ConsortEM

The newsletter for EM LawShare
Winter 2014

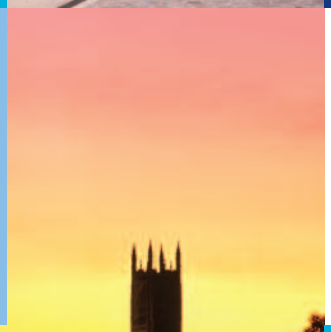
02
Welcome

04
"Fit for the Future" – Conference 2014 report

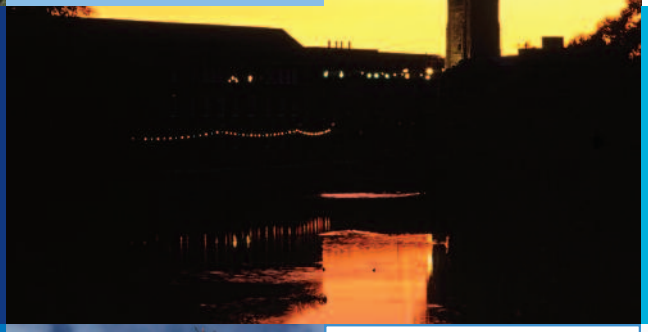
05
Spotlight on Lyn Sugden Gedling Borough Council

06
Christmas quiz

07
The 3 circles of "L"- Libraries, Lincolnshire and Lawyers Reflections on the Draper v Lincolnshire case
by Stephen Pearson



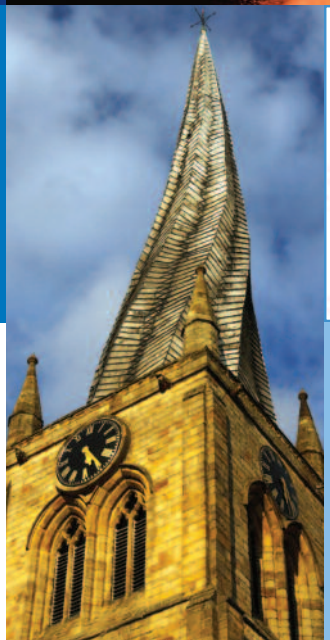
08
Public procurement New regulations bring a few surprises
by Mark Johnson



10
Avoiding negligent disciplinary hearings
by Sarah Lamont

12
Proposals for planning reform – potential changes to permitted development rights
by Denise Stephenson and Rachel Hey

14
Property in practice Practical implications of the Anti-social Behaviour Act 2014
by Jane Plant



EM LawShare
emlawshare.co.uk

16
Election advantage as an irrelevant consideration or improper purpose
by Tony Child

18
EM LawShare training programme 2014/2015

Welcome

Welcome to the winter edition of ConsortEM. We are glad to report the October conference was "a great day" with over 150 attendees. St. George's Park came in for particular praise. The feedback is best summed up by one delegate who commented, "like attending an SLG weekend in a day but without the expense and loss of three days" (see page 4).

We realise that members are increasingly reliant on IT to keep up to date with the mass of new legislation and case law. As such, we have been in discussions with the two leading online suppliers of legal knowledge, Thomas Reuters and Lexis Nexis. Your lead officers have received from Stuart details of an interim offer from Thomas Reuters for their online resource Practical Law. By mid-January, we anticipate that we will have sent out discounted offers from both suppliers on their full range of online resources including: Practical Law, Westlaw, Lawtel, Lexis Library and Lexis PSL Guidance.

As you will see from the article in the 'Members News', we are also making progress with our precedent bank and the revamp of our website. This now incorporates a recruitment page on which you can advertise vacancies for free.

We believe these innovations, and the continuing willingness of our six partner firms to develop added value, have contributed to our continuing growth. The breadth of EM LawShare's appeal is perhaps best illustrated by our two new joiners, Sheffield City Council and Pilsley Parish Council.

