

LOCAL GOVERNMENT

Welcome

Welcome to the spring issue of **Local Government**, our bulletin in which we aim to keep you informed of current issues and news in local government.

For further information on any of the topics covered in this issue of **Local Government**, please contact **Gary Soloman** on **0117 902 2791** or email: **gary.soloman@burges-salmon.com**

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The Remedies Directive - what Local Authorities need to watch out for

Implementation of the Remedies Directive (the "Directive") in relation to procurement is being received with concern by local authorities and is being welcomed as an opportunity by contractors. This is because the Directive increases the administrative burden for local authorities in complying with the procurement rules and increases the sanctions for non-compliance for contracting authorities and implements changes which put a contractor in a better position to bring a procurement challenge.

The changes include new requirements for information under the standstill provisions, the possibility of setting aside a completed contract, fines and automatic suspension of the tender award procedure on issuing of legal proceedings.

The Directive applies to those tender processes commenced on or after 20 December 2009. The good news for local authorities is that tender processes advertised in the Official Journal or contracts which have been the subject of negotiations between a local authority and a provider prior to 20 December 2009 are unaffected by the changes and the old remedies regime will continue to apply. Certain contracts, such as contracts below the procurement thresholds, concession contracts and contract for Part B services are also unaffected.

Most of the risks of the so called sanction of "contract ineffectiveness" arise out of choice of procedure or inadequacies in the debriefing process. For example entering into a direct contract in breach of a requirement to advertise and tender the contract, failing to properly serve a standstill notice in conjunction with a material breach of the procurement rules or improperly calling-off a contract under a framework agreement.

In most circumstances, it will be relatively easy for local authorities to mitigate their risk and avoid the application of the Directive by:

- ensuring compliance with the duty to tender;
- providing as much information as possible on the decision making process under the standstill notice



(subject to the limits of commercially confidential information); and

- calling-off contracts in accordance with framework arrangements.

Nevertheless, there are a number of situations where local authorities could inadvertently fall within the scope of the Directive. For example, the unjustified use of the negotiated procedure or the carrying out material variations to an existing contract which are deemed to amount to the award of a new contract, could result in the award of an illegal direct contract. If any of these circumstances are envisaged, local authorities are recommended to undertake a risk audit and if necessary take legal advice.

For further information on this subject please contact Stephanie Rickard on 0117 902 6682 or by email stephanie.rickard@burges-salmon.com

Outdoor events - contractual issues for Local Authorities to consider



Outdoor events range in size and character from very large festivals to smaller family orientated events. Local authorities may deal with applications from potential event organisers, but what about when the local authority is the one "putting on" an outdoor event?

There are many important issues to consider when organising an outdoor event which will impact on whether it runs safely and smoothly, ranging from health and safety to road closures, to noise and light nuisance issues. One

area that is sometimes overlooked is that of the contract governing the relationship between the artist engaged to perform or appear and the venue owner or promoter. Where a local authority is organising an event, it is the local authority who may be needing to contract with a performer, service provider or with a promoter.

Set out below are ten top tips to bear in mind when dealing with a local authority/performer relationship:

1. <i>Where and when</i>	It sounds very simple, but it is essential that an artist knows the exact location, date and time of their performance.
2. <i>The 'performance'</i>	What the artist will actually be doing! A local authority may also want to make specific requirements of the artist, for example, in relation to thanking sponsors, wearing suitable clothing, using suitable language and so on.
3. <i>Agent/Management involvement</i>	Local authorities will need to ascertain if the contract is to be with the agent or the artist themselves.
4. <i>Cancellation</i>	Contracts should anticipate cancellation occurring due to poor ticket sales, lack of sponsorship, bad weather and artist withdrawal. The contract might also stipulate that it is not to become binding until certain payments are made (like a deposit) so it is important therefore to check that the artists become "bound" as soon as possible.
5. <i>Payment/ Compensation</i>	You may wish to consider fixed fees, percentage of ticket sales and so on. If sales are going badly a local authority may wish to discount tickets but the artist's permission may be required before this can be done.
6. <i>The Rider</i>	Local authorities will want to ensure there are no extravagant requirements that they cannot comply with.
7. <i>Equipment</i>	The contract must deal with issues such as whether the local authority is providing the necessary equipment and staff or whether the artist will bring their own.
8. <i>Publicity, Advertising, Recording</i>	The local authority, especially if a performer is high-profile, should reserve the right to use the performer's name and/or image for event advertising and promotion.
9. <i>Licensing and Royalties</i>	The contract should ensure that a performer has the necessary licences (or at least permission) for performing copyright material or for selling merchandise.
10. <i>Insurance and Indemnities</i>	Insurance and who will be responsible for personal (death or personal injury) liability and property insurance issues should be considered. The contract should also deal with insurance of equipment and indemnities from the performer covering them for personal injury to event-goers.

There are evidently numerous contractual issues that must be considered when organising an outdoor event and it is hoped that this article has helped varied authorities on what some of those issues are.

