# NOTER*up*

The Journal for Solicitors in Local Government

# BOND 008 AND THE NEC

## Features

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- *Brussels Trip*
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# EDITORS LETTER

Welcome to the Summer edition of Noter Up. We are living in very challenging times. Gordon Brown has introduced 2,823 laws since becoming Prime Minister last year, which is a record! Apart from getting our heads round these new pieces of legislation, as local governments lawyers we are also faced, amongst other issues, with the prospect of more unitary authorities, changes to the administrative courts and public law fee increases.

In this issue you will be able to read about the proposed restructuring of the Law Society, leading cases at Brent and Sedgfield councils, new consumer protection powers, the Brussels Trip and your very own personal Noter Up self coaching session. I am very keen to get as many articles written by fellow local government practitioners who have first hand knowledge of cases they have been involved with, as you will see in this edition. So if anyone has any interesting articles for the future, please do not hesitate to contact me. SLG is also keen to hear your views both as a member and in response to consultation documents such as the recent Records Management consultation so please get involved and make sure you have opted in to SLG. For further details either contact your branch or visit the website slgov.org.uk.

Finally with 08 being the anniversary of Ian Fleming's birth, a new James Bond film coming out and not forgetting having a Bond as our new chairman, this seems to be very much the Bond season!

**Matthew Ginn, Editor**

# CHAIRMAN'S REPORT

Local Government has had a lot to deal with recently but through it all there has been a sense that as we go through it all we share experiences and work together on a local and national level.

In May the fees in public law proceedings were increased 2500% and were made retrospective. This hits at the very root of the local authority's statutory duty to protect children and against governments "Every Child Matters" policies. This is an issue, which affects not only local government but all those involved in child protection whether it is the Judiciary, Solicitors acting for parents or Guardians and this was shown by the 111 responses to the consultation. Local Authorities will still have the duty to protect children and will still issue proceedings where the threshold is met but the money will have to be found from somewhere. Will that mean one less social worker, one less solicitor and a greater burden on those teams directly involved with child protection? Only time will tell. Several authorities are challenging the Government on this issue and SLG supports their action as this goes beyond local government and money it goes to the heart of child protection and on a cynical front is another nail in the coffin of proper access to justice for all concerned in this process.

The Law Society began its consultation on the new look council. SLG responded stating we should retain our seat due to the unique attributes we could bring to the Law Society in its representative role. The employed sector currently makes up almost 25% of the profession and is an increasing in size; this sector deserves to be properly represented on the Council. It was good to see Andrew Holryod (President of the Law Society) at the NEC meeting in June where working closer together was discussed. However he was advised that losing the SLG Seat could reinforce the view held by some that the Law Society appears to do very little for the local authority solicitor. We do not believe a random election at a local level enable our valuable and unique voice to be heard.

It is not only looking within and at the relationships we make during our working life that need to be strengthened. SLG need to look beyond local government and the way we have done things and export our excellence. With that it is good to see that the Law Society are interested in working together with LGG to produce joint training and that we are involved in discussions with them to draft Guidance Notes for the profession at large. SLG has also offered to assist with the development of the Law Society's Equality and Diversity Policy promoting the best from Local Government. The Ministry of Justice have asked SLG to become involved with a "tool-kit" to encourage solicitors to enter the judiciary to increase diversity there.

There is still more to be done. Whilst we are raising our external profile through the responses to consultation papers, litigation we need to look closer to home and raise the profile of the in house solicitor within the authorities where we work.

Issues surrounding who should be the monitoring officer still need to be addressed – given the ever increasing amount of law which comes into this role it should be held by a legally qualified person, as does the vexed issue of the practicing certificate fee.

The value of the in house legal department cannot be quantified in purely monetary terms. Any authority, which has externalised work, will see this and indeed retention of the department within is something I have always advocated; but with it comes the challenge of making us leaders rather than someone who the client consults at last minute. We need to ensure that working for local government is seen as a career not just a means to obtaining the skills to market ourselves in the private sector.

I was lucky to meet Irena Krylatova, from the Ukraine, one of this years John Smith Fellows. We discovered there were a number of similarities between the problems faced when giving advice, which goes to show local government, is universal in its challenges to officers.

I also had the pleasure of visiting the Yorkshire & the Humber and North West & North Wales and London branches and thank them for their hospitality. Unfortunately my day out in the sun to the South West was cancelled but I look forward to seeing you all later in the year.

On a personal note I will be competing in triathlons and at least one half marathon to raise money for a village school in Thailand. If you are interested in sponsoring me my contact details are on the website.

**Suzanne Bond**
**SLG Chairman**

# DOES SIZE MATTER?

Does the size and composition of the Law Society matter? The answer is yes.

It matters more now that the representation role and the regulatory role have been split. The Law Society is responsible for the representation of the profession. The Solicitors Regulatory Authority (SRA) has been flexing its muscles in their regulatory role.

As with Local Government, a Council with an unwieldy number of members makes decision-making a long and costly process. Executive decision-making among fewer members results in efficient and effective business of Councils – or at least that was intended with the Local Government Act 2000 – but is full representation of the electorate guaranteed. The answer is no.

So where does this take us?

The profession is expanding all the time. There are many more solicitors on the Roll than ever before. The size of the Law Society Council has increased within the last ten years so that it can fully represent solicitors in all their fields of practice, in particular to be the collective voice of the profession.

There are approximately 100 members on Council, some have geographical seats, and those with non-geographical seats are special interest groups, sections or committees, (of practice areas or specialism). SLG Ltd. Is a Group recognised by the Law Society, which means the group comes under its wings and receiving some funding for its core functions, for the time being at least.

Why reduce the size of Council? Two reasons –the regulatory role passing to the SRA in theory, means a change in the nature of the work of The Law Society, who can concentrate on the representation functions only – and the other reason is accommodation, there is insufficient room in Chancery Lane to accommodate a cohort of 100. This to me seems completely irrelevant. It could be argued that reducing the size of Council tantamount to reducing the representation of the profession.

What is more important is the result of the "Have your Say" consultation exercise carried out last year which favoured a reduction of Council members to between 50 – 75, the higher figure being more popular. The consultation revealed little or no support for a Council solely with geographical or non-geographical representation. What appeared to be more popular was a mixture of the two. SLG supports the move to reduce the Law Society Council but to have an even split between geographical and non-geographical seats.

The critical issue is the balance between the Law Society's geographical and non geographical seats. Of the non geographical seats, the employed sector (of which SLG is part) is enlarging. This segment alone accounts for 25% of the profession. With the Law Society Membership Board looking at the question of its membership category, there could be potential for further growth in this sector.

Perhaps the Law Society should follow the example of Local Government and have proportional representation on the Council – now that would really be revolutionary for the Law Society!

**Maria Memoli, MBA**
**Law Society Council Member**

# SLG Launches Major New Website Late Summer

The new website will represent a significant change with even greater scope for interaction and the collecting and sharing of information.

It will feature a brand new "knowledge network" with an improved discussion forum, document library and links to special interest groups around the country on dedicated subject related pages. There will also be updates on case law provided by Sweet & Maxwell.

The site will include links to LGG Training and a special area for trainee solicitors.

"The addition of pages specifically targeted to young legal professionals is one very important example of how we have redesigned the site and how we view its development as an on-going process," says Nigel Snape, SLG's former chairman.

"Young solicitors employed in local government don't always have the back-up of those working in private practice and we want to encourage these members to access this area of the site in order to build contacts in other authorities and to share ideas and opportunities as well as problems."

Importantly there will also be links to the nine branches across England and Wales, providing a national platform for sharing ideas, data and information. The website has been developed so that each SLG branch can update their own details and local news such as branch meetings and regional events.

For Suzanne Bond, current Chairman, the launch of the new website is also about ensuring those who are entitled to become members of SLG do so:

"I strongly urge anyone who has not already done so to opt into the SLG. Growing numbers give us strength and influence and there is no reason why everyone should not have all the benefits of being represented by the leading professional group serving our interests."

For further details of Branch activities, officers and Special Interest Groups visit the SLG Website at: www.slgov.org.uk

## East Midlands Branch

On 11th June our branch meeting was held at South Kesteven Council. Peter MacMahon, Deputy Ombudsman (London Office) provided an interesting update on the changes to the Local Government Act 1974 and the Regulatory Reform Order.

Our future branch meetings for the rest of 2008 are:

- Wednesday 24 September – Licensing Update with Jim Button at Erewash Borough Council.

- Friday 12 December – Local Government Law Update with Peter Keith Lucas at Gedling Borough Council.

Social Services and Education SIG days for 2008 are:

- Wednesday 16 July – Leicestershire County Council from 11am to 3pm

- Wednesday 12 November – Lincolnshire County Council from 11am to 3pm

Check out our website – www.etribes.com/emsigs - for details of our activities.

**Mandeep Virdee**
**Assistant Branch Secretary**

## Northern Branch

Employment law issues dominate the northern scene. Steve Newton organised the last meeting of the Employment Law SIG on the 4th June 2008.

