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## PROCUREMENT



**Getting off the hook: a guide to securing release from contractual obligations and varying public contracts in light of Covid-19<sup>1</sup>**

**Parishil Patel QC and Katherine Barnes**



Given the current challenging economic circumstances arising from the Covid-19 pandemic, which the authors fear may worsen over the coming months as employers are weaned off the Government's furlough scheme,

contracting authorities and their contractors may want to be released from obligations under existing contracts (and/or to protect their position having already defaulted on their obligations). Similarly, contracting authorities may want to vary existing contracts going forward. However, for obvious reasons, notably the time and cost involved, the appetite for undertaking a new procurement exercise is likely to be limited. This article therefore provides a guide to the available options for achieving these objectives.

### **Securing release from existing contractual obligations: force majeure clauses**

In broad terms, a force majeure clause excuses a contractual party from the non-performance of a contractual obligation where the non-performance arises from an extraordinary event or circumstance beyond their control. Whether a force majeure clause covers non-performance or late performance due to the Covid-19 pandemic will depend on the construction of the particular clause being relied on. In theory, however, if the pandemic falls within the relevant clause, then

the defaulting party may be released from their obligations.

In practice, however, it is not quite that simple. The first reason for this is the principle that the extraordinary event must be the sole cause of the non-performance.<sup>2</sup> The second and related reason is that force majeure clauses are typically accompanied by an obligation to exercise reasonable endeavours to mitigate the effects of the force majeure clause (in other words, reasonable endeavours must be exercised to avoid non-performance). Even where there is no express reasonable endeavours requirement, the defaulting party will struggle to satisfy the "sole cause" test if there were alternative means of fulfilling their contractual obligations which they chose not to pursue.

It seems to the authors that these well-established contractual principles may pose real difficulties for those seeking to rely on force majeure clauses in the Covid-19 context due to, amongst other matters, the nature of the legal framework introduced by the Government for managing the pandemic. That is because the various sets of Regulations<sup>3</sup> dealing with the pandemic often include an exemption to the general requirements imposed on the public where necessary to "fulfil a legal obligation". For example:

- a) The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020<sup>4</sup> disappplied the requirement to stay at home and not to participate in gatherings or more than two people where necessary "to fulfil a legal obligation" (Regulation 6(2)(h) and Regulation 7(d)(iv));
- b) The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020<sup>5</sup> disapply the prohibition on participating in gatherings of over 30 people

1 This article follows a 39 Essex Chambers webinar given on 21 July 2020 on "Practical procurement tips in light of the changing landscape brought about by Covid-19" which can be accessed for free here: <https://www.39essex.com/practical-procurement-tips-in-light-of-the-changing-landscape-brought-about-by-Covid-19/>

2 *Classic Maritime Inc v Limbungan Makmur Sdn Bhd and another* [2019] EWCA Civ 1102.

3 Promulgated under the Coronavirus Act 2020.

4 In March 2020 these Regulations implemented into law the Government's "lockdown" policy but they have now largely been repealed.

5 These Regulations require the closure of certain businesses and impose restrictions on gatherings both inside and outside of more than 30 people.

where the participant is “fulfilling a legal obligation” (Regulation 5(3)(d)). Notably, and unsurprisingly, there is no such exemption in the business closure requirements;

- c) The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020<sup>6</sup> excuse a person from a local authority’s prohibition/restriction on entering a specified public outdoor place where the person is required to enter the space in question “to fulfil a legal obligation” (Regulation 7(4)(d)(iii));
- d) The Health Protection (Coronavirus, Restrictions) (North of England) Regulations 2020<sup>7</sup> disapply the prohibition on gatherings of two or more people in private dwellings in certain parts of the North of England where the relevant person “is fulfilling a legal obligation” (Regulation 5(2)(d));
- e) The Health Protection (Coronavirus, International Travel) (England) Regulations 2020<sup>8</sup> exempt a person from the need to remain at their chosen quarantine location on return from one of the relevant countries where they are required to leave that location “to fulfil a legal obligation” (Regulation 4(9)(c)).

As such, it would seem that in many instances the need to fulfil legal obligations, which on the face of it include the honouring of existing contractual responsibilities, operates as an exemption to the rules imposed on the public, and therefore contractors, for the management of the pandemic. This in turn risks seriously undermining the argument of a defaulting contractual party that they have complied with their reasonable endeavours obligation. That is because, in many instances, it will not be possible to assert that the law compelled non-performance. Indeed, it

could be argued that in such circumstances the defaulting party simply elected not to fulfil their obligations with the result that the protection offered by the force majeure clause is not triggered.

It follows that careful consideration of the contract and all the circumstances is required before a contractor seeks to rely on a force majeure clause to excuse non-performance due to Covid-19. In some instances a force majeure clause may well provide a “get out of jail free card”, but it cannot be assumed that is the case.

### **Varying public contracts under the Public Contract Regulations 2015**

Of course, if a contract cannot be suspended or its obligations terminated thanks to a force majeure clause, it may also be possible to renegotiate the terms of the contract going forward. This raises particular issues for public sector contracts given the applicable procurement rules. Indeed, despite a recent flurry of procurement guidance from the Government in light of Covid-19,<sup>9</sup> the Public Contract Regulations 2015 (“the PCR”) remain fully in force. This means that contracting authorities will need to consider Regulation 72 (“Reg 72”) of the PCR which sets out the limited circumstances in which a contract may be varied without requiring a new procurement exercise.<sup>10</sup> Reg 72 provides for six exceptions in this regard:

- 1) Express amendment clauses (Reg 72(1)(a));
- 2) Necessary additional works, services and supplies by the original contractor (Reg 72(1)(b));
- 3) Unforeseen circumstances (Reg 72(1)(c));
- 4) New contractor (Reg 72(1)(d));
- 5) Non-substantial changes (Reg 72(1)(e));
- 6) Minor variations (Reg 72(1)(5)).

6 These Regulations make provision for local authorities to give directions restricting public access to premises, events and public outdoor places.

7 These Regulations impose restrictions on gatherings of two or more people in private dwellings in certain parts of the North of England.

8 These Regulations require individuals to self-isolate at a chosen location for 14 days following return from certain countries.

9 See PPN 01/20: Responding to Covid-19; PPN 02/20: Supplier relief due to Covid-19; PPN 03/20 (on use of procurement cards); PPN 04/20: Recovery and transition from Covid-19.

10 By virtue of Regulation 118 of the PCR, Reg 72 applies equally to contracts awarded under the previous iteration of the PCR (the Public Contracts Regulations 2006). The exception to this are public works concessions.

**Exception (1): Express amendment clauses**

Exception (1) applies where the initial procurement documents provide for amendments to the contract (regardless of their value) in clear, precise and unequivocal review clauses, as long as such clauses:

- i) state the scope and nature of possible modifications as well as the conditions under which they may be used; and
- ii) do not provide for modifications that would alter the overall nature of the contract.

This exception was considered in the *Edenred litigation*, with the Supreme Court (*Edenred (UK Group) Ltd v HM Treasury* [2015] UKSC 45) commenting that *“the most significant restriction in this regulation is the degree of specification that it requires in the review clause”* (Lord Hodge at [42]). The court went on to uphold the decision of the Court of Appeal that the exception was made out in circumstances where the initial contract envisaged the extension of the services in question, and also confined the extension to opportunities within the scope of the original OJEU notice, as well as restricting any increase in the contractor’s profit margins (at [43]). It follows that careful scrutiny of the original contract will be required to determine whether authorities may rely on this exception.

**Exception (2): Necessary additional works, services and supplies by the original contractor**

Variations are allowed for additional works, services or supplies by the original contractor that have become necessary and were not included in the initial procurement, where a change of contractor:

- i) cannot be made or economic or technical reasons; and
- ii) would cause significant inconvenience or substantial duplication of costs for the contracting authority;

provided that any increase in price does not exceed 50% of the value of the original contract.

On the face of it, there is no obvious link between this exception and Covid-19. Rather, Recital 108 to the Directive<sup>11</sup> indicates that this exception is intended to apply: *“in particular where the additional deliveries are intended either as a partial replacements [sic] or as the extension of existing services, supplies or installations where a change of supplier would oblige the contracting authority to acquire material, works or services having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance.”* That is not to say, however, that certain contracts which require amending due to the pandemic may not fall within this category. What is required is a careful examination of the circumstances of a particular contract, including the identification of compelling reasons why economic and/or technical reasons prevent a change of contractor.

**Exception (3): Unforeseen circumstances**

A contract may be varied where all three of the below conditions are met:

- i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen;
- ii) the modification does not alter the overall nature of the contract;
- iii) any increase in price does not exceed 50% of the value of the original contract or framework agreement.

In this regard, recital 109 to the Directive provides: *“Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract, in particular when the performance of the contract covers a long period. In this case, a certain degree of flexibility is needed to adapt the contract to those circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking*

<sup>11</sup> Directive 2014/24/EU (“the Directive”) (transposed into domestic law by the PCR).

