can undertake reporting and use the results within strict legal frameworks contained in the Equality Act 2010.

The current situation and possible developments

Ethnicity pay gap reporting, which shows any difference in average pay between staff in an organisation from black, Asian and minority ethnic backgrounds as compared to white staff, has been much discussed in recent years.

Despite various calls for mandatory ethnicity pay gap reporting in the past, this is not currently a legal requirement for any organisations. The latest Government *report* on the introduction of ethnicity pay gap reporting in March 2021 outlined the possible difficulties in mandatory reporting.

It noted that as ethnicity is not binary and contains many different categories, approaching it in the same way as gender pay gap reporting can lead to significant statistical and data issues. It also advised BEIS would publish guidance to assist organisations seeking to carry out voluntary reporting, though this has not yet been published.

Despite the Government's position, the Women and Equalities Committee in February 2022 *recommended making ethnicity pay gap reporting mandatory*, stating there are clear economic and social incentives to address race inequality in the workforce. Despite a recommendation that steps should be taken by April 2023 to introduce mandatory reporting requirements, the Government's position has not changed.

Voluntary reporting

With the public sector equality duty ("PSED") in mind, many public sector organisations have chosen to compile an ethnicity pay gap report. The first step must be to ensure that the raw data is accurate and up to date.

It is likely that any ethnicity monitoring is voluntary and many employees may have chosen not to provide this information. No assumptions should be made on the ethnicity of any employee.

An initial staff campaign to update data and an explanation as to how the data will be used will be a good starting point.

The CIPD have provided *further detailed* guidance on ethnicity pay reporting which can be used when developing a method of calculation.

Public authority duties and powers in relation to equality

If an ethnicity pay gap is revealed through voluntary reporting, there is a strict framework to be followed regarding what action can be taken.

Where the PSED applies, a public authority must have due regard to their responsibility to, amongst other things, advance equality of opportunity for ethnically diverse employees.

Doing so can encompass reducing or minimising the disadvantages suffered by ethnically diverse employees, including lower pay.

Organisations must be cautious about any knee jerk reaction, which may contravene equality laws. The Equality Act 2010 provides a clear framework, enabling positive action in circumstances where the employer can establish all of the following:

- They have a reasonable belief that ethnically diverse employees have suffered a disadvantage connected to their race or ethnic origin, which is supported by some form of evidence.
- Any action taken would be a proportionate means of achieving a legitimate aim. It must be appropriate and necessary (although there is no need to demonstrate this was the only action possible).
- The action undertaken does not amount to a blanket policy of treating ethnically diverse employees more favourably.

It is key to remember that while positive action is permitted, positive discrimination is not; it is unlawful for an employer to introduce preferential treatment which benefits ethnically diverse individuals only on the basis that they are ethnically diverse.

In the case of ethnicity pay gap measures, it would be unlawful to increase salaries of employees from a black, Asian or minority ethnicity background just because of their race.

How can voluntary pay gap data legally influence policy?

It is important that once data has been collected through voluntary ethnicity pay gap reporting that it is analysed correctly and the reasons for the pay gap established. One option is to follow the reporting with a staff survey; this can lead to establishing the actual rather than assumed issues and ensure the next steps taken are sensible in the context and will actually alleviate the disadvantage.

Once the reason for the pay disparity has been established, we would suggest creating an action plan of short/medium and long-term actions to rectify the discrepancy.

The organisation must be satisfied that the proposed measure will rectify the issue and not just for the immediate employee.

This may mean reviewing recruitment practices, setting up an objective system for remuneration, clearer objectives for promotion and development opportunities and training. Any action should be considered carefully to ensure it is justifiable and it doesn't alienate other employees or cause disparity of treatment.

Caution should be exercised when undertaking any of these measures; failure to comply with the strict legal framework around ethnicity pay gap reporting could amount to positive discrimination and lead to employees seeking remedies in relation to breaches of the Equality Act 2010, judicial review proceedings, or claims under the Human Rights Act.

Julie Bann
Partner

M: 07584 706594
E: jbann@sharpe pritchard.co.uk

Sharpe Pritchard

Beth Edwards
Trainee Solicitor

T: 020 7405 4600
E: bedwards@sharpe pritchard.co.uk

Sharpe Pritchard

The Procurement Bill progresses through Parliament

The Procurement Bill is continuing to progress through Parliament and is currently at the Committee stage in the House of Commons. This will introduce major reform of the way that public procurement is carried out in the United Kingdom. This article looks at some of the changes that have been made in recent stages of the Bill.

Key provisions of the Bill include:

- Establishing principles and objectives and requiring contracting authorities to have regard to these when conducting procurements, as well as to national procurement policy statements. This includes having regard to any barriers that small and medium-sized enterprises may face to participation in a procurement and considering whether it is possible to remove or reduce any such barriers.

- Establishing the procedures that a contracting authority may use to procure a contract, as well as the preliminary steps that a contracting authority may take before publishing a tender notice.