On 13th March Ruth Stockley of Kings Chambers, spoke on the new Planning Bill. The Traffic Regulation Orders Special Interest Group met on the same date. Kelsey Clayton heads the Child Care/ Adult Services SIG. Meetings took place on 16th May and 6th June.

The Branch AGM took place on 10th July 2008.

**Dennis Hall**
**Branch Secretary**

## London and Home Counties

At the AGM in April the guest speaker was SLG Chairman, Suzanne Bond. This was followed by a presentation from DMH Stallard.

The Community SIG, the Corporate & Governance SIG, the Planning Forum and the Information SIG have been meeting regularly. July brings us the Education SIG at Camden Town Hall on 15 July 2008. The summer should also provide for the continuance of our highly successful SIGs away days. The Community SIG meets on 25th August and November gives us the double whammy of the Education SIG on the 11th and the Community SIG on the 27th.

Anyone interested in becoming more involved in branch activities should contact the Vice Chairman or Branch Secretary.

**Amrina Fakir**
**Branch Secretary**

## North-Western and North Wales Branch

On 15th April 2008 the Branch was delighted to welcome Law Society President Andrew Holroyd, who wanted to hear from Branch members the issues that were affecting them most.

**Richard Lester**
**Branch Secretary**

## South & Mid Wales Branch

On 12th June 2008 22 members attended our branch meeting held at Newport City Council offices. Guest speaker Consultant Julie James of Clarks Legal gave a thought provoking talk on Shared Services entitled “ Collaborative Working in Local Government and Recent Case Law”.

**Elizabeth Gubbings**
**Branch Secretary**

## West Midlands Branch

The last Branch Meeting was held on 17th April in Birmingham, topic “Preparing for Regeneration”.

A Branch Meeting and AGM is planned for 3rd September at Mills & Reeve’s Offices , Birmingham.

**Emma Harvey**
**Branch Secretary**

## West Midlands SLG Meetings

**Employment SIG**
21st September 2007 – a seminar covering conducting disciplinaries, single status and compromise agreements. This was presented by Counsel from No 5 Chambers in Birmingham.

**Court User group**
7th March 2008 - This was a well-attended seminar presented by Jim Button on the new Regulators Compliance Code and a general licensing update.

A further meeting was held on 22 May 2008 speaker Barry Berlin of St Philips wChambers on “Consumer Protection from Unfair Trading Regulations 2007”.

**Commercial Law**
10th April 2008 – The last meeting of this group was in Telford speaker Ruth Smith Pinsent Masons on Framework Agreements. Highways – 21st April 2008 – a general round table discussion regarding various aspects of highways and rights of way law. There was also an information-sharing discussion regarding town and village greens.

**Education**
On 9th April 2008 it held its inaugural meeting. Items discussed included belonging regulations, school contracts under SSFA 1998 and school organisation issues. The next meeting will be held in October 2008.

Information Law – On 27th February 2008 the SIG met and examined how and why local authorities should monitor internet and intranet usage, legislative changes and how this impacts on local authority lawyers.

**Forthcoming Events**
Planning SIGs – Convenor peterendall@warwickshire.gov.uk

Childcare SIG – next meeting 18 September 2008 - Convenor – (victoriagould@warwickshire.gov.uk)

## Yorkshire and the Humber Branch

Our last branch meeting was our AGM on 7 March 2008 when new officers were elected. Guest speakers were Stuart Turnock and Fiona Tatton.

The branch’s SIGs continue to be active holding regular meetings.

The branch was very pleased that following the success of Habib Aziz [Leeds] last year, this year’s young solicitor of the year also came from our area. Congratulations to Cathryn Moore, North Yorkshire County Council.

The branch’s essay competition for trainee solicitors has just been launched. Entrants need to submit no more than 2500 words on “Open government versus regulation - the dilemma for local government - discuss”. The closing date is Friday 19 September 2008.

The branch secretary attended a meeting of the North East branch of ACSeS in Gateshead on 5 June to discuss closer working.

**Ian Spafford**
**Branch Secretary**

# A PERSONAL AND INFORMAL REVIEW OF THE MEETING OF NATIONAL EXECUTIVE COMMITTEE HELD ON 13TH JUNE 2008

**Website**

1. The new website will become operational on a date to be announced. Only S.L.G. members, that is solicitors who have opted in to join S.L.G., will find that they can access the website by typing in their Law Society Roll No. Others will have to join first, or get a dispensation from the Branch Secretary. However the good news is that it will be a lot more user-friendly and interesting than the old one, if that's possible. The N.E.C. received a demonstration of the draft website from Piers, the designer. We shall have to disclose our e-mail addresses, but they will not be passed on to transcontinental pharmacists.

**The President of the Law Society**

2. For the first time in living memory (probably the first time ever) the current President of the Law Society, Andrew Holroyd, attended part of a local government solicitors national committee meeting, accompanied by Anne Godfrey, the Director of Member Services. For about an hour they discussed the Law Society's love of local government solicitors, who are some of the 25% of solicitors in the employed sector.

3. The President, a legal aid practitioner from Liverpool, has sought opportunities to meet employed solicitors during his year of office, which included convening a meeting of North West local government solicitors on 15th April hosted by the Branch Chair in Preston. He thought local government solicitors had a symbiotic relationship with private practitioners, and there were common ways of dealing with some matters. He mentioned shared training, rules, values, even a shared mindset in a unified profession.

4. The President considered it important to protect the values of the law and the legal profession.

**The Law Society Brand**

5. He mentioned that the Law Society brand came 160th in some league table or other, above Easyjet, Lloyds TSB and any other membership organization (and behind only 159 other commodities).

**Wales**

6. He noted that although European directives might bring some laws across Europe into harmony, there is an increasing divergence of the law of Wales and England.

**Monitoring Officers**

7. He supported the notion that monitoring officers should be legally qualified.

**The Law Society's Key Objectives**

8. These can be obtained on a mouse mat. (Reading glasses may be required).

**Employed Sector Forum**

9. The Law Society will establish an employed sector forum to listen to representatives of the valued 25%.

**Representation on the Law Society Council**

10. The Council is to be reconstituted in the foreseeable future, probably as a smaller body. Resolution (formerly the Solicitors Family Law Association but renamed to be more readily identifiable by the public) had decided that they no longer wanted a seat on the Council, because they preferred to exercise their influence by dialogue and other ways. The Council is compulsorily ceding its rule-making powers to the Solicitors Regulation Authority, to become a purely representative body. The President hinted that local government solicitors might also prefer to lose their 2 seats on the Council and exert influence in other ways. Later the National Executive Committee voted to support a proposal that the Law Society Council be reformed on the basis of 35 members elected on a geographical basis, 28 on a sectoral basis, 7 on a special interest basis, and 3 ex offico members.

**Money**

11. The cost to the Law Society of representational services was being regularly reduced, currently at £122 per member per year, only a small proportion of the practising certificate fee. The President hoped that it would reduce to £0.00 in due course. There seemed to be a mixed message regarding any of it going to support Solicitors in Local Government. Message 1: the grant which contributed to the cost of national executive committee meetings and the secretariat in the Law Society's Hall would continue. Message 2: The N.E.C. meetings cost twice as much as comparable bodies, and subsidy would only be available to groups which came within the control of the Law Society. Message 3: S.L.G. has access to profits from training provided by L.G.G. and should rely on them.

**Training**

12. L.G.G. are running lots of courses in London and a few elsewhere. The Law Society mandarin suggested that S.L.G. and L.G.G. considered branching out into a partnership with the Law Society to provide even more varied courses.

**Are We Government?**

13. Another proposal aired for the sharing of hot air was a proposal for public sector lawyers to talk to each other and the Law Society. They might not all be solicitors. They might be drawn from the Government Legal Service, the Crown Prosecution Service and local government.

**Local Government Association**

14. Julia Russell, the solicitor from the L.G.A. reported on bills which they are monitoring and lobbying as they pass through Parliament: the Housing and Regeneration Bill, the Health and Social Care Bill, the Constitutional Renewal Bill, the Planning Reform Bill, and the Local Transport Bill. She reported that the Law Commission had a project on Remedies Against Public Bodies, which sounded ominous! They are looking for data on claims and costs. Will they be able to work out that each award to an individual comes from all the other individuals who pay tax? The Ordnance Survey continues to be precious.

**Court Fees for Care Proceedings**

15. After solicitors from 7 authorities conferred with leading counsel, Hillingdon L.B.C., Leeds C.C., Liverpool C.C. and Manchester C.C. concurred in a letter before action to the Secretary of State for Justice to claim a judicial review of the decision to raise fees for care proceedings. If proceedings commence, the Law Society may intervene as an interested party.