If you would like further information on any of the issues raised in this article or assistance with any

other licensing or gambling issues, please contact Chris Pritchett, Head of Licensing and Gambling at Burges Salmon LLP, on 0117 902 6684 or by email at chris.pritchett@burges-salmon.com, or Joanne McPherson, Solicitor on 0117 902 7257 or by email at joanne.mcpherson@burges-salmon.com



Local Government Pension Scheme: South Tyneside

The Court of Appeal decision in *South Tyneside MBC v. the Lord Chancellor* has established that employers cannot be made to contribute to the Local Government Pension Scheme (LGPS) if they no longer have employees who are active members. This has major implications for the funding of LGPS liabilities that relate to such employers.

Employer Contributions

Employees within the public and private sector may be eligible to participate in the LGPS if their employer is a public sector body or a private sector body admitted to the LGPS under an "Admission Agreement" (for example following an outsourcing).

Throughout the period the employer has an active member (meaning employees accruing pension) in its employment, it will be liable to pay contributions to the LGPS.

However, as a result of *South Tyneside*, when an employer ceases to employ any active members, it will no longer be liable to make any contributions to the fund.

The LGPS (Administration) Regulations 2008 provide that each "employing authority" must contribute to the appropriate LGPS fund at the rate determined by the fund's actuary. In its decision the Court of Appeal determined that only employers who employ active members are "employing authorities" and are liable to contribute to the LGPS.

Therefore, when an employer ceases to employ any active members, *South Tyneside* would apply to extinguish its liability to contribute.

This may arise, for example, if the employees of a public sector employer are transferred to another (for instance by reason of merger or amalgamation) or when the underlying contract with a private sector employer is terminated causing its Admission Agreement to expire (although there are separate deficit recovery provisions for private sector contractors which need to be considered).

As a result, LGPS funds may become exposed to the financial risk of employers withdrawing from the LGPS.

For other employers in the fund the effect of *South Tyneside* may be such that they become liable for the shortfall of an exiting employer.

To identify and resolve the issues that the decision of *South Tyneside* may create, we are advising administering authorities of LGPS funds and public sector employers to check the terms of any "transfer agreements" concerning Government reorganisations or any Admission Agreements with private sector contractors.

For more information on this subject please contact Michael Hayles on 0117 939 2248 or by email michael.hayles@burges-salmon.com

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Compulsory Purchase and the world of the Planning Assumptions

In *Transport for London v Spierose* the House of Lords considered the application of the statutory planning assumptions under the Land Compensation Act 1961 ("the 1961 Act") and whether there was a lacunae in compulsory purchase legislation which it ought to fill through judicial interpretation and the application of the "no scheme rule" (also known as the *Pointe Gourde* principle).

In summary, Spierose owned industrial premises which were acquired compulsorily by Transport for London. Public notice of the proposed compulsory purchase was given in 1993, but possession of the site was not taken until 2001 (the relevant valuation date). Spierose applied for a Certificate of Appropriate Alternative Development (CAAD) in 2003 but the local authority made an error when granting the CAAD as it considered the application on the basis that the relevant date for determining it was the valuation date (i.e. 2001) rather than the date the notice of the compulsory purchase was published (i.e. 1993).

On the facts, it seems that the CAAD was very unlikely to have been granted if consideration has been based on the correct date of 1993. Despite this, the Tribunal found that, on the balance of probabilities, planning permission would have been granted at the valuation date and that the land should therefore be valued on the certain assumption that it benefitted from planning permission for mixed use development at that time, so that Spierose could realise the full development value of the site. This decision was subsequently upheld by the Court of Appeal.

The Court of Appeal's decision was overturned by the House of Lords. The Lords stated that this went beyond the statutory assumptions and it is not for the Court to try to correct the statutory code in accordance with its perception of what is fair. This would amount to judicial legislation. Once a finding has been made on the balance of probabilities (i.e. not certainty) that permission for mixed use development would have been granted at the valuation date, the land should have been valued on the basis of "hope value". If Spierose had been able to obtain a Section 17 Certificate confirming that in autumn 1993, planning permission would have been granted, then the statutory assumptions would have converted this into a certainty of planning permission for valuation purposes. It was not appropriate for the Court to interpret the no scheme rule so as to apply a different date for determining the CAAD Application than is provided for in the legislation, so as to correct an anomaly which arises on the particular facts of the case.



Helpfully, for local authorities, the decision in this case has effectively curbed the use of the no scheme rule and makes clear that it is not open to valuers or the Court to apply their own planning assumptions over and above those contained within the compulsory purchase legislation. Unless one of the statutory planning assumptions under Section 16 of the 1961 Act applies or a CAAD has been obtained under Section 17, the valuation should be made on the basis of hope value only and not a certainty that planning permission would have been granted.

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Local Authorities and the Carbon Reduction Commitment



“it is essential for all local authorities to start preparations for the CRC as soon as possible.”