- Imposing requirements on contracting authorities in the management of public contracts, including requirements as to prompt payment of contractors, assessment of performance against key indicators, management of arrangements with sub-contractors. The Bill also makes provision for contracts to be modified during their term without the need for a new procurement if certain circumstances apply.

- Imposing a duty on contracting authorities to identify and mitigate against conflicts of interest in their procurement activities.

- Establishing requirements applicable to the procurement of contracts where the value would be below the threshold for the application of the full requirements contained in the Bill.

- Imposing transparency requirements relating to the expected procurement activities of contracting authorities.

- Making provision for remedies available to parties who have suffered as a result of a contracting authority's breach of procurement legislation, including reference to automatic suspension of procurement and interim remedies, as well as pre-contractual and post-contractual remedies.

- Providing for an "appropriate authority" to have oversight of procurement by contracting authorities, with power to investigate compliance and issue recommendations and guidance. This role is expected to be undertaken by a procurement review unit.

Amendments made to the most recent version of the Procurement Bill, following its passage through the House of Lords include:

Framework Agreements

The Bill makes provision for contracting authorities to establish frameworks and then to call off contracts from those. The latest version of the Bill has specified the requirements for competitive selection when contracting authorities run competitions to identify a contractor for a contract awarded under a framework.

This requires that any such competitive selection process may only allow proposals to be assessed against the award criteria against which tenders

were assessed in awarding the framework. This is more limited than arrangements for call-off contracts from frameworks established under the Public Contracts Regulations 2015, the 2015 Regulations allow competitions for call-off contracts to include terms "referred to" in the procurement documents for the framework agreement.

Modification of contracts

The Bill sets out circumstances in which a contracting authority may modify a contract during its term, without this amounting to a new contract which would require a new procurement process. These circumstances are when the modification is:

- A permitted modification specified in a schedule to the Procurement Bill.
- Not a substantial modification.
- A below-threshold modification.

The Bill defines a "substantial modification" as a modification which would increase or decrease the term of the contract by more than 10 per cent of the maximum term provided for on award, materially change the scope of the contract, or materially change the economic balance of the contract in favour of the supplier.

A new sub-clause added to the latest version of the Bill explains that a reference to a modification changing the scope of a contract is a reference to a modification providing for the supply of goods, services or works of a kind not already provided for in the contract. This may provide contracting authorities with flexibility in determining whether

the provision of new services, goods or works under a contract is a permitted modification where they are of a "kind" already being provided under the contract.

Disregarding tenders during a procurement process

The latest version of the Bill gives contracting authorities more discretion about disregarding tenders during a procurement process. As originally introduced, the Bill required a contracting authority, in assessing which tender best satisfies its award criteria, to disregard any tender which materially breaches a procedural requirement set out in the tender notice or associated documents.

The current version of the Bill has amended this to say that a contracting authority "may" disregard any tender which breaches a procedural requirement set out in the tender notice or associated documents.

Authorities are likely to think it appropriate to disregard tenders which materially breach the requirements of procurement processes but a general discretion to disregard tenders for breaches could prove helpful to contracting authorities in managing their procurements and informing bidders of how they will respond to any breach of the authorities' requirements.

The Bill still has some way to go before it completes the Parliamentary process, so further changes may be made. The final version will provide for a new landscape for public procurement specific to the United Kingdom.

Tiffany Cloynes
Partner

T: 029 2039 1766
E: tiffany.cloynes@geldards.com

Geldards LLP

Clare Hardy
Partner

T: 029 2039 1766
E: clare.hardy@geldards.com

Geldards LLP

EM LawShare Training Programme 2023/24

We are delighted to confirm that the full Training Programme for 2023/2024 will be announced later this month.

The majority of courses will continue to be delivered as webinars with a few face-to-face courses. Webinars will be delivered "live" and recordings will be available on the *EM LawShare website*.

The full Programme of webinars will be available to book on the *EM LawShare website* so please check back soon, so that you don't miss out on your preferred course.

The following courses have now been confirmed and these are available to book with immediate effect or to watch as recordings:

Date	Title
7 March 2023	Adult Care to include social care debt recovery
8 March 2023	Conducting successful local authority prosecutions
9 March 2023	The things you wish you'd asked about bringing services back in-house
15 March 2023	Employment Law Update
16 March 2023	Overage agreements
21 March 2023	SPVs and directors duties in an insolvency scenario

Please don't forget to complete the Evaluation Form after each webinar you attend so your Development Record is updated.