**Graham Cooper**
**Trafford M.B.C.**

# "ON THE ROAD" WITH SLG - BRUSSELS OR BUST!

How often have you found yourself sitting at your desk, wading through page after page of impenetrable European directives, or interminable ECJ judgements, and wondered about the process of law-making in Brussels? Answers on a postcard will do, but for those with just a touch of the adventurous travelling spirit, you need ponder no more! In conjunction with The Law Society's Brussels office, SLG is arranging a study visit to the Brussels-based institutions of the European Union. Departing on Eurostar from St Pancras at 10 on the morning of Monday 3rd November, we return on the 16.05 train from Brussels on the following Wednesday, 5th November. As well as the Eurostar bookings, already arranged are two nights' accommodation in Brussels, along with all meals. The Brussels office has been charged with putting together a packed programme, which is likely to include a visit to a sitting session of the European Parliament (or one of its committees), a meeting with a number of MEPs, information sessions on the work, role and services of the Law Society in Brussels, a key meeting with representatives of the Local Government International Bureau and addresses from representatives of various of the EC's directorates general.

The finishing touches are presently being applied to the practicalities, but the total cost per delegate is likely to be in order of £450. For those who have not attended one of these visits as previously arranged by SLG (or its predecessor LGG) with the benefit of a subsidy from the Legal Society Trust Fund, the Trust has generously offered to subsidise half of the delegate fee, such that for these "first-timers", the cost will be in the order of £225, to cover everything except spending money. By any yardstick, this represents stunning monetary value for such an informative and educational opportunity. A contribution to costs might also be available through the office of your own MEP. This will be the group's fourth visit to Brussels in the last fifteen years and in each case, the feedback from delegates has been extremely positive. Only 25 places are available, 2 of which have been reserved for our colleagues in the Irish Local Authorities Solicitors Association and two for in-house lawyers in Scotland. So just 21 places are available and competition is likely to be fierce.

If the visit is over-subscribed, a ballot for places will be held. An application form will be available later this month and the closing date for receipt will be 31st August, but for now, initial expressions of interest can be made (as well as requests for further information) by e-mailing SLG's International Officer Nigel Roberts on nigel.roberts@gloucestershire.gov.uk. At the same time, please indicate (in one short paragraph) the likely benefits that will accrue to you and your authority as a result of your participation. As a rule of thumb and to encourage broad participation throughout the group, there will be an initial allocation of two places per SLG branch. And applications will be particularly welcome from those who have not attended an SLG/LGG Brussels trip before. This really is a rare opportunity to study the EU institutions at close hand in the company of fellow local government practitioners; don't miss out!

**Nigel Roberts**
**SLG International Officer**

# LOCAL AUTHORITY AGE ASSESSMENTS

The London Borough of Lambeth is currently defending a judicial review claim which involves important issues relating to the way in which local authorities undertake age assessments.

**The four main issues to be determined**

There were a number of cases at court in April 2008 which raise similar issues relating to:

*(a) Whether the assessments of age by the Council are contrary to s.6 of the Human Rights Act 1998, in that they are contrary to the procedural protection of Article 6 of ECHR,*

The claimant argues that given that the LAs decision as to whether or not a young person is a child will determine their eligibility for services as a child (including leaving care services post 18) in conducting the age assessment LAs will be influenced by resource issues i.e. an inherent or implied bias. So they say in order to avoid a breach of their HRs an independent Tribunal rather than the LA should determine age for these purposes.

Lambeth say there is no breach of HRs because the determination of age does not engage their civil rights. And even if it did Lambeth say there is no such breach and no need for an independent tribunal because the claimant has the option of challenging welfare decisions by way of judicial review in the usual way.

*(b) The question of whether a person is a child for the purpose of s.17 Children Act 1989 is one of precedent fact to be reviewed by the Courts on the balance of probabilities*

The claimant says the courts should determine age. One cannot envisage that the Court Service or the judiciary would wish to or have the capacity to undertake this expensive and time consuming role. Moreover having regard to the statutory framework Lambeth say there is nothing there to suggest that Parliament intended the courts rather than LAs to undertake this administrative function in order to determine eligibility for welfare services.

*(c) Whether the LA can depart from a determination of age by the Secretary of State and the Immigration Appeal Tribunal.*

Lambeth say there is no statutory basis for asserting that the LA is bound by a decision of the SoS or IAT. And even if there was the claimant concedes that LAs can depart from such decisions on exceptional basis. In any event in the current case Lambeth say the IAT judge erred in his judgement and placed undue weight on the report of a paediatrician which we challenge. Furthermore, the IAT judge did not have the benefit of the social work age assessments Lambeth had conducted on the young person. NB Normally it is the policy of the Secretary of State to look to and rely upon the LA to determine age (based on an agreement reached between the SoS and the ADSS in 2005).

What the other cases do not raise, and what only the Lambeth case raises is:

*(d) Whether there is any reliable scientific way in which a person's age may be determined.*

This issue was specifically raised by Lambeth in light of problems that the council encounters very regularly by applicants seeking to challenge its age assessments. Lambeth (and other LAs) are concerned that medical experts, regularly produce reports which are used to challenge the council's findings. Lambeth is arguing that such reports appear to be based upon methods that are scientifically ill-founded and of little or limited evidential value.

**Lambeth's expert evidence**

Lambeth have obtained a report from Dr Stern, Consultant Paediatrician which concludes that such medical reports estimating age are scientifically ill founded and of no more evidential value than a LAs social work assessment.

**Timetable**

On this basis this case and one of Croydon's cases were set down for hearing as lead cases between 4 - 6 June 2008.

**Fateha Salim**
**Senior Social Services Lawyer**
**London Borough of Lambeth**

Colleton Chambers are the oldest established chambers West of Bristol.

Chambers are able to offer expertise in the fields of Child Care, Trading Standards, Regulatory Law, Employment, Inquests, Health & Safety and Local Government.

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# UPDATE FOR WESTLAW UK AND LAWTEL

The team at Westlaw UK and Lawtel monitors news and journal sources as well as judicial decisions at all levels in order to deliver up-to-date information to local government legal professionals. We appreciate you require updates on wide-ranging issues therefore our team is dedicated to ensuring that as many areas as possible are covered.

Included below is a selection of recent key cases, legislation and articles that help illustrate the diversity of subject matter we understand local government professionals require and rely upon.

**CASE LAW UPDATE**

**Personal Injury**
Where a patient had been left gravely handicapped as a result of the negligence of a health authority, but the local authority also had a statutory obligation under the National Assistance Act 1948 s.21 to provide for the costs of her care in a private care home, both the health authority and the local authority were liable to the patient for the future costs of her care – *Chantelle Peters (by her Litigation Friend Susan Mary Miles) v East Midlands Strategic Health Authority & ors: LTL 14/5/2008; [2008] EWHC 778 (QB)*

**Licensing**
The absence of unmet demand for gaming facilities of the kind proposed by an applicant for a licence under the Gaming Act 1968 Pt II was a reason in itself for the licensing authority to exercise its discretion so as to refuse a licence, and could be expected to lead to the refusal of a licence unless that reason was outweighed by other material considerations – *R (on the application of TC Projects LTD) v Newcastle Licensing Justices & ors; LTL 30/4/2008; 2008 WL 1867185 (CA (Civ Div)); [2008] EWCA Civ 428*

**Family Law**
The court gave guidance on the steps to be taken before and during care proceedings where there was an issue as to a parent's capacity – *RP v Nottingham City Council & anr; LTL 8/5/2008; [2008] EWCA Civ 462*

**Planning**
A decision as to whether listed building consent was required for intended works was one for the normal planning processes, namely application to the planning authority and appeal to the secretary of state. The High Court's jurisdiction on the issue was not a jurisdiction that excluded the decision from the planning processes – *Chambers & anr v Guildford Borough Council; LTL 25/4/2008; (2008) NPC 54; 2008 WL 1771448 (QBD); [2008] EWHC 826 (QB)*

**Property**
For the purposes of the Natural Environment and Rural Communities Act 2006 s.67(6) an application was not made in accordance with the Wildlife and Countryside Act 1981 Sch.14 para.1 unless it was made in accordance with all three requirements of that paragraph – R *(on the application of Winchester College & anr) v Hampshire County Council & ors; LTL 29/4/2008; (2008) 18 EG 127 (CS); (2008) NPC 55; Times, May 8, 2008; 2008 WL 1867160 (CA (Civ Div)); [2008] EWCA Civ 431*

**ARTICLE UPDATE**

**A low-key anniversary**
Discusses the law surrounding council tax, 15 years since its introduction in 1993, and highlights recent and planned changes to valuation tribunals, the appeals procedure under "Appeals Direct", access to the tribunals system, the process for settling appeals, the types of appeals which can be heard, methods open to local authorities to ensure they have the correct information, and enforcement procedures.
*S.J. 2008, 152(22) page(s) 20-21*