The Carbon Reduction Commitment Energy Efficiency Scheme (CRC) is a mandatory UK emissions trading scheme that will apply to non-energy intensive public and private sector organisations from April 2010. Generally, public sector organisations designated as a public authority under the Freedom of Information Act 2000 will be required to participate where their electricity consumption through half hourly meters for the 2008 calendar year was over 6,000 MWh (approximately a £500,000 electricity bill).

Obligations and costs

Local Authorities that are required to participate in the scheme will have to calculate their emissions from static energy use (which includes electricity, gas and other fuels but excludes most transport related emissions), fulfil reporting obligations, purchase allowances corresponding to their emissions, and surrender the allowances at the end of each scheme year. These obligations will have a variety of cost consequences for the organisations covered by the CRC.

Revenue recycling to participants will occur six months after the government allowance purchase auctions and will vary depending on ranking in a published performance league table. Ranking in the performance table will be based on certain performance metrics – organisations could receive more or less back than they pay for their allowances depending on where they find themselves placed in the performance league table.

Determining responsibility

Obligations arising from the CRC will fall on the organisation that is responsible for energy supplies. An organisation will be the responsible party where it has entered into an agreement for supply and pays for such supply, receives energy under that agreement, and (for electricity and gas) that energy is measured by fiscal meter. In addition to supplies that local authorities will be responsible under the above test, local authorities will need

to include emissions from both state-funded schools that they maintain, and Academies and City Technology Colleges in the area which the local authority exercises educational functions. The emissions of any police or fire authorities legally part of a local authority will also be the responsibility of that authority.

In the case of PFI schools, differing rules may apply when the PFI SPV is responsible for the school's energy supply. Where the majority owner of the SPV is a private undertaking, the SPV will participate with its parent and responsibility for the CRC emissions of the school will reside with that parent. Should a local authority be the majority shareholder and the SPV meets the inclusion threshold, the SPV will be responsible for the CRC emissions of the school and it will be required to participate in its own right.

What to do now

It is essential for all local authorities to start preparations for the CRC as soon as possible, if they have not done so already. Such preparations should include determining the boundaries of the local authority for the purposes of the CRC; identification of responsibility for the energy supplies to the local authority and other organisations falling within the authority's responsibility; ensuring systems and processes are put in place to collate the information required for compliance; budgeting for the purchase of allowances; and considering tenancy agreements, service contracts outsourcing and the implications of the CRC on any projects, PFIs and transactions.

Burges Salmon has been advising a wide range of public and private sector organisations on the CRC.

If you have any questions or would like more information or updates on the CRC please contact Lucie Drummond on 0117 307 6906 or email lucie.drummond@burges-salmon.com

Appropriation - an alternative to compulsory purchase



Notwithstanding recent case law clarifying aspects of the process, compulsory purchase remains a complex area of the law which can be procedurally time consuming and expensive. This article is a reminder of a companion, or possible alternative, to CPO.

Section 237 of the Town & Country Planning Act 1990

Section 237 provides planning authorities (and those deriving title from them) with the power to override easements and similar rights over land that they have either acquired or appropriated for planning purposes. This can remove the need to acquire third party rights and may reduce the risks of not having "clean title" (often cited as one of the key benefits of CPO).

Procedurally, Section 237 has a number of advantages compared to compulsory purchase. There is no requirement to notify parties whose rights are to be overridden. Nor is there any requirement to advertise or otherwise publicise the intention to utilise s.237. Significantly, there is no provision for objections to be lodged or for any form of inquiry or hearing to take place (although a third party right holder would still have the ability to go to Court to obtain, for example, an injunction). Third parties do have a right to compensation, which will be assessed on the

same basis as if their rights had been CPO'd. The compensatory burden under Section 237 should be no more, and may be significantly less, than in instances where the full compulsory purchase procedure is used.

There had been some dubiety as to whether Section 237 could be relied upon to over-ride rights to allow for the ongoing use of land, or if it only applied to the initial construction works. Section 237 was amended by the Planning and Compulsory Purchase Act 2004 to make it clear that it applies to both the initial construction works and ongoing use of land. It is therefore a very wide power.

There are limitations on the exercise of the powers under Section 237 which mean it will not be appropriate in every case. It can only be used where the relevant planning permission has already been granted, and cannot be used to create new rights or override rights exercised by statutory undertakers in the carrying out of their functions. That said, it is something that should be kept in mind by local authorities and their private sector development partners, especially in the context of urban regeneration schemes.

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Local Government at Burges Salmon

Burges Salmon's Local Government Group comprises specialist public sector/local government practitioners (including ex-local authority lawyers) who are well versed in the law, practice and procedures of local authorities. Being a cross departmental team, it is able to draw support from a number of the firm's specialist practice areas, including planning, environment, property, procurement, commercial and corporate.



For further information about the specialist local government advice and assistance which Burges Salmon can provide, please contact **Gary Soloman** on 0117 902 2791 or email: gary.soloman@burges-salmon.com.

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