*into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value."*

Plainly, this exception is likely to prove of particular assistance in the Covid-19 pandemic given that this constitutes a quintessential unforeseen circumstance. Indeed, the Cabinet's Office's PPN 01/20<sup>12</sup> makes express reference to this exception, and advises:

*"Contracting authorities should keep a written justification that satisfies these conditions, including limiting any extension or other modification to what is absolutely necessary to address the unforeseeable circumstance. This justification should demonstrate that your decision to extend or modify the particular contract(s) was related to the Covid-19 outbreak with reference to specific facts, eg your staff are diverted by procuring urgent requirements to deal with Covid-19 consequences, or your staff are off sick so they cannot complete a new procurement exercise."*

Unfortunately there is no case law which addresses directly the issue of when the "nature" of a contract changes in this context, but some of the guidance from the authorities outlined below (on when a variation is "substantial") may provide some assistance in this regard.

#### **Exception (4): New contractor**

Substitution of an initial contractor amounts to an exception where the replacement arises as a consequence of:

- i) an unequivocal review clause or option (i.e. the original contract made provision for the replacement); or
- ii) corporate restructuring (including takeover, merger, acquisition or insolvency).

While a narrow exception, it is of obvious relevance to the economic fallout from Covid-19 given that significant numbers of contractors risk insolvency due to the reduction in demand for various goods and services, as well as the financial pressures resulting from new regulatory requirements.

#### **Exception (5): Non-substantial changes**

Variations, irrespective of their value, will fall within this exception as long as they are "not substantial".

A variation will be "substantial" (with the result that it falls outside the exception) if it meets one or more of the following conditions (as per Reg 72(8)):

- i) The variation renders the contract materially different in character from the one initially concluded;
- ii) The variation introduces conditions which, had they been part of the initial procurement procedure, would have: allowed for the admission of other candidates than those initially selected; allowed for the acceptance of a tender other than that originally accepted; or, attracted additional participants in the procurement procedure;
- iii) The variation changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the initial contract;
- iv) The modification extends the scope of contract considerably;
- v) The variation replaces a contractor in circumstances other than those covered by exception (4).

Condition (iv) above was considered by the Supreme Court in *Edenred*, which found that a variation will not extend the scope of a contract considerably where the initial contract envisages and provides for the relevant extension. As Lord Hodge explained at [36]:

*"I do not accept that one should read the prohibition from modifying a contract to*

*encompass services not initially covered as banning the modification of a public contract which extends the contracted services beyond the level of services provided at the time of the initial contract if the advertised initial contract and related procurement documents envisaged such expansion of services, committed the economic operator to undertake them and required it to have the resources to do so. [...] Were it otherwise, it is difficult to see how a government department or other public body could outsource services that were essential to support its own operations and accommodate the occurrence of events and the changes of policy that are part of public life."*

Conditions (ii) and (iii) above were considered at an earlier stage in the proceedings. In respect of (ii), Andrews J considered (with reliance on *Presstext*<sup>13</sup>) that the relevant test is whether, had the variations formed part of the initial tender, it **would** have allowed for the admission of tenderers other than other initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted. Notably this imposes a higher threshold than that applied by Lang J in *Gottlieb v Winchester City Council* [2015] EWHC 231 (Admin), who found that a claimant "*has to satisfy the Court, on the balance of probabilities, that a realistic hypothetical bidder would have applied for the contract, had it been advertised, but he is not required to identify actual potential bidders*" (at [69]).

As for (iii), in *Edenred* Andrews J held (unsurprisingly) that there had been no change to the economic balance of the contract in circumstances where she found on the facts (based on the relevant contractual charging mechanisms) that the contractor would not stand to increase its profit margins as a result of the variation (see [119]-[123]).

Again, therefore, the extent to which contracting authorities may rely on this exception is likely to turn on the terms of the original contract.

### **Exception (6): Minor variations**

Low value changes are permitted as long as the value of the proposed changes is less than:

- i) the relevant threshold in Regulation 5 of the PCR; and
- ii) 10% of the initial contract value for service and supply contracts and 15% of the initial contract value for works contracts

provided that the modification does not alter the overall nature of the contract.

### **How many variations may be made?**

An important final point is that the 50% limit applicable to exceptions (2) and (3) applies each time a variation is made, as long as the change is not with the intention of circumventing the procurement rules. 50% is to be calculated by reference to the original contract (and not 50% of any increased price resulting from an earlier contract).

In contrast, the 10% and 15% limits applicable to exception (6) – minor changes – apply in aggregate (and not each time a change is made).<sup>14</sup>

### **Concluding thoughts**

It is trite that every case turns on its facts, but that could not be more true when it comes to attempts by contractors to be released from existing contractual obligations via force majeure clauses on the basis of Covid-19 and also attempts by contracting authorities to vary public contracts without recourse to a further procurement exercise. While it is undoubtedly the case that Covid-19 provides opportunities in both of these respects, getting off the hook is only likely to be straightforward in exceptional cases.

<sup>13</sup> *Presstext v Republik Österreich (Bund)* [2008] EUECJ (C-454/06).

<sup>14</sup> See the guidance from the Crown Commercial Service entitled "Guidance on amendments to contracts during their term" (October 2016).



## Abandoning existing procurements without contract award

### Philippe Kuhn

The current global Covid-19 pandemic has thrown into sharp relief the legality of

abandoning existing procurements without proceeding to contract award. This may be relevant to contracting authorities for reasons including a sudden drop in demand for certain services or products, re-allocation of tight budgets to emergency spending and pausing procurement where it is expedient to start afresh in future in view of anticipated shifts in pricing and supply. This article addresses alternatives to abandonment and the leading cases on abandonment, as well as providing practical guidance based on the case law, in particular in a Covid-19 world.

#### (1) Alternatives to abandonment:

This is the first question to consider in any case. Abandonment is a drastic step and, in most cases, carries with it greater risks of legal challenge than less onerous steps.

The first option is variation. This is governed by the detailed provisions of Regulation 72 of the Public Contracts Regulations 2015 ("PCR 2015"). In brief summary, there are six permitted categories or "safe harbours". Namely: (1) amendment clauses, (2) economic and technical reasons, (3) unforeseen changes, (4) new contractor cases, (5) "insubstantial" modifications and (6) minor modifications. The detail is beyond the scope of this article. Notable authorities include *Edenred (UK Group) Limited v HM Treasury* [2015] UKSC 45; [2015] PTSR 1088, *Gottlieb v Winchester City Council* [2015] EWHC 231 (Admin) and *Finn Frogne (C-549/14)* [2016] PTSR 1569.

Another option are call-offs from existing contracts, framework agreements or dynamic

purchasing systems ("DPS"). Key prerequisites are: (1) prior identification as a permitted customer, (2) compliance with the original scope of the contract, framework agreement or DPS, (3) that the procurement was PCR 2015 compliant originally and (4) the adequacy of the existing contractual terms.<sup>15</sup>

#### (2) Case law on abandonment:

The two leading cases on abandonment both pre-date the current pandemic, but Government guidance in the form of Public Procurement Notice 01/20 ("PPN 01/20") at the start of the lockdown was quick to reiterate that the PCR 2015 continue to provide the applicable legal framework. The key cases thus remain *Amey Highways Limited v West Sussex County Council* [2019] EWHC 1291 (TCC); [2019] PTSR 1995 and *Ryhurst Ltd v Whittington Health NHS Trust* [2020] EWHC 448 (TCC).

#### Amey:

*Amey* arose out of a claim for damages against West Sussex County Council ("the Council"). *Amey* alleged breaches of the Council's duties under the PCR 2015 in respect of a procurement exercise for the award of a 10-year highways service contract awarded to another bidder, Ringway. *Amey* had scored only fractionally lower than Ringway. It argued that, but for errors in scoring, it would have won. In light of claim no.1, the Council did not award the contract but instead decided to abandon the procurement process and start again. *Amey* brought a second claim challenging the lawfulness of the decision to abandon the first procurement. Claim no.2 was tried at same time as preliminary issues in the damages claim concerning the effect of the abandonment (claim no.1).

The judgment of Stuart-Smith J provides a helpful summary of the general principles:

- A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to

<sup>15</sup> See the summary in PPN 01/20, page 5.

award a contract following an invitation to tender and thus in any decision to abandon a procurement: [12](a).

- The exercise of that discretion is not limited to exceptional cases or does not necessarily have to be based on serious grounds: [12](b).
- The decision to abandon is subject to fundamental rules of EU law, i.e. rationality, equal treatment (including reason-giving) and transparency: [12](d)-(e),(g).
- It is not enough to merely examine whether the decision to abandon was “arbitrary”: [12](f).
- Potential triggers include (1) changes in the economic context or factual circumstances or (2) the needs of the contracting authority: [12](h).