**A new approach for resolving disputes and to proceedings relating to Park Homes under the Mobile Homes Act 1983 (as amended): A consultation paper**
A joint Department for Communities and Local Government and Welsh Assembly Government consultation concerns protected sites, as defined in the Caravan Sites Act 1968 s.1(2), that are subject to the Mobile Homes Act 1983. It outlines three options for a third party dispute resolution system dealing with any disputes arising in the park home sector. The options are: maintaining the jurisdiction vested in county courts; transferring county courts' jurisdiction to residential property tribunals; and transferring county courts' jurisdiction to a dedicated tribunal. Copies of the consultation are available from www.communities.gov.uk/documents/housing/pdf/parkhomesdisputes [Accessed May 30, 2008]. Comments by August 22, 2008.
*Department for Communities and Local Government*

**Three new rights to right local wrongs - new Community Empowerment Bill to harness petition power**
Under the Community Empowerment, Housing and Economic Regeneration Bill, expected to be introduced in 2008, citizens would be given a right to: ask for a stronger say on spending decisions that affect them or their communities; ensure that councils consider the sale or transfer of under-used properties, lands or parks to local community groups, co-ops and social enterprises; and have a debate on specific local issues entered onto the council agenda.
*Department for Communities and Local Government.*

**LEGISLATION UPDATE**

**2008 No. 239**
**PENSIONS, ENGLAND AND WALES The Local Government Pension Scheme (Administration) Regulations 2008 In force April 1, 2008 Enabled by the Superannuation Act 1972, s.7.**
These Regulations relate to the administration of the new Local Government Pension Scheme and is constituted by these Regulations, the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 ("the Benefit Regulations") and the Local Government Pension Scheme (Transitional Provisions) Regulations 2008. These provisions supersede most of those in the Local Government Pension Scheme Regulations 1997 that they replace. Reference is made to nominated cohabiting partners as they are a category of dependent beneficiary in the Benefits Regulations. The other main changes are mentioned in the Explanatory Note.

**2008 No. 1430**
**LOCAL GOVERNMENT, ENGLAND AND WALES**
**POLICE, ENGLAND AND WALES**
**FEES AND CHARGES**
**The Local Authorities (Alcohol Disorder Zones) Regulations 2008 In force June 5, 2008**
Enabled by the Violent Crime Reduction Act 2006, ss 15, 16(7), 17(6) and 20(5) and the Local Government Act 2000, ss 13 and 105(2).
These Regulations implement Chapter 2 of Part 1 of the Violent Crime Reduction Act 2006. They allow local authorities to designate localities as alcohol disorder zones where there has been a nuisance or annoyance to the public, or disorder, and where the nuisance, annoyance or disorder is associated with the consumption of alcohol supplied by local premises and where there is likely be a repetition of that nuisance, annoyance or disorder.

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# RISK MANAGEMENT -V- BRENT LONDON

Local Government Act 2000. The decision was made at the Executive meeting of November 2006 to join and participate in LAML and to enter into an insurance contract with LAML, provided that LAML was ready to provide insurance to Brent from the beginning of April 2007. In case LAML was not ready to enter into insurance contracts in April 2007, Brent's Executive authorised a procurement exercise to be carried out in respect of the Council's insurance contracts. RMP took part in that procurement exercise and after Brent abandoned the procurement process in March 2007 when it was clear that LAML would be able to provide insurance from April 2007, RMP issued a claim for judicial review seeking a declaration that Brent had now power to participate in LAML and a claim for damages for breach of the Public Contracts Regulations 2006.

**Introduction**

Two Judgments were handed down in the case of Risk Management Partners Limited –v- Brent London Borough Council where London Authorities Mutual Limited and London Borough of Harrow are Interested Parties. The first part was Risk Management Partners Limited's (RMP) claim for judicial review seeking a declaration that Brent Council ("Brent") had no power to participate in and establish a company called London Authorities Mutual Limited ("LAML"). The second part was a claim by RMP against Brent for damages for breaching of the Public Contract Regulations 2006 in relation to EU procurement rules in failing to undergo a procurement exercise in granting LAML the bulk of the Council's insurance business.

**LAML**

LAML is a company that was set up by a number of London local authorities so that local authorities could make efficiency savings in respect of its insurance arrangements in a climate where local authority insurance premiums were high and competition in the local authority insurance market was low. Authorities wishing to take insurance from LAML could became participating members of LAML and provide a guaranteed capital contribution and a paid capital contribution to LAML to keep the company capitalised and in return for paying a premium, local authorities could obtain insurance cover and enter into a contract of insurance with LAML.

**History**

In October 2006, a report was put before a meeting of Brent's Executive for a decision recommending that the Council should join LAML in principle, subject to a further report from officers after fully exploring this option and considering external legal advice. In this report, it was stated that the well-being power under section 2 of the Local Government Act 2000 could be relied upon for the Council to exercise its power to join LAML. At that Executive meeting in October 2006, it was decided that further legal advice should be taken. The further legal advice which Brent received stated that it would be better to rely on section 111 of the Local Government Act 1972, on the grounds that arranging insurance is a normal incident of the substantive functions of a local authority and that it is conducive to or calculated to facilitate the discharge of those functions (following the wording of s.111 LGA 1972).

As a result, in the report to Brent's subsequent Executive meeting in November 2006, it was stated that the Executive could rely on section 111 of the Local Government Act 1972 and that it could also rely on section 2 of the

**I - Vires**

Brent's Case on Vires was that it had the power to participate in the establishment of a mutual company to provide insurance for itself and other London local authorities under section 111 of the Local Government Act 1972, in that it was argued that arranging insurance is a normal incident of the substantive functions of a local authority and that it is conducive to or calculated to facilitate the discharge of those functions and that participation in mutual insurance arrangements is simply one means by which insurance is insured. Section 111 of LGA 1972 states that a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or

# PARTNERS LIMITED BOROUGH COUNCIL

disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. Brent's argument was that participating in LAML was a means of obtaining insurance and that the challenged activity should be considered as a whole and accordingly, this was incidental to the Council's substantive functions for the purpose of s.111 LGA 1972. Brent argued that it was incorrect to divide up or atomise into separate transactions which may be the subject of different decisions on the application of s.111. RMP's argument was that the separation of the taking of insurance and participation in LAML for the purposes of determining the application of s.111 was not illegitimate atomising but a necessary analysis.

Brent's further and alternative case was that section 2 of the Local Government Act 2000 (s. 2 LGA 2000), the "well-being power", also provided Brent the necessary power to participate in LAML. The rationale for the establishment of LAML and for Brent's decision to participate in its establishment under s. 2 LGA 2000 was that it would bring about both costs savings and better risk management practices which in turn would lead to direct and indirect benefits to its area, thereby promoting the well-being (especially the economic well-being) of the area pursuant to section 2 LGA 2000.

**Declaration on Vires**

At the hearing of 22 April 2008, Lord Justice Stanley Burnton (he heard the case as a High Court Judge before his promotion as a Lord Justice of Appeal on 21 April) ruled that Brent Council did not have power to participate in establishing LAML, becoming a Member or Participating Member of LAML, making a paid Capital Contribution to LAML and making a guaranteed capital contribution to LAML under section 111 LGA 1972. The test under section 111 of the Local Government Act 1972 is objective and the Judge ruled that Brent did not have power under s. 111 LGA 1972 to participate in LAML. The Judge ruled that establishing or becoming a member of a mutual insurance company such as LAML and providing insurance for other local authorities for the purpose of obtaining insurance was at best incidental to the incidental power to insure (in the sense of obtaining insurance cover), and this was not incidental to the discharge of any function of a local authority.

The Judge ruled that the Council did not make a requisite decision necessary under section 2 LGA 2000 to authorise it to exercise its power to participate in LAML. The Judge was not satisfied on the evidence, including the reports and the Minutes of the Executive Meetings of October and November 2006, that Brent's Executive had formed the necessary opinion at the November 2006 meeting that its participation in LAML would be likely to promote or improve the economic, social or environmental well-being of the area under section 2 LGA 2000. Until and unless this Judgment is overturned, the local authorities will need to be explicit when drafting minutes as well as reports to the Executive to ensure that it is clear what is being decided and on what basis, especially when relying on section 2 LGA 2000 where the well-being power depends upon the local authority making a subjective opinion and where more than one power is being relied upon.

**Judge's Obiter Dicta regarding LAML**

The Judge provided some obiter dicta about whether it is possible for a local authority to participate in a company like LAML. He did not directly address the issue of whether other local authorities had the power to participate in LAML. He said that it was possible for other local authorities to have the power to participate in LAML under section 2 LGA 2000, but said that a local authority would have to consider seriously whether its participation in a company like LAML would be likely to achieve one or more of the statutory objects of the well-being power and decide that it would do so. The judge added that where the effect of participating in LAML on the well-being of a local authority's area was not obvious, a vague and unspecific assumption may not be sufficient. However, the judge does raise the possibility of whether the provision by LAML of specified risk management services could be sufficient to satisfy the well-being power.

**Section 1 of the Local Government (Contracts) Act 1997**

Brent also argued that section 1 of the 1997 Act could be relied upon to promote an incidental power to insure into a function to which section 111 of the LGA 1972 applies. The Judge held that a contract of insurance was not a contract for the provision or making available of assets or services within the meaning of section 1 of the 1997 Act and thus, section 1 could not be used as a "function" for the purposes of section 111 of the LGA 1972. The Judge held that the obtaining of insurance was itself incidental to the functions of a local authority and that providing insurance to other local authorities was not.