If you have any queries, please contact Julie Scheller the Training Administrator at ***Julie.Scheller@Freeths.co.uk***

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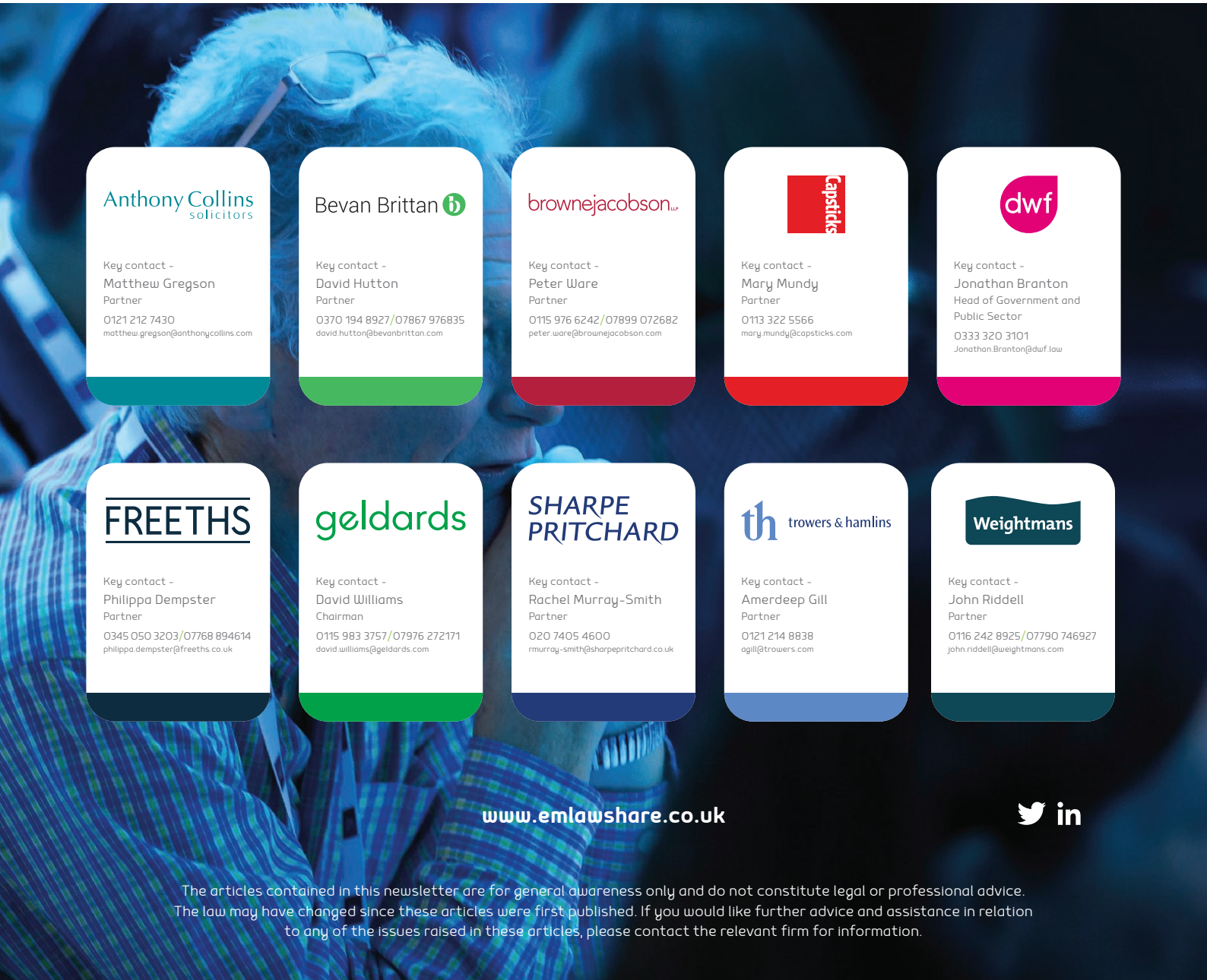

Anthony Collins solicitors

Key contact -
Matthew Gregson
Partner
0121 212 7430
matthew.gregson@anthonycollins.com

Bevan Brittan

Key contact -
David Hutton
Partner
0370 194 8927/07867 976835
david.hutton@bevanbrittan.com

brownejacobson LLP

Key contact -
Peter Ware
Partner
0115 976 6242/07899 072682
peter.ware@brownejacobson.com

Capsticks

Key contact -
Mary Mundy
Partner
0113 322 5566
mary.mundy@capsticks.com

dwf

Key contact -
Jonathan Branton
Head of Government and Public Sector
0333 320 3101
Jonathan.Branton@dwf.law

FREETHS

Key contact -
Philippa Dempster
Partner
0345 050 3203/07768 894614
philippa.dempster@freeths.co.uk

geldards

Key contact -
David Williams
Chairman
0115 983 3757/07976 272171
david.williams@geldards.com

SHARPE PRITCHARD

Key contact -
Rachel Murray-Smith
Partner
020 7405 4600
rmurray-smith@sharpepritchard.co.uk

th trowers & hamlins

Key contact -
Amerdeep Gill
Partner
0121 214 8838
agill@trowers.com

Weightmans

Key contact -
John Riddell
Partner
0116 242 8925/07790 746927
john.riddell@weightmans.com

www.emlawshare.co.uk