On the facts, Stuart-Smith J concluded that after taking into account planned savings and benefits of the proposed Ringway contract, the Council decided that “contracting with Ringway and pursuing the *Amey* litigation to a conclusion was an unpalatable risk”: [41](ii). The key Council officials had “hoped and intended” that abandoning the procurement would have the effect of terminating claim no.1, but did not believe that abandonment “was bound to have that effect”: [41](iii). He went as far as finding there was “no other rationale that was driving the decision to abandon the Procurement”: [41](v).

Stuart-Smith J concluded it is wrong that a procurement can only engage public law principles and remedies: [57]-[58]. Irrespective of a concurrent public law claim, a damages claim for breach of the PCR is essentially a private law claim upon completion of cause of action, subject only to *Francoovich* conditions: [11]. Thus, while a lawful abandonment may prevent private law claims from coming into existence *subsequently*, it does not extinguish an *accrued* cause of action on the part of an economic operator: [60]-[62]. This meant the abandonment decision had no effect on claim no.1 if *Amey* did succeed in establishing that (accrued) damages claim: [79]. The judge

also briefly applied the general principles at [12] in deciding on the question of *lawful* abandonment at [80]-[89]. He declined to find irrationality, breach of equal treatment or lack of transparency. The remarks are quite fact-specific and *Ryhurst* provides a more helpful and thorough illustration.

### **Ryhurst:**

*Ryhurst* was a specialist provider of health estate management services. Controversially, it was part of a group which included a company responsible for supply and installation of cladding at the Grenfell Tower. In June 2016, Whittington Health NHS Trust (“the Trust”) had begun a procurement exercise for a 10-year strategic estates partnership (“SEP”) contract. In October 2017, the Trust decided to award the contract to *Ryhurst*. By June 2018, a decision was taken to abandon the procurement for reasons including (1) the Trust’s improved financial position, (2) strengthened relations with other partner organisations, (3) risk of insufficient stakeholder engagement and (4) the need for approval from the Trust’s regulator.

*Ryhurst* claimed the real reason for the decision to abandon the procurement was pressure from local campaign groups, MPs and others due to the Grenfell connection. It brought a claim against the Trust for breach of its duties under the PCR 2015, seeking damages for losses.

The trial was heard by HHJ Stephen Davies in the TCC. Notably, he approved at [20] the summary of principles on abandonment in *Amey* at [12]. The key issue on the facts turned out to be the identity of the bidder. The judge held that “a public authority may decide to abandon a procurement by reference to reasons connected with the individual circumstances of the tenderer concerned”, subject to “fundamental principles of EU procurement law”: [25].

For present purposes, HHJ Stephen Davies provided the following key clarifications:

- Regarding transparency, *Ryhurst* would have to establish that, had the Trust not breached that obligation, it would either on the balance



of probabilities have entered into the SEP or, alternatively, not have wasted further time and expenditure: [32].

- It was not sufficient for Ryhurst to show that it had a characteristic that no other bidder had, i.e. Grenfell connection. Materially, the judge considered that it is not always necessary to apply a two-stage analysis without consideration of objective justification at stage (1), and that Ryhurst must show that it was “manifestly erroneous or irrational or disproportionate or not objectively justified”: [41], [44]. He also considered that the non-discrimination principle does not add anything to equal treatment: [45].
- In relation to manifest error, he concluded that contracting authorities have a margin of appreciation as regards manifest error and the EU law concept is comparable to the Wednesbury unreasonableness standard in English public law: [54].
- The English public law doctrine of relevant considerations does not usually apply to damages claims in the procurement context: [55]-[65].

Dismissing the claim, the judge considered the Trust had established a significant change in its financial position in June 2018 and that that was “a genuine and a principal reason” for abandonment: [219]. He added that strengthening relations with other partner organisations would not have been a sufficient reason in itself, but the Trust was reasonably entitled to and did consider it “as supporting the decision to abandon”: [231]. Importantly, he also held that the Trust was not obliged to put out of its mind the fact that there was a lack of stakeholder support simply because one or the principal reason for that was the Grenfell connection: [247]. Accordingly, there was no breach of the obligations of equal treatment, non-discrimination, proportionality or avoiding manifest error: [247].

### (3) Practical guidance:

Both *Amey* and *Ryhurst* deserve careful reading. *Ryhurst* in particular provides a detailed and very recent illustration of how the principles of EU law summarised in *Amey* at [12] are likely to be applied by the TCC. The key lesson to take from both judgments is that it is vital not to look at abandonment in a vacuum. Contracting authorities should consider carefully any accrued rights, which will survive abandonment. Timing is crucial irrespective of Covid-19.

A more heartening observation for contracting authorities is that the level of scrutiny as to whether a decision to abandon was *lawful* is modest, though not limited to *arbitrariness*. That point is made in terms in *Amey* at [12](f). Arguably, it will be even harder to attack decisions to abandon in the majority of (genuine) emergency situations arising from Covid-19. That said, there are no special principles in the present pandemic context and (if PPN 01/20 is followed strictly by the courts) these may never develop.

Consideration of political sensitivities (such as the Grenfell connection in *Ryhurst*) are not necessarily impermissible, but care must be taken to see how and why they are relevant to the efficacy and success of the subject-matter of the procurement. In other words, mere political controversy is not itself a sufficient or good reason for abandonment.

Lastly, as ever, it is best practice to document the reasons for abandoning a procurement clearly and contemporaneously to avoid fact-sensitive disputes. While this is more challenging given time and resource pressures resulting from Covid-19, it is a crucial step in curbing costs and litigation risk. It is a worthwhile investment.

## PLANNING, ENVIRONMENT & RATING



### The right to lobby councillors: Holborn Studios 2 Richard Harwood QC

The High Court has ruled, for the first time, whether members of the public can

write to councillors, and whether councillors can read those letters in advance of taking decisions. The case concerned the practice of the London Borough of Hackney of prohibiting planning committee members from reading correspondence sent to them about forthcoming applications.

Holborn Studios run the largest photographic studio in Europe. Redevelopment is proposed by their landlords, with a scheme which will not accommodate them. In 2017 planning permission was quashed because of an unfair failure to reconsult on amendments and a failure to disclose application documents in breach of a legitimate expectation: *R (Holborn Studios) v London Borough of Hackney* [2017] EWHC 2823 (Admin). A new application was considered by Hackney's Planning Sub-Committee in January 2019. Shortly before the meeting Holborn Studio's managing director wrote to the committee members about the officers' report and received this reply from the chair:

"Planning members are advised to resist being lobbied by either applicant or objectors."

Holborn Studio's solicitors, Harrison Grant, then wrote to the planning officers, copying in the committee members, explaining why the officer recommendation to refuse the application should be rejected. They also said that Hackney's approach of not allowing committee members to read representations sent to them was unlawful. A councillor replied that he had been given legal advice that he 'should forward any lobbying letters to Governance Services and refrain from reading them'. Consequently, he said, 'I have not read

your email'. In an addendum report the officers responded to the solicitors' letter:

"Members are warned about viewing lobbying material as this can be considered to be prejudicial to their consideration of the application."

This reflected the Council's leaflet 'How to have your say at the Planning Sub-Committee', sent to the public in advance of the meeting 'it is advised that you don't contact any of the councillors before a meeting'.

The particular issue was whether the public could write to councillors about decisions they will be making and whether those councillors could consider those representations. The point was remarkably free of any judicial authority, apart from a passing comment by Dove J in *R(Legard) v Royal Borough of Kensington and Chelsea* [2018] EWHC 32 (Admin) at [143] that 'As democratically elected representatives they are expected to receive and consider representations and lobbying from those interested in the issues they are determining'.

Holborn Studios relied on Article 10 of the European Convention on Human Rights and the common law. Article 10 provides 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information ... subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'. In *R(Lord Carlisle of Berriew v Secretary of State for the Home Department* [2014] UKSC 60. Parliamentarians asked for the exclusion of a dissident Iranian politician from the United Kingdom to be lifted to enable her to address meetings in Parliament on issues associated with Iran. Lord Neuberger said at paragraph 91, discussing meetings with MPs and Peers:

"These are hugely important rights. Freedom of speech, and particularly political speech, is the foundation of any democracy. Without it, how can the electorate know whom to elect and how can the parliamentarians know how to make

up their minds on the difficult issues they have to confront? How can they decide whether or not to support the Government in the actions it wishes to take?"

Baroness Hale emphasised that whilst the politician could still speak to UK Parliamentarians by video or audio link, or they could see her in Paris, the preventing a meeting at Westminster was still an interference with the Parliamentarians' Article 10 rights (Lord Carlisle at [94]).

Holborn Studios also relied on the common law as being in step with Article 10 citing Lord Steyn in *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 at [125]:

"The starting point is the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible. ... In *Attorney-General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283-284, Lord Goff of Chieveley expressed the opinion that in the field of freedom of speech there was in principle no difference between English law on the subject and article 10 of the Convention. ...