**Delay**

Brent also argued that RMP was out of time in its claim for judicial review. Brent argued that RMP had three months from November 2006 (when Brent's Executive decided to participate in LAML) in which to commence its claim for judicial review. RMP stated that it was not aware that Brent had abandoned the procurement process until March 2007 and that by issuing its claim in early June 2007, it was within the time limit to issue its claim. The Judge found in favour of RMP on this point.

The Judge granted permission to appeal to Brent and the Interested Parties and appeals have been lodged by these parties with the Court of Appeal. It is expected that the appeal on vires will be consolidated with the appeal on the procurement issue which will be dealt with in a separate article in the Autumn edition of Noter Up.

**Arnold Meagher**
**Principal Lawyer (Housing and Litigation)**
**Legal Services**
**London Borough of Brent**

# LARGE SCALE VO CONSULTATION LEGITIMATE EXP

The public law doctrine of legitimate expectation has developed over a number of years to make non contractual promises by public bodies legally enforceable in some circumstances if they were clear and made to a discrete group of people. The decision of the High Court in R –v- North Somerset Council ex. p. Bath on 4 April 2008 tested the limits of this doctrine.

**The Basis of the Claim**

On 26 June 2007 the Council resolved:

(1) to rescind the resolution of 17 January 2006 "that the use of the transfer capital receipt from housing be in accordance with the following principles –

(a) to ensure a significant improvement in affordable housing provision to general housing need and special schemes for vulnerable groups,
(b) to ensure all development is in accordance with principles of sustainability and community regeneration, including the provision of supporting infrastructure, and…"
(c) to maximise affordable housing provision through section 106 agreements and the generation of external funding…" in order to provide more flexibility in the application of the housing stock transfer receipt to fund improvements across all Council priorities.

(2) to re-affirm the resolution of 1 March 2005 relating to the use of the net capital receipt in respect of a sum of £8M with the balance of the housing stock receipt to be allocated according to the Council's general priorities in due course.

The Claimant brought judicial review proceedings applying for the decision to be quashed and/or for this be declared unlawful and void. She contended that, as a tenant balloted on the LSVT, she had a legitimate expectation based on the consultation document that the Council would use all of the net capital receipts from the Large Scale Voluntary Transfer (LSVT) of its housing stock "to meet the affordable housing needs of the area".

The Council defended the proceedings denying that any legitimate expectation had arisen. In the alternative, the Council said that either any legitimate expectation was confined to the sum of £8M (this being the anticipated net capital receipts at the time of consultation) or that the denial of that expectation was a proportionate response to the changed circumstances.

**Factual Background**

In the early stages of moving towards the LSVT, the Council on 18 November 2003 agreed a resolution of the Executive of 28 October 2003 that:

"The net usable capital receipt from the transfer will be invested in capital projects to address the housing needs of North Somerset".

At this stage the amount of the receipt was not known or estimated.

In about January 2005 the Council issued the formal consultation document - the source of the statement relied on by the Claimant for the alleged legitimate expectation.

On 1 March 2005, after receiving the results of this consultation and a report estimating the net capital receipt as £6-8 million, the Council resolved to hold a ballot of tenants who voted were in favour of LSVT.

On 25 October 2005 the Council were told that the net capital receipt would be around £12.4M and on 6 December 2005 that it would be about £19.5M.

Arising out of this increase in value, the Council obtained advice from external Counsel. The Council meeting on 17 January 2006 was told that the estimated net capital receipt was now £21.5M,

On 6 February 2006 the LSVT was completed.
During the budget-setting process in early 2007, the Council decided to allocate £13.5M of the anticipated net capital receipt of £21.5M for affordable housing with the balance of £9M allocated for the wider purposes encompassed by the resolution of 17 January 2006.

As part of the budget revision by the new administration in 2007, the challenged decision of 26 June 2007 was taken. The effect of this decision was to reduce the sum allocated for affordable housing from £13.5M to £8M.

**The Judgement**

The Judge concluded there were 2 issues:
Issue 1 – Whether the Council gave a clear and unqualified commitment to Mrs Bath and/or other tenants affected by the transfer proposal upon which she can found a legitimate expectation that all the net capital receipt – whatever it amounted to – would be applied to housing needs.

The Judge held that the whole of the claim must fail on this first issue because:
a) The law normally requires a legitimate expectation to be founded on a clear and unqualified representation to the claimant and/or to those for whom he or she may be taken as speaking, as a foundation for showing that departure from it by the maker is so unfair as to amount to an abuse of power.
b) There was no such clear and unqualified commitment

# OLUNTARY TRANSFER DOCUMENTS AND ECTATION

here. Neither the decision of 18 November 2003 or the consultation documentation amounted to a clear or firm representation to anyone that all or any of the capital receipt would be spent on housing. Neither mentioned any specific amount estimated or contemplated. The proposal in the consultation document was part of a wider and general project for transfer of housing stock, subject to completion of the various stages and contingencies that the statutory process involved.

c) Given the Council's responsibility to plan and budget so as to enable it to respond appropriately to varying priorities as and when they arose over the whole range of its responsibilities, it was inherent in the very nature of the proposal that its detailed implementation might be subject to change.

Issue 2 –if the Council's consultation documentation were sufficient to create a legitimate expectation on which Ms Bath were entitled to rely, whether the Council's decision of 26th June 2007 would be unlawful as a departure from that expectation and because the departure is unjustified

The Judge said that the proper approach in a claim based on legitimate expectation of a substantive benefit is: 1) whether departure from a representation giving rise to that expectation is so unfair to the person or persons to whom it was made as to amount to an abuse of power; and 2) to weigh the unfairness against any overriding public interest relied upon for departure from the representation. Such unfairness is normally manifested in the form of detriment to the holder of the legitimate expectation, but not always. However, it is very much the exception for a court to find unfairness in the absence of detriment

With regard to detriment, the Claimant suggested 2 possible sources:
a) Her grandchildren or other affected tenants' relatives who might need public housing in the future may be prejudiced by the Council's June 2007 decision.
b) That the Court could assume that the tenants who voted in the ballot in favour of the transfer would have voted against it but for the claimed representation.

The Judge said there was not any detriment to Ms Bath or other tenants. The documentation showed that the main driver for the proposed transfer, and a powerful incentive to vote in favour of it, was to enable the new social landlord to spend an additional £42m on much needed improvements to their homes and housing support services. As to where the burden of proof should lie the court should ask itself whether a change of tack affecting a claimant who has been led to expect something different is "a just exercise of power". It should have regard to considerations of proportionality. A public body responsible for statements of policy or of proposals or representations as to its future conduct affecting a wide range of interests may change such statements of intent if and when the public interest requires it, if it does so without unfairness to the claimant and does so proportionately.

If there had been any departure from any legitimate expectation that Mrs Bath might have had, it would not, in the circumstances, have been an abuse of power or otherwise unfair. In terms of the Council's responsibility for the good local governance of North Somerset, its 2004/2005 consultation proposals were directed at a large group, some 7,000 affected tenants. It was clearly in the interest of the whole community, of which the affected tenants formed a significant part, and for which the Council is responsible, and consistent with central governmental guidance, to have regard, when allocating money for housing, to its spending priorities and resources as a whole. There were changes of circumstance, which entitled it to conclude that it was in the public interest to limit the sum it should ear-mark for housing to £8m, about the sum originally contemplated at the time of the 2004/2005 consultation as the net capital receipt, in the change in priorities to meet other pressing needs, in particular, in relation to highways, identified in June 2007. There was no suggestion that it acted in bad faith.

The Judge also found that, when making the June 2007 decision, the Council had paid sufficient regard to its proposal in the consultation document for the spending of the net capital receipt on housing because the report to the meeting of 26 June 2007 specifically referred to this and set out the relevant terms of the Council's decisions of 1 March 2005 and 17 January 2006.

**Conclusion**

Local authorities who are making promises to groups of people need to think through carefully the terms of the promise and to whom it is being made. The case however gives comfort to bodies that want to change direction, provided they make the change in good faith, in express awareness of all the facts, and in careful consideration of their financial responsibilities.

**Malcolm Nicholson and Sally Andrews**
**North Somerset Council**

# COMPULSORY PURCHASE AND THE OCCUPATIONAL HAZARD

It is not unusual, when Councils are bringing forward plans for the renewal or regeneration of large areas, to set out their proposals in Master Plans, or general schemes, prior to undertaking a compulsory purchase exercise. Such an approach is consistent with the standards expected of local authorities in being open and transparent about their intended actions.

However, this usual practice is not without risks. Invariably the risk of challenge is "courted" even before formal steps to make a CPO are taken and will usually emerge in the form of Blight Notices being served upon the Council, not again unusually by absentee commercial landlords, as was the case in this instance. They tend to be southerners........ who may have done no more than glimpsed the property on a website and pressed "buy"

The Blight Notice in this case was challenged on a number of grounds by the Council, only one of which was considered as a preliminary matter.