In a time when the legal profession is perceived as increasingly specialised, it is welcoming to be reminded by Lyn Sugden (see Spotlight on page 5) that most local authority lawyers, especially at district councils, need to be a jack of all trades. A role that is not only a necessity but also part of the appeal of the job. Long may it continue!

Merry Christmas to you all.

JAYNE FRANCIS WARD
Chair of the EM LawShare Management Panel

STUART LESLIE
EM LawShare Coordinator
sl.emlawshare@yahoo.com

Welcome to our new EM LawShare website

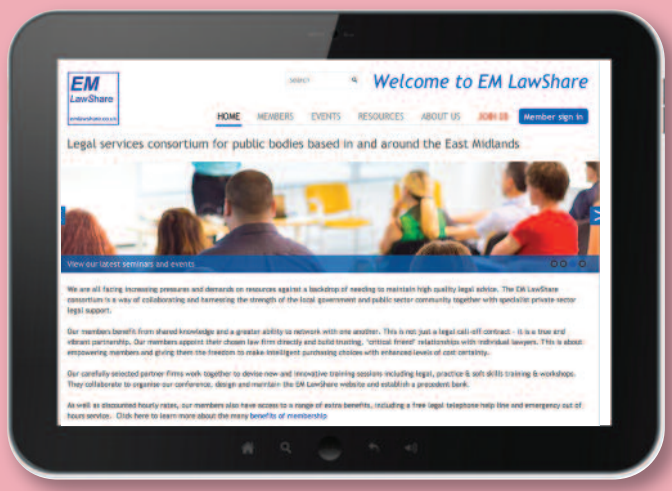
We enjoyed meeting you all at the recent EM LawShare Conference 2014, and hope you have had an opportunity to have a look at the new EM LawShare website since then.

It has lots of new benefits for members including articles, guides and training notes, details of our training programme, online booking form, and useful links to the secure members only area.

All panel firms continue to work hard on ensuring the website is a beneficial resource to members by continuously adding new and interesting content, so please keep popping back to visit us at www.emlawshare.co.uk.

Advertise your vacancies for free
Our new recruitment page is live and ready for your legal job vacancies. Simply email our website administrator at senara.shapland@brownejacobson.com with the job vacancy title, public authority name, authority logo, job location, salary, link to application web page and the application deadline. Advertising your vacancies is absolutely free.

More new developments
We are now looking forward to our next big project, the development of the secure members only area. This will provide greater user-friendliness, easier navigation from the public site and more features exclusive to EM LawShare members, including blogs and a members only forum. Look out for the new secure site early in the new year!



Members news

Update on EM LawShare precedent bank

The results of the survey on the EM LawShare precedent bank are now in. We had a great response, with over 60 EM LawShare members taking the time to give their views.

The results are very positive, with almost all welcoming the idea. We now plan to take the next step and have a trial run with sample documents. It is important that the precedent bank is designed to meet your needs, which is why we will be giving you the opportunity to test it for yourself. You will also be invited to take part in a survey where you can give us your feedback.

The partner firms are currently in the process of preparing sample precedents, which will be placed on the EM LawShare website with suitable search tools. We are planning to start the trial run in January, when we will send you a notification that it is online.

If you have any other suggestions, please contact Stuart Leslie, sl.emlawshare@yahoo.com or John Riddell of Weightmans, john.riddell@weightmans.com.

In the meantime, thank you for taking the time to answer the survey and for your continued support.

Spend by members

In 2013 and 2014, members spent just over £2.7 million, not including VAT and disbursements, on legal advice and services from our then, five partner firms. For the first time, in this - the last year of a four year framework agreement, county councils were not the biggest spenders.

This 'honour' went to unitary and metropolitan councils who spent just over £1 million, followed by district councils who spent just over £700,000. The county council spend being just under £500,000. Over the life of the four year agreement from 2010 to 2014, the total spend was £10.2 million.