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v United States* (1919) 250 U.S. 616, 630, *per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country ..."

Dove J referred to the Local Government Association's publication "Probity in Planning" which says 'Lobbying is a normal part of the planning process'. It was 'indisputably correct' that 'that issues in relation to freedom of expression and the application of Article 10 of the ECHR were engaged in the communication between members of a local authority, and in particular members of a planning committee, and members of the public who they represent and on whose behalf they were making decisions in the public interest' (para 78). He held (para 78):

"Similarly, bearing in mind the importance of the decisions which the members of the planning committee are making, and the fact that they are acting in the context of a democratically representative role, the need for the communication of views and opinions between councillors and the public whom they represent must be afforded significant weight. In my view, it would be extremely difficult to justify as proportionate the discouragement, prohibition or prevention of communication between public and the councillors representing them which was otherwise in accordance with the law. Here it was no part of the defendant's case to suggest that the communication which the claimant made in their correspondence in respect of the committee report was anything other than lawful."

Mr Justice Dove concluded (para 79):

"Receiving communications from objectors to an application for planning permission is an important feature of freedom of expression in connection with democratic decision-taking and in undertaking this aspect of local authority business. Whilst it may make perfect sense after the communication has been read for the member to pass it on to officers (so that for instance its existence can be logged in the file relating to the application, and any issues which need to be addressed in advice to members can be taken up in a committee report), the preclusion or prevention of members reading such material could not

be justified as proportionate since it would serve no proper purpose in the decision-taking process. Any concern that members might receive misleading or illegitimate material will be resolved by the passing of that correspondence to officers, so that any such problem of that kind would be rectified. In my view there is an additional issue of fairness which arises if members of the planning committee are prevented from reading lobbying material from objectors and required to pass that information unread to their officers. The position that would leave members in would be that they would be reliant only on material from the applicant placed on the public record as part of the application or the information and opinions summarised and edited in the committee report. It is an important feature of the opportunity of an objector to a planning application to be able to present that objection and the points which they wish to make in the manner which they believe will make them most cogent and persuasive. Of course, it is a matter for the individual councillor in the discharge of his responsibilities to choose what evidence and opinion it is that he or she wishes to study in discharging the responsibility of determining a planning application, but the issue in the present case is having the access to all the material bearing upon the application in order to make that choice. If the choice is curtailed by an instruction not to read any lobbying material from members of the public that has a significant impact on the ability of a member of the public to make a case in relation to a proposed development making the points that they wish to make in the way in which they would wish to make them.

81. ... The standard correspondence clearly advised against members of the public writing directly to members of the committee; there was no warrant for that advice or discouragement and it impeded the freedom of expression of a member of the public who was entitled to write to a member of the planning committee setting out in his or her own terms

the points they wish to be considered in respect of an application and expect that the member would have the opportunity to read it.”

The permission was not quashed on this ground since whilst committee members had thought they were obliged to disregard a letter from Holborn Studios’ solicitors, their points were made by their QC at the committee meeting. The judgment establishes, surprisingly for the first time, the right of local councillors to receive correspondence from the public and to consider it when making decisions. Part of that is the right of the public to write. There is also a recognition that members can and will be lobbied, whether in writing, in meetings, at social events or chatting in the street. Provided that is done openly, in particular that correspondence is copied to officers whether by the writer or the recipient, that is not simply legitimate, but an important part of the democratic process.

The planning permission was though quashed because the Council failed to make affordable housing viability assessments available to Holborn Studios and the public. These were background papers and given government policy and guidance on transparency, the public interest did not allow these to be exempt information. Dove J found that the viability material which was published to justify a reduced affordable housing contribution was ‘opaque and incoherent’. This aspect of the case is considered in detail by Richard Harwood QC [here](#).



## Section 106s and the 'technical traps' submission – The final chapter?

**John Pugh-Smith**

### Introduction

In my initial article "Section 106s and the 'technical traps' submission"<sup>16</sup> I drew attention to the potentially worrying implications on the interpretation of such deeds, of Mrs Justice Thornton's judgment in *Norfolk Homes Limited v North Norfolk District Council & Norfolk County Council* [2020] EWHC 504 (QB) in early March 2020. There, she dismissed NHL's initial application for summary judgment for a declaration that their residential development was not bound by obligations contained in a Section 106 agreement upon the basis that NNDC had sufficiently arguable submissions, based around the *Lambeth* case,<sup>17</sup> to warrant a full hearing. Now, following that substantive hearing on 21st July 2020 final judgment has been handed down by Mr Justice Holgate [2020] EWHC 2265 (QB) a month later conclusively in favour of NHL.

The reason why this case is important, as a matter of planning jurisprudence, is that NNDC had sought to distinguish principles of contractual interpretation from the interpretation of planning documents. It had boldly submitted that *"it is inapt to apply pure principles of contractual interpretation to section 106 agreements, given the public nature of those agreements; the fact that they run with the land and the fact that they often intend to secure mitigations for the impact of development which are necessary to make the development acceptable. In those circumstances it is not apposite for the document to be construed by reference only to the contracting parties' intentions and according to the facts and circumstances at the time of the contract. Rather, the approach adopted by the Supreme Court in Lambeth as regards planning conditions should be applied."*

Through his judgment, delivered in distinctly trenchant terms, Mr Justice Holgate has restored the level of reassurance required for these current unsettled times.

### The Facts

In August 2011 NHL had submitted an outline application (with all matters reserved apart from means of access) to NNDC for the erection of up to 85 dwellings, access, public open space and associated infrastructure. NNDC resolved to grant planning permission subject to the prior execution of a s106 agreement between the then landowner, NNDC and Norfolk County Council ("NCC") to secure the provision of 45 per cent affordable housing together with a number of financial contributions. On 22nd June 2012 the section 106 obligation was executed ("the Agreement"), following which NNDC issued the decision notice ("the 2012 Permission"). In September 2013 NNDC granted a s.73 permission for the purpose of varying two of the conditions on the 2012 permission ("the 2013 Permission"); and in September 2015 NNDC granted another s.73 permission, in order to remove two conditions of the 2012 Permission and substitute a new condition requiring construction details for reducing energy demand to be submitted for approval ("the 2015 Permission"). The grant of the 2013 and the 2015 Permissions was not made contingent upon the prior execution of any further s.106 obligation, in particular, one imposing the same requirements as those contained in the Agreement. In September 2018 NNDC issued a CLOPUD decision notice under s.192 of the TCPA 1990 refusing a certificate that the 2015 Permission could lawfully be implemented without triggering the landowner's obligations under the Agreement. NHL did not appeal NNDC's refusal because they recognised that it had been "made outside the limited terms of section 192 of the Act, and there would be no jurisdiction to determine the appeal". Accordingly, NHL brought the present proceedings under CPR Part 8 seeking

<sup>16</sup> <https://www.localgovernmentlawyer.co.uk/litigation-and-enforcement/311-litigation-features/43562-section-106s-and-the-technical-traps-submission>

<sup>17</sup> *Lambeth LBC v SSCLG* [2019] UKSC 33

(i) a declaration that the continuing residential development of the land in question pursuant to the 2015 Permission was not subject to any of the owner's obligations contained in the Agreement; and (ii) an order requiring NNDC to remove any reference to the Agreement from the local land charges register within 28 days of the Court's judgment.

### The Judgment

Finding wholly in NHL's favour, the principal point in issue was whether the affordable housing obligations in the Agreement were expressly tied to the implementation of the 2012 Permission, as readily apparent from the definitions of 'Application', 'Development' and 'Planning Permission', whereas the development being implemented was under a separate and independent planning permission, granted through section 73 of the TCPA 1990, as to which the parties chose not to include the increasingly standard clause to the effect that the s.106 obligations were to remain binding. On NNDC's behalf it was submitted that the Supreme Court decision in *Lambeth* had made clear that a planning document, which includes a s.106 agreement, must be interpreted according to the natural and ordinary meaning of the words in their surrounding context, which includes the planning context. Accordingly, the 2012 Agreement was to be construed as applying to the 2012 Permission as varied. Failing that, these words were to be implied. The available evidence, namely NNDC's approval of reserved matters and the payments made under the Agreement were consistent with the Council's understanding that the Agreement continued to apply to the varied planning permissions.

Robustly dismissing that submission Mr Justice Holgate helpfully re-states the, hitherto, golden rules of construction of S106s, forged, after 20 years of consideration both by the House of Lords and the Supreme Court, and articulated most recently in *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Limited*

[2017] 2 WLR 1095. He also notes, citing *R (Robert Hitchins Ltd) v Worcestershire County Council & Worcester City Council* [2015] EWCA Civ 1060, that essentially the same principles as those set out above are applicable to section 106 obligations, whether a bilateral agreement or a unilateral undertaking. He further records, having referred to *Trump*<sup>18</sup> that there is nothing in the *Lambeth* decision either which alters the standard principles of construction for public documents as set out above.