The moral then that immediately emerges for practitioners, is always to consider in appropriate cases challenging Blight Notices by seeking early hearings prior to a full hearing which, of course, is likely to be far less costly.

In this case the Lands Tribunal was required to determine, as a preliminary issue, whether a Blight Notice served by the claimant company (X) on the Sedgefield Borough Council, was valid. X had purchased the property as an investment with the intention of refurbishing it. Following refurbishment the property was let to tenants between June and August 2006, it then remained empty until October 2006, when the Blight Notice was served under the Town and Country Planning Act 1990, Section 150.

Sedgefield Borough Council served a Counter-Notice (drawn up by yours truly!) objecting to the Blight Notice on the grounds contained in Section 151(4)(a)(b)(f) and (g) of the Act. On an application by X for disclosure, it was decided that the local authority's objection, under Section 151(4)(f), would be determined as a preliminary issue.

The local authority submitted that X could only serve a Blight Notice if it had a qualifying interest under Section 149(2) of the Act, under which X was required to show that it had an interest either as "an owner occupier" or a "resident owner occupier" as defined under Section 168 of the Act, and that X had not occupied the property during any relevant period.

The Lands Tribunal held that works of refurbishment did not constitute occupation of the property and applied the case of Arbuckle Smith and Co. v Greenock Corporation 1960 AC 813 HL.

X had not occupied the property during the whole period of six months ending with the date of service of the Blight Notice for the purpose of Section 168(1)(a), as the property had been let to tenants until August only. Neither had X occupied the property during the whole period of six months ending immediately before the period when it was not occupied for the purposes of Section 168(1)(b), as for two of those six months the property was occupied by tenants. Occupation had to be "actual occupation" and legal possession of the property did not, of itself, constitute occupation of it. As regards this aspect, the case of Westminster City Council v Southern Railway 1936 AC 511 HL was applied. Accordingly, X did not have a qualifying interest under Section 159(2) and Sedgefield Borough Council's objection under Section 151(4)(f) was therefore upheld.

The arguments rehearsed in this case are likely to be of interest to compulsory purchase practitioners who invariably find themselves dealing with investment landlords who, not infrequently, have purchased properties that they may not have even seen. "Token acts" of occupation, falling short of actual occupation, will not assist them in sustaining arguments that they have an interest capable of being protected by a Blight Notice and permitting them the opportunity to obtain compensation from a local authority.

For further details of the case the Lands Tribunal reference is: LTL28/2/2008 and the Lawtel document number is AC0116333.

**Dennis Hall,**
**Branch Secretary,**
**Northern Branch**
**Solicitor to the Council**
**and Monitoring Officer,**
**Sedgefield Borough Council**

# LAW SOCIETY UPDATE

**Supporting solicitors**

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**E-disclosure training**

Regional locations, June – July
The Society is launching nationwide training on the courts' expectations on disclosure, electronic document collection and solutions to help with this. It is aimed at litigation practitioners, those responsible for practice development and practice management in law firms, and in-house lawyers responsible for litigation readiness and instructing outside lawyers.

Equal pay for women and black and minority ethnic solicitors
A survey published by the Law Society has found that female solicitors earned, on average, 7.6 per cent less than male solicitors, while black and minority ethnic (BME) solicitors earned, on average, 17 per cent less than white solicitors.
The Law Society is working with the Association of Women Solicitors (AWS) and BME groups to understand why these pay differences are so wide.

**Can you help with a new selection test for Recorders?**

The Judicial Appointments Commission (JAC) seeks volunteers to pilot new written tests to be used in the forthcoming Recorders selection exercise for the Midland and South Eastern circuits. If you'd like to take part, you'll need a minimum 10 years' post-qualification experience in the Criminal, Civil, Family, or Chancery jurisdictions. Assistance is welcomed from those who already undertake fee-paid judicial work (including particularly existing Recorders), as well those who have started on a judicial career.
If you're interested in taking part, contact the following:

Tony Bellringer, Tony.Bellringer@jac.gsi.gov.uk, tel: 020 7210 0553, or

Kate Williams, Kate.Williams@jac.gsi.gov.uk, tel: 020 7210 0336

• The Midland exercise is also likely to encompass a small number of Chancery vacancies on the Northern circuit. Those assisting with the Midland test pilot will also exclude themselves from applying for these vacancies.

Higher rights of audience
Standards for solicitor higher courts advocates and outline proposals for a new accreditation scheme
We are developing a new accreditation scheme for solicitors and registered European lawyers (RELs) wishing to exercise rights of audience in the higher courts of England and Wales. This consultation seeks views on the competence standards for solicitor higher courts advocates, and sets out the outline proposals for the operation of the scheme.
Subject to approval under the Courts and Legal Services Act 1990 Schedule 4 procedure, the proposed scheme will replace the current qualification regime under the Higher Courts Qualification Regulations 2000.
This consultation paper sets out the outline proposals for the new scheme and the standards against which solicitors who wish to advocate before the higher courts will be assessed. It is also the intention that the standards will in future be used as the benchmark for all solicitors who advocate before the higher courts whether or not they choose to be accredited.
We propose to introduce revised competence standards for solicitor advocates in the higher courts of England and Wales.
We intend that these standards will be the benchmark against which the performance of all solicitors appearing before the higher courts can be objectively judged—irrespective of whether or not they choose to be accredited under the new scheme. The standards will be set at the level of competent higher courts advocate.
Solicitors who wish to demonstrate their competence as higher court advocates may do so by being accredited using the new scheme.
We will no longer prescribe additional training requirements for solicitors seeking qualification to advocate before the higher courts.
A process to enable those solicitors who have already achieved a higher courts qualification under the current scheme to be transferred on to a new register of accredited Solicitor Higher Courts Advocates.
We seek the views of practitioners and stakeholders on the appropriateness of the standards and performance indicators, outline proposals for the operation of the scheme, and proposed changes to the Solicitors' Code of Conduct 2007 guidance on rule 2 and/or rule 11.

**How to respond**

The paper is available on The Law Society website www.lawsociety.org.uk
Email enquiries – trainingconsultations@sra.org.uk
The deadline for receipt of responses is 25 July 2008.

Comments and suggestions
The Law Society needs to hear from its members about issues and problems it faces so it can help represent and support you. You can contact your council members, Maria Memoli and George Curran, utilise your forum on SLG's website www.slgov.org.uk or e-mail stephanie.nunn@lawsociety.org.uk

**Stephanie Nunn**
**Policy Executive**
**– employed solicitors**
**The Law Society**
**e-mail:Stephanie.nunn@lawsociety.org.uk**

# RETIREMENT - A FEW BASIC TIPS

I consider, that as I am now retired I am sufficiently experienced to set out some guidelines on how that state should be approached. By retirement, I mean simply retirement from paid employment. This has nothing to do with leisure. It's just a redirection of activity. If you cannot relate to that, seek your guidance elsewhere and this advice is aimed solely at men. That's where my experience lies and besides I have yet to find the best approach to giving advice to a woman.

First, don't assume, if you're married, that both spouses should retire simultaneously. There is something about waving one's wife off to work which strengthens the bond beyond anything achieved in the past thirty-four years. However, this should be done while upright and fully dressed. A brief recumbent flap of the hand between snores has the opposite effect. Continuing to get up at 7.00 shows solidarity with the worker and is appreciated, albeit unconsciously.

Next - if you've been used to getting the job done however long it takes (I'm not recommending this) don't expect any change. Everything outside work you wanted to do but lacked time or energy for will be waiting. You will start on them at your normal time and continue every day until your normal finishing time (if you had one) or beyond. Don't worry about being drawn unwillingly to daytime television. It won't happen. You will continue to strive for – what? It doesn't matter. But (the good news) you'll be doing things you want, or at least choose, to do. This may even occasionally include a task which you have planned to do; something of which you've always said "when I retire I'll be able to…." This is unlikely, because you probably won't have time, but if it happens, it may be anything from learning kick-boxing to writing pointless guidance on retirement. In summary, you will have plenty of time to do anything, but nowhere near enough time to do everything.

If you failed at the start of your marriage to make clear that you do DIY , then so doing will form a significant part of your activities. I pity you, but I don't sympathise. (I do recognise that some folk bizarrely enjoy that sort of thing).

Alternatively, if you have always been a layabout, such you will no doubt continue to be and daytime television awaits you. No advice is required.

Thirdly (this should have been first, since it occurs in the run-up to retirement, but it's too late to change now) you should beware of people's expectation that your retirement will start with some exotic holiday. When people ask where you are going tell them that the purpose of retiring is to cease working because you have to; that the pleasure of having just retired is to revel in that; and that you can't do that when you are savouring (or enduring) Samarkand or Machu Picchu. Don't allow yourself to be persuaded hastily to book such a holiday. These people, unlike myself, don't know what they're talking about.