If you would like more details on your organisation's spend in 2013 and 2014 please email **Stuart Leslie at sl.emlawshare@yahoo.com.**

EM LawShare welcomes new members

Since our last newsletter we have had five new members:

Doncaster Children's Services Trust

Sheffield City Council

Old Bolsover Town Council

Warwickshire County Council

Pilsley Parish Council

This now brings our total membership to a fantastic 81. This includes:

- 41 district councils
- 13 unitary/metropolitan councils
- 8 county councils
- 4 fire and rescue authorities
- 2 NHS Trusts
- 3 ALMOs
- 2 town councils
- 2 parish councils
- 1 children's trust
- 5 miscellaneous.

To see a full list of members please visit our website: www.emlawshare.co.uk

" Fit for the Future" 2014 Conference report

Are you " fit for the future" ? The main theme of EM LawShare's biennial legal conference explored a creative and innovative approach to overcoming the challenges of providing cost effective, efficient and customer focused public services from the legal perspective. Over 150 delegates attended from local authorities and the legal panel.

The focus of the conference, organised and produced by Geldards LLP this year, was on developing and maintaining "fit" public services in the context of a period of rapid change and a challenging funding environment. The sessions ranged from delivering value through partnerships; analysing public procurement after the rules change; implications of data protection for local authorities; re-shaping public services through mutual and employee-led spinout companies.

The biggest shakeup for local government and the NHS for a generation has raised issues for local authorities. A session covering this asked "How can lawyers help their council most?"

The sporting home of St. George's Park in Burton, was the perfect setting for Graham Taylor (former England, Watford, Aston Villa and Lincoln City Manager) and Sam Rush's (ex-City Lawyer and Derby County CEO) session on "Building a team for optimum performance".

Pictured: (Left to right) Colin Gibson (ex BBC journalist), Jayne Francis-Ward (Nottinghamshire County Council), Graham Taylor (former England, Watford, Aston Villa and Lincoln City manager), Sam Rush (President and CEO, Derby County FC).

Jayne Francis-Ward (EM LawShare Management Panel Chair, Corporate Director and Monitoring Officer of Nottinghamshire County Council) said:

"The conference was a tremendous success. It was a visible demonstration of the partnership between the councils and the firms which distinguishes EM LawShare from traditional panel arrangements. Delegates were able to meet colleagues, get high quality legal training and CPD points, be challenged with new ways of working and take back information and ideas to their authorities".

The EM LawShare consortium, originally launched in 2006, spearheaded the drive to deliver efficiency and cost savings to local authorities buying legal services. Working with its six legal partner firms, the consortium delivers efficiencies and improved service through a range of factors including partnership working, added value services and multi-million pound savings achieved through bulk purchasing power. The consortium has

now grown to 81 members and includes a range of local authorities, housing associations, police and fire authorities and ambulance trusts. The most recent to join is Sheffield City Council. The six partner firms are:

- **Bevan Brittan**
- **Browne Jacobson**
- **Freeth Cartwright**
- **Geldards**
- **Sharpe Pritchard**
- **Weightmans**

Spotlight on...

There are many organisations within EM LawShare and we like to highlight one in each edition of ConsortEM by putting a member in the spotlight. This month, Lyn Sugden discusses how EM LawShare is a valuable source of training and support.

Lyn Sugden, Assistant Solicitor at Gedling Borough Council

How long have you been with Gedling Borough Council?

Over nine years - although it can, on occasions, seem longer than that!

What does your role entail?

My background is civil litigation, so anything in that line comes to me. All of us do non-contentious work too and stand in for colleagues when necessary. It is the variety of work that makes working for a small authority so interesting.

I am also keen to promote learning and development. I studied for my degree part-time as a mature student, qualifying aged 43, and benefitted enormously from the support of my employer at the time. I am keen to give that same support to others.

As such, I give internal training to officers and members and am an enthusiastic supporter of the training programme run by EM LawShare. I volunteered when EM LawShare first started and am encouraged by its growth. It is great to see such a varied programme making use of the talents of the partner firms. I am sure there are many talented employees in local authorities who could also be persuaded to contribute!

Who do you report to? What is the structure of your team?