Turning, specifically, to the "technical traps" argument that had appealed to Mrs Justice Thornton as one of the District Council's seven "arguable" points, Mr Justice Holgate trenchantly dismissed this First Issue as follows:

89. *Lord Carnwath mentioned at [20] a reference in the decision of the Court of Appeal to a suggestion that s.73 posed a "technical trap" for a local authority, in that the approval of an application nominally for the variation or discharge of a condition required the grant of a fresh permission. However, that notion of a "technical trap" played no part at all in the reasoning of the Supreme Court. They certainly did not suggest that planning documents should be interpreted so as to avoid or overcome the possible effects of a planning authority falling into any supposed trap.*
90. *I do not accept in any event that s.73 creates a technical trap for planning authorities. It is plain from the language of the legislation that (1) although the original permission remains intact whatever the outcome of the application, (2) if the authority decides to impose different conditions from those originally imposed, or no conditions at all, then a fresh permission must be granted. It is also obvious that a s.106 obligation is a freestanding legal instrument, which does not form part of any s.70 permission or s.73 permission, even though it may impose obligations in relation*

<sup>18</sup> *Trump International Golf Club Limited v Scottish Ministers* [2016] 1 WLR 85

*to development carried out under such a permission.*

91. *The Supreme Court did not lay down any interpretative principle that planning documents, whether a s.106 agreement or a subsequent s.73 permission, should be read so as to prevent landowners and developers from avoiding or side-stepping obligations which they have previously entered into. Ms. Dehon did not point to any authority which supports any anti-avoidance principle or presumption in the construction of planning documents.*
92. *In my judgment the language of the 2012 agreement is unambiguous and clear. It does not suffer from poor drafting. To the contrary, it has been carefully drafted by lawyers well versed in the preparation of such documents.*

Moving to the Second Issue, whether additional words should be implied into the Agreement, the Judge notes that, unlike in *Trump*, this case concerns a s.106 obligation rather than the conditions in a permission; but that the breach of a s.106 obligation may give rise to injunctive relief, and thereby to criminal sanctions for any contempt of court. Furthermore, a s.106 obligation runs with the land and may affect the interests of parties who were not originally involved many years later, as well as the general public and other public authorities and agencies. Having reviewed the relevant authorities, concluding with *Marks and Spencer plc v BNP Paribas Securities Services* [2016] AC 742, Mr Justice Holgate then highlights Lord Neuberger's clarification of the two key points. First, the question whether a term should be implied is to be judged as at the date when the contract is made. Second, the tests that a term must be "so obvious as to go without saying" or "necessary for business efficacy" are important to avoid any suggestion that "reasonableness" is a sufficient ground for the implication of a term.

The Judge then turns to discuss NNDC's implied wording which he observes that, despite his findings on the First Issue, would not contradict

the express terms of the Agreement. However, NNDC's arguments faced insuperable problems. First, it could not be said that without the implied language suggested by NNDC the Agreement lacked "practical coherence", or coherence for giving effect to development plan policies and planning control. Secondly, and, in any event, he did not accept that the reasonableness criterion was satisfied for a number of reasons. Here, the judgment helpfully identifies the "unintended consequences" of the interpretative approach urged by NNDC. These can be summarised as follows:

- a) Even if the parties to an agreement have expressed their obligations so as to apply solely to development under a contemporaneous permission, without any reference to a subsequent s.73 permission, they are to be treated as if they have agreed that the obligation should apply to development under all such consents.
- b) It would be necessary for parties who agree that performance of a s.106 obligation should be conditional upon the carrying out of a particular permission solely, to exclude s.73 permissions expressly in order to avoid the implication of NNDC's type of additional wording. For example, there may be cases where it is in the interests of the planning authority to confine any covenants which they are to perform to the carrying out of one particular permission, or to reserve their position as to what requirements would be appropriate if a further planning permission were to be granted at a later date e.g. there might be a change of policy before the original grant of permission is due to expire. He adds: "*The illusory 'technical trap' upon which NNDC has sought to rely in this case could actually become a real trap for other authorities, and indeed parties generally. As was stated in **Trump**, the Court should exercise great restraint and proceed cautiously*".
- c) When an original permission is granted for a large mixed use scheme, it is common

practice to use very broad language in the “grant” section of the consent to describe the project and to confine its detailed description to a condition requiring the development to be carried out in accordance with a list of approved drawings. In that way the drawings may be modified quite substantially by a subsequent permission under s.73, and there may be large changes in, for example, quantum of floorspace, without infringing the *Finney* principle. This undermines NNDC’s argument that the proposed implied language is reasonable because a s.73 permission cannot involve substantial changes to the development permitted. Even if in the present case the 2013 and 2015 Permissions granted did not in fact involve substantial changes, it has not been shown that, viewing the position as at the time of the Agreement, the development authorised under the 2012 Permission could not have changed quite significantly by the use of the s.73 procedure. NNDC’s implied terms would operate so as to apply the Agreement automatically to any subsequent s.73 permission, irrespective of the circumstances pertaining at the time of the subsequent planning application. The applicant would need to persuade the local planning authority to vary or discharge the s.106 obligation.

The Judge also highlights the other legal consequences, including the following:

- i) *Going back to the original decision on whether or not to grant planning permission, if the local authority were to be dissatisfied with the terms of the s.106 obligation offered by a developer, they could refuse permission and the developer would be able to test the reasonableness of that stance in a planning appeal;*
  - ii) *If, however, a s.106 obligation is treated as applying to subsequent s.73 permissions, the landowner may seek to persuade the local authority to vary or discharge the s.106 obligation in relation to a particular s.73*
- application. But the local authority might decide that although there is no reason to refuse to grant the s.73 permission sought, the s.106 obligation should remain unaltered. In that event, s.78 would not give any right of appeal to enable the merits of that issue to be determined independently. The landowner would not be able to apply under s.106A to modify or discharge the s.106 obligation for a period of 5 years from the date on which it was entered into. If, however, the proposed terms are not implied and there is a dispute when a s.73 application is being determined by the local authority as to whether existing s.106 obligations should be re-applied (whether at all or in some amended form) and the application is refused for that reason, the issue can be tested on appeal;*
  - iii) *As pointed out above, similar problems would apply to a local planning authority which has no good reason for refusing a s.73 application, but which could justify seeking a variation in the terms of a s.106 obligation only to find itself tied to an existing agreement by virtue of NNDC’s implied terms. In these circumstances, it would be unreasonable for an authority to refuse to grant a s.73 permission simply because the s.106 obligations treated by implication as applying to such a permission were no longer acceptable to the authority. The authority could not seek to “have it both ways”. Flexibility to deal with changes of circumstance or evaluation may be just as important to a planning authority as to a landowner or developer;*
  - iv) *The planning merits affecting what conditions if any should be imposed in the determination of a s.73 application are considered as at the date of that decision. The same approach should apply to the need for any s.106 obligation and its terms. There should be a contemporaneous decision on that point unless the parties have expressly agreed otherwise. That point should not go by default. It is a generally intrinsic feature of decision-making under the development control system;*
  - v) *The merits of what should be imposed in a s.73 permission may be connected or intertwined*



with the issue of whether there should be a related s.106 obligation and, if so, on what terms.

He adds: "Parties to a s.106 agreement (or a developer offering a unilateral undertaking) may choose to agree explicitly that the performance of the obligations created applies not only to the planning permission then being granted but also to any subsequent s.73 permission (or for that matter more broadly still). But if parties reach such an agreement, or a developer offers such an undertaking, they will have had the opportunity to take advice on the statutory framework and the legal implications of the promises they make. Applying the standard principles for the implication of language in legal documents, NNDC has not demonstrated why parties who have entered into an agreement without such explicit language should nevertheless be treated as having tied their hands in the same way in relation to the unknown content and circumstances of future s.73 applications."

### Concluding Remarks

NNDC is not known to give up the fight, easily, and, as evidenced by *R (Champion) v North Norfolk District Council & Anor* [2015] UKSC 52<sup>19</sup> can even receive the ultimate a judicial endorsement. Indeed, in the interest of expediency, unexpected outcomes can happen these days as, perhaps, in *Lambeth*,<sup>20</sup> Nevertheless, it is to be hoped that in a post- Pandemic world at least well-established principles of construction and interpretation of S106s will not now become one casualty of such expediency. Otherwise, some of the certainties, as we currently know them, will be forever changed and not necessarily for the better in the public interest.



### When is a new house treated as a new house for VAT zero-rating purposes?

**Andrew Tabachnik QC and Kelly Stricklin-Coutinho**



A long-standing exemption zero rates the supply of goods and services relating to the construction of a new house for VAT purposes. But when is a new house constructed? This question gives rise to no practical problem where a residential consent is implemented on a greenfield or

fully cleared site. But difficulty can arise where an existing house is re-developed in a dense urban environment, with heritage and construction complexities preventing the initial step of razing everything to the ground, before starting again from scratch.