Finally a note on spending money. Clearly (no apology for re-stating the obvious – judging by many events it cannot be re-stated too often) any advice on this depends on how much you have. However, the difference is purely a matter of scale. Take what I say and revise it to be proportionate to your own circumstances. Beware of the temptation to spend money in ways designed to make your retirement more enjoyable. This may be by buying yourself a motor-bike or a fully-reclining, fleece-lined Parker-Knoll chair. Never splash out like this until you know what schemes your life partner has secretly decided on for when you retire. Once these are identified, each concession on one of them can be matched by indulgence of one of yours. This has little to do specifically with retirement, it's more of a lesson in life, but it frequently becomes an issue then.

Those are the points which seem most significant to me. I hope this is helpful, but am not bothered if it isn't. If you need further advice, please don't come to me as I choose, in my new complete discretion, not to provide it.

**Post script**

The above was written several months ago. Since then I've been too busy – no, I've chosen not – to do anything with it until now. I now know that while some of it is right, some isn't, a lot is only relevant for the first few weeks and there's also much more needs saying. But I can't be bothered to amend or extend it, so, for what it's worth, here it is.

**John Emms**
**formerly a solicitor with Kirklees Metropolitan Borough Council**

# FREEDOM OF INFORMATION

Section 36 Exemption in the context of budget formulation.
ICO Decision FS 50131785

In 2005/ 2006, Gloucestershire County Council was considering its budgetary position. Directorates were asked to prepare options for savings for the Medium Term Financial Strategy ("MTFS"). One of whose options for The Learning Disabilities Service was the closure of a respite centre.

An FOI request was made for copies of all documents relating to the contribution of Adult Care to these savings. Some documents were already in the public domain but others were not and the "qualified person", for the purposes of Section 36, the monitoring officer, came to the view that, in his reasonable opinion, disclosure would, or would be likely to, prejudice the free and frank exchange of views for the purposes of deliberation under Section 36(2)(b).

Gloucestershire withheld three spreadsheets detailing options for the Learning Disability Service, the Adult Care Directorate and the whole council. A document entitled "Savings Story for Adult Care" was disclosed. Significantly, the documents which were withheld represented officers' blue sky thinking around savings.

The public interest test was applied with factors in favour of maintaining the exemption being that:

- Disclosure may inhibit future consideration by officers of potential options which are new, innovative and/or unusual but which may nevertheless contribute to the effectiveness of the service.
- The information contains possible savings options over the next three years, some of which will never be adopted but may unnecessarily affect the morale of council staff and any service users affected.

The factors in favour of disclosure were:

- Disclosure would contribute to open policy making and increased trust between citizens and local government.
- Disclosure would help to explain the formulation of the MTFS.

A review took place which focused on the rationale for using the s36, stating:

- The advice submitted by officers when preparing the budget, is to provide the options to the administration in order to enable a free debate. Subsequent debate is unlikely to be effective if the options are made public and would cause unnecessary anxiety to the public and to staff. This would mean that, for future budgets, officer advice would be likely to be more guarded and the quality of decision making diminished.
- Some of the suggestions will require further discussions with external partners before they can be realised. Publishing potential savings before negotiations are entered into is likely to prevent constructive partnership discussions at which new, innovative or unusual ways of working more cost effectively could be achieved.

The matter proceeded to the ICO several months later where it was suggested, and Gloucestershire agreed, that some of the information which had been withheld could now be released, but there remained sensitive information which could still be subject to the s36 exemption. The information which could be disclosed related to savings which had been implemented or publicised by the council since the time of request/ refusal. The ICO suggested that where the documents contain opinions and recommendations that are part of the planning process and have not yet been approved by the council, it is likely to be in the public interest for the s36 exemption to be maintained.

It was accepted that whilst some savings options might be permanently discarded, there remained the possibility that they may be reconsidered in the future, and that possibility was likely to cause concern to the public.

The ICO agreed that the impact of early disclosure on external partners might be detrimental.

The ICO took the view that the withheld information represented "blue sky thinking" and that because the savings options that had been suggested heralded the possibility of cuts across a range of local services, each proposal had the potential to upset different sections of the community. Staff who formulate such options need space to do so without the inhibitions that would ensue if this was carried out in the public domain. Council members also need the ability to evaluate the options without the pressure of speculation arising from premature public disclosure. In the Commissioner's view such disclosure would inhibit free and frank exchange of views and would affect the quality of deliberation and section 36 was engaged.

The Commissioner did not agree with the applicant that the withheld information should be disclosed in order to enable public consultation on the possible closure of the respite centre. He felt it would be impracticable for users of the respite unit to have the opportunity to choose alternative cuts in service provision – it would entail one group of users possibly selecting service reduction for another vulnerable group. The requested information was still work in progress and premature publication would have a more negative than positive effect, thus the public interest in withholding the information outweighed the public interest in disclosing it.

**Christine Wray**
**Assistant Director of**
**Law & Administration**
**Gloucestershire County Council**

# THE FREEDOM OF INFORMATION ACT - SECTION 21 OR CATCH 22?

I won't bore you with the full details of the recent Information Tribunal case of Rhondda Cynon Taff County Borough Council v Information Commissioner EA/2007/0065 although please feel free to read it in its entirety should your insomnia ever become too severe. Suffice it to say that following a request for information a fascinating argument arose about the need to supply to an enquirer something that was already available to him via a number of more convenient – and less expensive – means. It also caused a large group of Freedom of Information Officers, the collective noun for which should probably be "a revelation", to hold its breath in anticipation.

In essence, a complex FOI request had been resolved to the satisfaction of the Information Commissioner save for one point. The enquirer wanted a copy of a certain statute although he did not request it in any particular format. I responded by offering him the following options:

1. I pointed out to him the relevant website where it could be ordered in hard copy.
2. Alternatively, I told him that if he did not have access to the internet at home then he could visit one of the Council's libraries. One of our staff would be happy to print off copies of the relevant sections. There is a library close to the enquirer's house.

Quite naturally I consulted various sources of guidance including Defra's website which, having reached the point where it deals with information that is publicly available, goes on to say (in a large, bold, blue box) that the next step for the Council is either to provide this information or to "Direct the applicant to where it is already publicly available". Had we not done this and therefore complied with our obligations? How much further were we expected to go?

The Commissioner's decision was that the Council was obliged to obtain a copy of the statute and pass it on subject to the recouping of all costs. Instinctively, this felt wrong and whilst a gut feeling is not the usual basis for considering whether or not to appeal I decided to write to his Cardiff office for clarification. The question that I posed was whether I had understood the position correctly and that it was my duty is to ask the enquirer if he would like me to obtain a copy of the statute for him. Was this to be done on the understanding that he paid the relevant postage and administrative costs and notwithstanding that it would be far cheaper for him either to take advantage of the offer of access that I had made already or to purchase a hard copy for himself? During a telephone conversation with the Commissioner's office I was told that this was indeed the case although, understandably, this was not confirmed in writing. In my opinion the original, incorrect decision was made because the Commissioner believed that the disclosure regimes under the Environmental Information Regulations and the Freedom of Information Act are mutually exclusive. The Information Tribunal did not agree and felt that the FOI Act provided a "potential supplementary right of access to environmental information". It was of the view that the information, whilst correctly identified by the Commissioner as environmental information, could nevertheless be withheld under Section 21 FOIA as it was available elsewhere. Further, there is a distinction to be made between the obligations imposed on public authorities by the two regimes. Under FOIA, Section 1(1)(b), an applicant has a right to have the information "communicated to him". However, under EIR Regulation 5 the public authority is obliged to make environmental information that it holds "available on request".

Whilst the Tribunal's judgement is, in many ways, quite complex it was refreshingly clear in posing the main question: "Did the Commissioner err in requiring the Council to disclose a copy of the [statute] under EIR".

Having considered this at length the Tribunal issued a substitute decision which, in my view, has the twin merits of being both brief and eminently sensible. It was made clear that the Council had dealt correctly with this request by making available to the enquirer the information to which he was entitled. And it's fair to say that there was a collective sigh of relief from many practitioners when the ICO's decision was reversed, as there had been wide interest not just from user groups in South Wales but also from practitioners as far apart as Manchester and Devon. The case has even formed part of the set question in the EIR Module of the distance learning LLM being run by Northumbria University. Fame indeed!

The Council could of course have capitulated and bought a copy of the statute to forward to the enquirer, making sure that the full costs were also passed on to him. This would have been easier, cheaper and entirely the wrong thing to do. We felt that this was one of those very rare occasions when "it's not the money, it's the principle of the thing". We were very dissatisfied with the Commissioner's Decision Notice and were bolstered by the calls of support from other public authorities where officers could not accept his reasoning. Incidentally, may I at this point apologise for any sense of smugness that may have crept into this article as I am not usually one to adopt the maxim "In defeat, malice. In victory, revenge."

However, FOI and EIR are complex areas of work which are often heavy on confrontation and light on job satisfaction and it is a very rare and pleasant experience not only to have got something right but also, equally importantly, to have been acknowledged to have done so.