Instructed by Meeta Kaur and Ricardo Gama at Town Legal LLP, we recently assisted a client overturn an adverse HMRC determination where just such problems had arisen. The client's site is located in a Central London conservation area. The planning authority required retention of the two façade walls on heritage grounds, as well as the two party walls, but permissions existed to remove the roof, "gut" the interior, and re-construct with an additional above-ground storey and a new basement. HMRC initially took the view that zero rating was inapplicable in circumstances where the construction sequence was as follows: (i) remove roof and erect temporary structure over site; (ii) demolish all internal parts of the building, but retain the first floor; (iii) construct new first floor, above the original one; (iv) remove the original first floor; (v) complete the consented

<sup>19</sup> On the discretion of the courts not to quash planning decisions where there had been some defects in the decision-making process when dealing with a challenge based on procedural error.

<sup>20</sup> See my previous articles footnoted above. In the author's view on *Lambeth*: "...., the scope of the single judgment by Lord Carnwath was specifically upon the question of interpreting planning permissions by the use of implied conditions i.e. implying words into a public document such as a planning permission. Furthermore, it was one of those cases which was highly fact-specific. Indeed, *Lambeth's* decision notice had undoubtedly been poorly drafted. It is also notable that the decision of the Supreme Court did not overtly overturn established case law or otherwise break new ground, as had seemingly arisen from *Trump* and only rejected the approach taken by the lower courts in respect to the interpretation of the actual wording used in the decision notice in question. Accordingly, it determined that a reasonable reader would have read the section 73 consent as being a simple variation of the original permission and, implicitly, subject to the conditions attached to that permission".

works. The reason for this construction sequence was to brace the retained facades, where external bracing had been banned by the local planning authority (due to narrow surrounding streets) and because interim internal bracing would have added substantial costs to the project. Focusing on the order in which the new first floor was installed before the old was removed, HMRC argued at first that there was no single moment when the existing building had (apart from the walls which were required to be retained) ceased to exist, and therefore it continued to exist.

Section 30(2) of the VAT Act 1994 ("VATA") provides that a supply of goods or services is zero-rated if the goods or services or the supply are of a description specified in Schedule 8. Item 2 of Group 5 of Schedule 8 sets out:

"The supply in the course of the construction of:  
A building designed as a dwelling or number of dwellings or intended for use solely for a relevant residential purpose or a relevant charitable purpose; or

...

Of any services related to the construction other than the services of an architect, surveyor or any person acting as a consultant or in a supervisory capacity."

Section 96(9) VATA provides that schedule 8 must be interpreted in accordance with its notes.

Note 16 to Group 5 of Schedule 8 provides:

"For the purpose of this Group, the construction of a building does not include:

- a) The construction, reconstruction or alteration of an existing building ...".

Note 18 to Group 5 of Schedule 8 provides:

"A building only ceases to be an existing building when:

- a) Demolished completely to ground level; or
- b) The part remaining above ground level consists of no more than a single façade or where a corner site, a double façade,

the retention of which is a condition or requirement of statutory planning consent or similar permission."

Retention of façade(s) is thus not an obstacle to claiming zero rating (and, for understandable reasons, the same is accepted as applicable to party walls, per HMRC's VAT Notice 708), so long as this "is a condition or requirement" of the consent. In our case there was no explicit condition to this effect, but consistent with a line of Upper Tribunal cases, HMRC accepted that the necessary obligation was implicit in a condition requiring adherence to approved plans, on which notations had stipulated retention of the walls.

This was not a case (of which the Upper Tribunal has seen a number) where (apart from the – specifically exempted – facades and walls) some part of the old building had been absorbed into the new. The determinative issue, therefore, related to the construction sequence adopted. On this, HMRC was persuaded that the new dwelling was to be regarded as a new building, and not an extended version of the old building. HMRC accepted that the opening words of Note 18(b) – "the part remaining above ground level" – referred to the remaining part of the "existing building". Thus, the "existing building" ceased to exist for relevant purposes when the final above-ground vestige of it was removed (apart from walls), with no part retained in the new building. And it was irrelevant that this occurred after the new first floor had been installed. This interpretation reflected a purposive construction of Note 18(b), taking into account the statutory encouragement for replacement dwellings, which incorporate no relevant works or components of the old.

This reading of Note 18(b) also gave effect to:

- The principle of tax neutrality. A tax is neutral if it avoids distortions of the market where inconsequential but different choices are made. Here, requiring the developer to proceed by way of expensive internal bracing to ensure every joist of the first floor was removed before the new installed would

distort the market for no discernible purpose.

- The principle of equity and fairness in taxation matters, which requires that those in materially identical circumstances should pay an equal amount of tax. Again, it would be illogical and would serve no useful purpose for the choice of internal bracing methodology to determine the level of VAT payable.

The net result is that the proper question to ask is whether, at the end of the project, any forbidden part of the old remains.

One further final point of interest for practitioners is worth mentioning. The developer proceeded by way of a number of separate planning permissions for works of “extension” to the existing building. Ultimately HMRC was persuaded that these permissions cumulatively amounted to a qualifying project, were not inconsistent with each other, and did not comprise an “extension” of the existing building. The developer may have found this aspect easier and swifter to navigate if it had chosen to proceed by way of a single umbrella consent, with a description of development that avoided potential misunderstanding.

## COMMUNITY CARE

### Adult Social Care: Covid-19 Winter Plan 2020 – 2021<sup>21</sup>

The following three short notes provide an overview of the Department of Health and Social Care (non-statutory) guidance issued on 18 September 2020. It applies to England only.<sup>22</sup>

The Guidance is aimed at Local Authorities (“LAs”), NHS organisations, care providers and the CQC. For LAs it should be read alongside the Adult Social Care Action Plan (April 2020),<sup>23</sup> updated Visiting Guidance (21 September 2020)<sup>24</sup> and ADASS guidance.<sup>25</sup>

The Government’s three overarching priorities for adult social care are described as:

- ensuring everyone who needs care or support can get high-quality, timely and safe care throughout the autumn and winter period.
- protecting people who need care, support or safeguards, the social care workforce, and carers from infections including Covid-19.
- making sure that people who need care, support or safeguards remain connected to essential services and their loved ones whilst protecting individuals from infections including Covid-19.

21 <https://www.gov.uk/government/publications/adult-social-care-coronavirus-Covid-19-winter-plan-2020-to-2021/adult-social-care-our-Covid-19-winter-plan-2020-to-2021>

22 Health and Social Care are devolved: Wales has published its own Winter Protection Plan for Health and Social Care 2020 to 2021 <https://gov.wales/winter-protection-plan-health-and-social-care-2020-2021>

23 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/879639/Covid-19-adult-social-care-action-plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879639/Covid-19-adult-social-care-action-plan.pdf)

24 <https://www.gov.uk/government/publications/visiting-care-homes-during-coronavirus/update-on-policies-for-visiting-arrangements-in-care-homes>

25 <https://www.adass.org.uk/cohorting-zoning-and-isolation-practice-commissioning-for-resilient-care-home-provision-sept-2020>



## Interplay with the well-being principles of the Care Act 2014

### Siân Davies

The key issue for local authorities is the need to manage a potential conflict

in terms of the wellbeing of both care home residents and those in the community with care and support needs as regards prevention of C-19, and the detrimental impact that prolonged periods without community access and visits from family and friends may have on their mental health.

The Winter Guidance addresses actions to LAs, care providers and the NHS as regards the former (pre-discharge testing, infection control measures in care homes, limiting staff movement between settings and PPE). On the latter, the DHSC states that it will distribute tablet devices to care homes that are in greatest need, so that care home staff can access remote health consultations for the people in their care. This will also support care home residents to stay connected with their families and loved ones. Technical and user support will be provided to set up the devices for use by care providers.

Social Prescribing (a bridge between health and social care) is addressed as a means of supporting those who are shielding, or who are in receipt of social care services, to maintain their independence by:

- conducting welfare telephone and/or video calls
- coordinating medication delivery or pick up with pharmacists
- facilitating community support (such as food and shopping)
- connecting people to support social and emotional needs, including through use of digital platforms
- supporting voluntary organisations and community groups to develop their virtual support

The reliance on digital support is understandable in current circumstances but fails to engage with the needs of those for whom remote contact, either with professionals or family members, is inaccessible or insufficient to meet identified needs.

On the issue of visits to those in care homes, the Winter Guidance refers to the (now updated) Visiting Guidance which requires a risk-assessment based approach to family members attending care homes to visit residents. Overall, the Winter Guidance is clear that the “first priority remains to prevent infections in care homes and protect staff and residents”.

The Guidance does not engage with the effect of this on the duty of a LA, in exercising functions under the Care Act 2014, to promote the well-being of an individual.

Well-being includes physical and mental health and emotional well-being, control by the individual over day-to-day life, participation in work, education, training or recreation, domestic, family and personal relationships and the individual's contribution to society [s.1(2)]. Under s.1(3), In exercising a function under this Part in the case of an individual, a local authority must have regard to the matters which include (a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being, (b) the individual's views, wishes, feelings and beliefs, (c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist, (d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances, (f) the importance of achieving a balance between the individual's well-being and that of any friends or relatives who are involved in caring for the individual and (h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised.

Many of these well-being factors are “in play” where an individual is in a care home or community setting and is restricted from access to friends, family, community resources and leisure/recreation activities. It is not difficult to see how those restrictions are capable of exacerbating existing mental and physical ill health.

The Winter Guidance makes clear that the Care Act easements under the Coronavirus Act 2020 are to be exercised only when absolutely necessary.

What is not addressed is the apparent inconsistency of prioritising infection control over potentially conflicting well-being factors under s.1 Care Act 2014.



### Winter Plan – implications for the right to respect for family and private life

#### Steve Broach

Throughout the Covid-19 pandemic, as set out above, there has been a significant tension between the imperative to protect the health of social care users (and the social care workforce) and the need to respect the family life and private life rights of those who might be subject to protective restrictions. At certain points in the pandemic, some local areas and institutions have implemented ‘blanket bans’ on visiting in a way which is likely to be disproportionate and therefore contrary to Article 8 of the European Convention on Human Rights. Where these measures are adopted or supported by public authorities, this will in turn breach section 6 of the Human Rights Act 1998, which requires public bodies to act in accordance with ECHR rights.

The Winter Plan continues the English government’s approach of treating decisions relating to restrictions on family and private life rights as a matter of local discretion. For instance, the ‘key actions’ section of the Plan includes the following: *‘local authority directors of public health should give a regular assessment of whether*

*visiting care homes is likely to be appropriate within their local authority, or within local wards, taking into account the wider risk environment and immediately move to stop visiting if an area becomes an ‘area of intervention’, except in exceptional circumstances such as end of life.’*

Importantly, the Plan states that *‘local authorities and NHS organizations should continue to put co-production at the heart of decision-making, involving people who receive health and care services, their families, and carers.’* This involvement should extend to the production of the winter plan which is required for each local area; the Plan states *‘local authorities must put in place their own winter plans, building on existing planning, including local outbreak plans, in the context of planning for the end of the transition period, and write to DHSC to confirm they have done this by 31 October 2020.’*

As such, it appears that it is a matter for local areas whether care home visits can continue generally through the winter of 2020-21, unless an area becomes an ‘area of intervention’ when visits should only be permitted at end of life or in other exceptional circumstances (the Plan later clarifies that end of life visits should be permitted *‘In all cases’*). The Plan is silent as to what the approach should be to visits in other settings, most obviously supported living settings. However, it can reasonably be assumed that the government expects a similar approach to be adopted to that in care homes.

The Plan goes on to state that *‘care home providers should develop a policy for limited visits (if appropriate), in line with up-to-date guidance from their relevant Director of Public Health and based on dynamic risk assessments which consider the vulnerability of residents. This should include both whether their residents’ needs make them particularly clinically vulnerable to Covid-19 and whether their residents’ needs make visits particularly important.’* Again, significant discretion is given to individual providers, who will need to ensure that any restrictions on visiting

placed on their residents and family members are proportionate. Providers are informed that *'Social workers can assist with individual risk assessments, for visits, and can advise on decision-making where the person in question lacks capacity to make the decision themselves.'* However this may prove to be a rather optimistic statement, given the limited capacity of many local authority adult social care teams.

There is a discrete section of the Plan, headed *'Visiting guidance'*. This section reiterates *'for avoidance of doubt'* that *'any area listed by Public Health England's surveillance report as an 'area of intervention' should immediately move to stop visiting, except in exceptional circumstances'* which would presumably include end of life visits as referred to above. However outside areas of intervention, the Plan is more permissive, stating *'we continue to encourage providers to find innovative ways of allowing safe contact between residents and their family members'*. The Plan cross refers to separate visiting guidance for care homes and supported living.

Care home providers are also given the following specific guidance on visiting in the Plan:

*'ensure the appropriate PPE is always worn and used correctly – which in this situation is an appropriate form of protective face covering (this may include a surgical face mask where specific care needs align to close contact care) and good hand hygiene for all visitors*

*limit visitors to a single constant visitor wherever possible, with an absolute maximum of two constant visitors per resident to limit risk of disease transmission*

*supervise visitors at all times to ensure that social distancing and infection prevention and control measures are adhered to.*

*wherever possible visits should take place outside, or in a well-ventilated room, for example with windows and doors open where safe to do so*

*immediately cease visiting if advised by their*

*respective director of public health that it is unsafe'*

It would perhaps have been helpful if the Plan acknowledged the human rights implications of restrictions on visiting for service users and their family members, and the need for such measures to be proportionate to the risks they are addressing in order to avoid a human rights breach. However it is undoubtedly welcome that the Plan does not provide any support for blanket bans on visiting in care homes, outside 'areas of intervention'. Still less is there any support in the Plan for local areas or providers imposing restrictions on service users leaving their care setting, otherwise than in accordance with the regulations on guidance on self-isolation as applies to the general population. It remains unclear though why a national Plan like this is focused solely on care homes, ignoring the reality that many social care service users (particularly younger people) will be living in supported living arrangements.

Finally, the private life rights of many disabled people (including their 'psychological integrity' or well-being) have also been negatively affected by the closure of many services. As such it is welcome that the Plan states (twice!) that *'local authorities should work with social care services to re-open safely, in particular, day services or respite services. Where people who use those services can no longer access them in a way that meets their needs, local authorities should work with them to identify alternative arrangements.'*



## Winter Plan: Impact on the Deprivation of Liberty Safeguards

**Neil Allen**

The Plan requires Directors of Adult Social Services and Principal Social Workers to

ensure their social work teams and partner organisations are applying, *inter alia*, the Mental Capacity Act framework, to review any systemic safeguarding concerns to date and ensure actions are in place to respond, and to support adult social care to apply statutory safeguarding guidance with a focus on person-led and outcome-focused practice.

Of particular relevance to DoLS is that all those discharged from hospital or interim care facilities to care homes, and all new residents admitted from the community, should generally be isolated in their own rooms for 14 days. This is required *regardless* of whether they have symptoms, and whether they have tested positive. The purpose is to minimise the risk to care home residents during periods of sustained community transmission of Covid-19 and accords with other updated [guidance](#). Everyone should be tested before being discharged from hospital to a care home and such discharge should not take place without the involvement of the local authority.

A similar 14-day isolation expectation is in place for hospital discharge to supported living settings or their own home. Care home visits are considered elsewhere but we note that constant visitors should be supervised at all times to ensure social distancing and should, wherever possible, take place outside or in a well-ventilated room.

The guidance recognises that “people with dementia or a learning disability, autistic people, and people experiencing serious mental ill health are likely to experience particular difficulties during the pandemic. This could include difficulty in understanding and following advice on social distancing, and increased anxiety. They may need additional support to recognise and respond to

symptoms quickly, and in some cases may be at greater risk of developing serious illness from Covid-19.” We anticipate that such “additional support” may require measures to ensure they remain in their bedrooms.

In addition to this guidance, the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 requires those testing positive, or a notified close contact of the same, must self-isolate for 10-14 days depending on the circumstances. Failing to do so without reasonable excuse is an offence, with the Regulations making no provision for those with impaired decision-making [capacity](#).

In these circumstances, does 14-days isolation constitute a deprivation of liberty for Article 5 ECHR purposes? Those with capacity will not be deprived of their liberty if they consent to their self-isolation. Those with capacity who refuse to self-isolate could, with reasonable force, be returned to their homes or another suitable place. As such, they are not ‘free to leave’ but – like guardianship – there is an absence of continuous supervision and control. The matter could, of course, be different if there was such supervision and control.

For those who lack the relevant capacity, and whose needs require continuous supervision and control, 14-day bedroom isolation seems to be more than a negligible period and accordingly would constitute a deprivation of liberty. It seems, therefore, that those lacking such capacity who are admitted to care homes – whether from hospital or the community – and are required to self-isolate for that period, with additional support required as a result of mental disorder to enable them to do so, ought to be subject to DoLS. Unless discharged from residential care, such safeguards are likely to be required in most cases beyond the 14-day period in any event. There has been a significant [drop](#) in liberty safeguards during the pandemic which must be addressed as we go through this Winter of increasing confinement.

## EDUCATION



### Registration cancelled Jennifer Thelen

In disability discrimination claims, the First-tier Tribunal has exercised a process of “registering” claims, whereby each act of discrimination raised is analysed. As part of that process, the Tribunal Judge will indicate what claims, under what sections of the Equality Act 2010 (the “Equality Act”), will proceed. Thus, if a claimant argues that he or she was discriminated against because a particular adjustment was not put into place, the First-tier Tribunal could review the claim form and issue a case management direction indicating that the incident in question was registered as a claim under the reasonable adjustment provisions of the Equality Act. Often, pursuant to registration, a First-tier Tribunal judge will indicate that a claim is to be treated one way (e.g. as a reasonable adjustments claim) even if it is pleaded another way (such as a claim for direct or indirect discrimination). Plainly the First-tier Tribunal has found this a useful case management tool in disability discrimination claims, where often the parties, and in particularly the parents, are not legally represented.