My hope is that this important decision will encourage public authorities to make a stand against any regulatory body if its decisions appear to be unreasonable. After all, if it is true that "From his silence a man's consent is inferred" then to do otherwise is to imply that we accept such decisions.

**Colin Sparkes**
**Corporate Information Management Officer**
**Rhondda Cynon Taff C. B. C.**

# YOUR PERSONAL NOTER UP SELF COACHING SESSION - RECOGNISE YOUR CAREER AMBITION

Some people find that their life is so busy that time to think about their future at work is precious and scarce. Local government solicitors seeking promotion have an excellent depth and variety of skills to offer their employers. Legal services and council senior management teams need experienced, motivated individuals, just like someone like you. When would now be a good time to plan your next 12/24 months in your career?

What's your ambition; chief executive of a unitary or district council, a specialist in your chosen field, monitoring officer and/or head of legal services, an accomplished generalist, director of a county council or something completely different? What does your imagination and your motivation tell you?

Use the following questions to consider your career goals. Remember that when it comes to career progression in local government, involvement in SLG can have many benefits including networking, a ready supply of experienced mentors and the opportunity to shine, to learn and to demonstrate your skills in different ways. LGG Training provides CPD opportunities at different levels from the latest regulations in your area(s) of law to management skills.

Perhaps choose to answer just one or two of the questions in each section below. The questions may well have more impact for you if someone else puts them to you. Saying what you think out loud often makes a great difference to the impact of your thoughts.

**How does your current role work for you?**
In a sentence, what do you feel / think about your current role? How far is your present role a good fit with room for enjoyment and/or growth and how far is it a comfort zone? On a scale of 0 - 10 how far does your current role give you what you want? What do you want from a future role? Who is responsible for your future? How far ahead are you looking?

**What does your future at work hold for you?**
In the future, what role(s) are you picturing yourself in; what would someone who knows you very well think that you are capable of; if you were being playful about this what would you think; how lightly can you hold your ideas about those roles? How interesting and enjoyable is your future role? What do you like about that; what differences do you notice about your behaviour in the new role; if you were helicoptering above yourself in this role, what would you look like? What's different about you now?

**Where do you want to work?**
What part of the world do you want to work in; what sort environment do you want to work in; what sort of culture do you want to contribute to; what can you add to this picture about where you want to work that improves it for you? What do job adverts tell you about the sorts of role that you would like?

**What do you need to help you get there?**
What do you want? What will your first step be? What skills do you need? Who has the wisdom, help and support that you need to get you to where you want to be? What information do you need? How will you get this? What training do you need?

**So how come you want this new role?**
Think about your future it in a way that is good for you, paint it a colour that you like, choose the good feelings that will come with it. Got it? On a scale of 0 - 10 how good do you feel about this future role?

**What are you telling yourself about your future?**
How useful are the words you are using? How useful are these words to you? What words will serve you better? What assumptions are you making?

**What's next?**
What good things has this conversation shown you? How will you celebrate this? What's your next step?

In a 'real time' one to one coaching session, the questions may come rather less quickly and may be quite different, depending upon your replies. Coaching is all about getting the best from someone just like you. The answer to the question "What's next?" may be to seek out a qualified coach as part of your CPD. Have fun and keep on noticing the differences in yourself.

Helen Liddar has 14 years experience as a local government solicitor and is currently a personal development coach and Head of Coaching at Work with Powerchange. Her practice includes working with local authorities. Helen is collating case studies of the use of coaching within local authorities and legal service teams. If you have been involved in coaching at work, she would love to hear from you.
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# THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008

The Unfair Commercial Practices Directive 2005/29/EC ("UCPD") was implemented on 26 May 2008 by the Consumer Protection from Unfair Trading Regulations 2008 ("CPR"). The Regulations introduce a number of new concepts and presumptions - some automatic - in consumer law. Whilst the UCPD's broad scope overlaps with existing laws, it should achieve some regulatory simplification: The Regulations repeal much of the Trade Descriptions Act 1968 and Part 3 of the Consumer Protection Act 1987 (misleading price indications).

The Regulations can presently only be enforced by a competent enforcement authority: Local weights and measures within section 69 of the Weights and Measures Act 1985; the OFT; and the Department of Enterprise, Trade and Investment in Northern Ireland.

The UCPD:

- harmonises unfair trading laws in all EU Member States; and,
- introduces a general prohibition on traders not to treat consumers unfairly. This prohibition is intended to act as safety-net consumer protection legislation.

The UCPD obliges businesses (including trades, crafts and professions), or anyone acting on their behalf, not to mislead consumers or subject them to aggressive commercial practices such as high pressure selling techniques. There are additional protections for vulnerable consumers who are unfortunately often the target of unscrupulous traders.

The Regulations catch any sort of unfair commercial practice which reaches or is addressed to consumers. It could include any act, omission, course of conduct, representation or commercial communication, including advertising and marketing, by a trader which is directly connected with the promotion, sale or supply of a product to or from consumers - whether occurring before, during or after commercial transaction [if any] in relation to the product. Product includes service, rights, unmoveable property or obligations.

In determining a practice's effect, the typical average consumer is taken as reasonably well informed, observant and circumspect. Where a practice is directed at a particular group, including the vulnerable [due to mental or physical infirmity, age or credulity in a way that economically only affects that group and which could be reasonably foreseen], then average consumer refers to the average member of that particular group. Allowance is made with respect to the vulnerable for the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.

Regulation 3 of the CPR sets out the prohibitions on unfair commercial practices:

- Practices that breach the requirements of professional diligence ("the general prohibition") and materially distort or are likely to distort materially the economic behaviour of the average consumer with regard to the product.
- "Professional diligence" means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either:
- Honest market practice in a trader's field of activity; or,
- The general principle of good faith in a trader's field of activity
- Any "Misleading Action" within regulation 5 (which contains a long list of such actions)
- Any "Misleading Omission" within regulation 6 (which also contains a long list)
- Any "Aggressive Practice" within regulation 7
- In all cases, any of the 31 practices listed in Schedule 1 [The UCPD Annex Prohibitions]

The Regulations can presently only be enforced by the competent Enforcement Authority (qv) - Most breaches will be criminal offences. The general prohibition (qv) will be a mens rea offence (including recklessness, but with the requirement of showing that the practice materially distorts, or is likely to distort, the economic behaviour of the average consumer), whilst the last four bulleted points just above will be strict liability. There are defences of due diligence and innocent publication of advertisements.

The Part 8 Enterprise Act 2002 enforcement mechanism is applicable (regulation 26). By regulation 27, a person named in an enforcement application may be required to provide evidence to substantiate factual claims made as part of their commercial practice. If inadequate or no evidence is provided, the court may consider the factual claims are inaccurate.

There are powers in Part 4 to make test purchases and powers of entry and investigation, and provisions to deal with obstruction of authorised officers. There may have to be compensation for goods wrongly seized and/or detained.

Traders and businesses also gain a new protection on 26 May by the Business Protection from Misleading Marketing Regulations 2008 ("BPR"). These Regulations replace the Control of Misleading Advertisements Regulations 1988 which the CPR revoke. The BPR ensure that there is no reduction in business protection following the repeal of certain legislation (especially much of the Trade Descriptions Act 1968) which protects businesses as well as consumers. The operation and enforcement of the BPR, including enforcement authorities, are in many ways similar to that under the CPR.

The CPR and to a lesser extent the BPR might well offer an additional and possibly rapid means of dealing with data protection issues in a trading context. They would also appear to provide a criminal remedy in certain potential "passing off" situations.

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**Conflict Communications**
8/7/08 London

**Code of Conduct**
10/7/08 London

**Anti Social Behaviour and Mental Health**
11/7/08 London

**Advanced Advocacy**
14/7/08 Leeds

**Planning Law Basic Survival Guide**
14/7/08 London

**Management and Skills Module 2**
15/7/08 Leeds

**Planning Committees**
17/7/08 London

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17/7/08 Manchester

**Prosecuting Council Tax and Benefit Fraud**
18/7/08 London

**Management and Skills Module 3**
24/7/08 Leeds

**Hearing Preparations**
25/7/08 London

## SEPTEMBER

**Data Protection and Freedom of Information - Update**
1/9/08 London

**Highways Maintenance**
2/9/08 London

**ASBO's Advanced**
4/9/08 Leeds

**Essential Guide to Overview & Scrutiny Committees**
4/9/08 Manchester

**Planning Committees**
9/9/08 Leeds

**Possession Proceedings**
9/9/08 London

**Dealing with Persistent Complaints**
10/9/08 London

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15/9/08 London

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**Homeless Prevention**
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**Health & Safety Conference**
30/9/08 London

## OCTOBER

**Dealing With Members**
1/10/08 London

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**Conflict Communications**
7/10/08 Manchester

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8/10/08 London

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9/10/08 Birmingham

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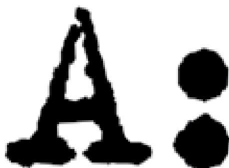

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