In *F v Responsible Body of School W*, Upper Tribunal Judge Ward considered the lawfulness of the registration process in disability discrimination claims.

In *F*, which concerned school exclusion, the First-tier Tribunal judge had registered a number of claims under s.15 of the Equality Act 2010 (“arising under” discrimination claims) but not a separate reasonable adjustments claim by way of “Case Management Directions on the Papers”. *F* applied to vary those directions. The directions were upheld by First-tier Tribunal Judge Lewis who stated that the reasonable adjustments claim was not sufficiently well-pleaded. *F* appealed.

The appeal was allowed. However, the import of the decision is its reasoning on the lawfulness of the Tribunal registration process. The concept of

“registration” is not set out in either the Tribunals, Courts and Enforcement Act 2007 or the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) rules made thereunder (the “HESC Rules”). Not surprisingly, then, the decision of Upper Tribunal Judge Ward focused on the legislation which underpinned the registration process to consider it and its lawful limits. Two provisions of the HESC Rules were particularly relevant: (1) Rule 5(1), which provided for wide case management powers for the First-tier Tribunal; and (2) Rule 8, which provided a power to strike out, which could only be exercised upon a finding of no reasonable prospect of success and following an opportunity to make representations. Ultimately, Upper Tribunal Judge Ward concluded that the registration power as exercised here was not lawful. In so finding, he noted that “the very uncertainty and ambiguity in what is involved in a refusal to register is a powerful indicator that, as operated, it is not lawful.” In particular it was not clear what test was being applied. If it was the test for strike out (no reasonable prospects of success) that was not stated. If further detail was required, there were other powers, such as the power to require a party to amend a document, which a First-tier Tribunal judge could exercise.

Further, here *F* was not given an opportunity to make representations on the issue on which his reasonable adjustments claim was ultimately not allowed to proceed, namely that it was insufficiently pleaded, because that point only emerged in the second order, the Order of First-tier Tribunal Judge Lewis. UT Judge Ward accepted that there was value in a judge providing “initial, provisional, guidance to the parties, not least in discrimination cases with their potential for multiple heads of claim”. To this end, a First-tier Tribunal Judge can lawfully make directions which:

- provide indicative guidance as to the Judge’s views of the issue in a case; or
- operate the strike out provision of the HESC Rules in accordance with their terms.

The Judge acknowledged it may be possible to operate, lawfully, a registration system “which may



have the effect of screening out some cases, or parts of cases which might, later in proceedings, have been the subject [of a strike-out application]". However, for such a system to exist, procedural safeguards would be required. What that system, and those safeguards, should be was a matter for either the First-tier Tribunal itself (e.g. by way of Presidential Guidance) or the Tribunal Procedure Committee.

While the relief provided – that the claim be registered with a claim for the inclusion of a reasonable adjustments claim – appears to resurrect the concept of “registration”, that plainly cannot be right given the language of the Decision. Rather, that language was likely chosen to simplify case management on the facts of this particular case, where only one aspect of the registration decision had been appealed.

## ELECTORAL LAW



### Mapping the Maze: A Practical Guide to Election Law by Tom Tabori

Gethin Thomas

#### The maze

A decade ago, the Office for Democratic Institutions and

Human Rights observed that UK electoral law is “*not suitable to conduct a 21st century election.*” The legal framework is fragmented and complex, with many key electoral law principles not having been modernised since they were established in 19th century legislation.

Regrettably, relatively little has changed. Despite efforts to reform electoral law, most notably and comprehensively by the Law Commission, the legal framework remains in desperate need of rationalisation and modernisation.

The Representation of the People Act 1983 (“the 1983 Act”) contains the bulk of the law governing the administration of UK Parliamentary elections and local government elections in England and Wales. The 1983 Act is derived from legislation which was enacted in the nineteenth century,<sup>26</sup> and as Lady Hale observed in *R v Mackinlay and others* [2018] UKSC 42 at para [4], ‘*some of the rules and concepts in that Act effectively date from Victorian times.*’

Since 1983, there has been a huge growth in new types of elections and local referenda, and a notable increase in the number of national referenda. These new species of elections are governed by separate pieces of legislation, which frequently adapted, and repeated, provisions of the 1983 Act. This has resulted in electoral law becoming ‘*voluminous and fragmented*’.<sup>27</sup> During the rapid growth of electoral law over the past 30 years, there has been no concerted effort to modernise and rationalise its structure or content.

<sup>26</sup> Ballot Act 1872 (from which the rules in Schedule 1 to the 1983 Act derive), the Parliamentary Elections Act 1868 (from which much of Part III of the 1983 Act derives) and the Corrupt and Illegal Practices Prevention Act 1883 (from which much of Part II of the 1983 Act derives); see *Parker’s Law and Conduct of Elections*, para 1.2.

<sup>27</sup> Law Commission, *Electoral Law: A Joint Consultation Paper* LCCP218/SLCDP 158/NILC 20 (2014), paras 2.6 to 2.7.

**The map**

A comprehensive and clear map to the electoral law maze has recently been published by Law Brief Publishing: *A Practical Guide to Election Law*, written by Tom Tabori of 39 Essex Chambers, with consultant editor, Timothy Straker QC (whose renowned reputation is unrivalled in the field, and who sits as an Election Court commissioner.)

*A Practical Guide to Election Law* provides an accessible survey of the electoral landscape, providing clear explanations of:

- a. The Electoral Commission and its regulates;
- b. The right to vote and registration;
- c. Election campaigns: agents, expenses and offences;
- d. Returning officers and their conduct of elections, and;
- e. Election petitions: principles and procedure.

Notably, and perhaps uniquely among the relatively scarcely numbered practitioners' texts, *A Practical Guide to Election Law* also insightfully discusses the right to free elections protected by Article 3 of Protocol No. 1 to the European Convention on Human Rights ("A3P1"). It provides a treatise of the rights protected and duties imposed by A3P1 as a separate field, so as to enable the reader to gain a proper understanding of this important body of law which overarchingly influences, directly or indirectly, cornerstones of electoral law: the franchise, and right to challenge an election result.

Moreover, *A Practical Guide to Election Law* collects and analyses the many reform proposals, both adopted and awaiting adoption, which may and will soon result in significant changes to the law. These reform proposals have been made from an array of sources, including a number of Parliamentary select committees. They are coherently drawn together, and presented in a typically digestible manner in the final chapter of the book. In particular, shortly before going to print, the Government recently stated its agreement to the proposal, made both by the Electoral

Commission and the Law Commission, to bring the archaic election petition process within the normal court process, so as to increase its accessibility.

Despite the range of reform proposals made over the last decade, the complexity of electoral law appears likely to persist. However, as the legal framework which effectively governs and protects the democratic process, it is of fundamental importance that it is understandable. *A Practical Guide to Election Law* lucidly contributes to that crucial end.

More information is available [here](#).

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Andrew has a versatile and wide-ranging practice, specialising in cases of complexity, and encompassing (in particular) planning and compulsory purchase; and disciplinary and regulatory law.

He has been a Recommended Silk and Junior in all the above areas from 2009 to date in Chambers & Partners and the Legal 500. To view full CV [click here](#).



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Parishil regularly acts and advises local authorities in a number of areas: procurement and PFI disputes, local government finance, community care and the public sector equality duty.

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John specialises in planning with related compensation, environmental, local government, parliamentary and property work. He is the General Editor of Shackleton on the Law of Practice and

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Neil regularly undertakes work for Local Authorities, typically in the Court of Protection but also in respect of matters arising under the Mental Health Act 1983, including displacement of nearest relatives

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Siân has experience in advocacy, advice, and drafting in public law matters, across the full range of legal issues encountered by adult social services, children's services and housing departments. She also

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Jennifer was instructed in the case of *Davis v London Borough of Brent*, a seven-week trial in the Chancery Division, on behalf of the local authority, in a fraudulent conspiracy claim involving a maintained school, which resulted in High Court findings of breach of fiduciary duty in respect of the head master and two ex-governors, as well as a finding of misfeasance in public office against the two ex-governors. The case was notable for its finding that section 49(5) of the School Standards and Framework Act 1998 gave rise to a fiduciary relationship between the head and governors, and the local authority. Jennifer regularly advises local authorities regarding education matters, including special educational needs, and appears on their behalf at First-tier Tribunals, Upper Tribunals and in judicial review challenges, including a recent challenge to special school reorganisations. She is also regularly instructed by local authorities in employment and freedom of information/data protection matters. To view full CV click here.



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