I report to the senior solicitor and above her, the council solicitor and monitoring officer. Our team is small, which is quite usual for a small local authority.

Other than the above roles which are full time there are a number of part-time employees, so we have to work closely together as a team and be prepared to do almost anything at a moment's notice.

Have you thought about doing anything other than law?

Law was not my first choice. I was an insurance broker before changing course and taking a law degree. For the last four years, as well as my day job for Gedling, I also work part-time as an assistant lecturer in public law and criminal law with the Open University. For the moment, I am happy combining the two things I love – law and learning.

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

Planning challenges!

How does Gedling Borough Council compare to other places you have worked?

Other than working for a county council for a short period as a locum this is the only public authority where I have worked, so comparison between authorities is difficult. I think the fact that I have been here for almost 10 years demonstrates that I am satisfied with my lot. I do prefer the variety of work here to that in private practice, which was all civil litigation.

What law would you like to see changed?

I am following the progress of the Assisted Dying Bill through its various stages and the proposed amendments. I have been affected over the past few years by losing several close friends and relatives to cancer. I hope this bill will become law in a way that gives some comfort to those faced with a prolonged and painful death. Even if they do not wish to take advantage of the provisions, at least it gives people a choice.

To volunteer for a future edition of Spotlight, contact amoy@sharpepritchard.co.uk or sl.emlawshare@yahoo.com

Facts about Gedling Borough

- Gedling Borough was formed in 1974 when the Arnold and Carlton urban districts in Nottinghamshire were merged.
- The borough covers the Greater Nottingham area, including the suburbs of Arnold and Carlton, as well as rural villages such as Calverton and Woodborough in north Nottingham.
- Gedling Borough is home to almost 112,000 people and covers an area of 46.3 square miles.
- It is covered by two parliamentary constituencies: Gedling and Sherwood.

Christmas quiz

To celebrate this special time of year we are offering you the chance to win a bottle of champagne. All you need to do is answer the following festively themed questions correctly and you will be entered into our prize draw.

1. Which of Santa's reindeers has a name beginning with 'B'?
2. The Christmas tree in Trafalgar Square, London, is traditionally given by which country?
3. Which Christmas plant has the Latin name 'Hedera'?
4. Who wrote the novel 'A Christmas Carol'?
5. St. Stephen's Day is also known as what in the UK?
6. On the fifth day of Christmas, what did my true love give to me?
7. The Royal Family spend Christmas at which estate?
8. Who composed the carol 'Silent Night'?
9. What three gifts did the wise men give to baby Jesus?
10. The film 'Miracle on 34th Street' is set in which US city?
11. It is tradition to kiss under what kind of plant at Christmas?
12. Who made eating mince pies illegal in 17th century England?

Please send your answers to sl.emlawshare@yahoo.com by Monday 8 January 2015.

We will announce the winner in the next edition of ConsortEM.

The 3 circles of "L"- Libraries, Lincolnshire and Lawyers

Reflections on the *Draper v Lincolnshire* case

We are seeing an increasing amount of judicial review challenges to decisions made by local authorities. In spite of new limitations that make it harder to bring an action, over the last five years the number of cases being brought before the courts has doubled - although many of these fail at the 'permission' stage.

A popular ground of challenge has been that of inadequate consultation and/or a failure to comply with the section 149 Equality Act 2010 public sector equality duty. The recent case of *Draper v Lincolnshire County Council* in the High Court has added to this concern with regard to the reception of expressions of interest; pursuant to the rights granted under the Localism Act 2011, which makes this case particularly interesting for local authorities.

The background to the case is not unusual. Lincolnshire County Council, traditionally regarded as already lean, is looking to cut back the provision of library services heavily. This incorporates a reduction of the current 44 static libraries to 15 – this in one of the largest and most rural counties in the country. The process was challenged by three applicants, one of whom was a Mr Draper, but also certain other parties.

As might be expected, the council extensively consulted community groups and parish councils on the need to achieve savings as part of their £125 million budget cut. The consultation process made use of the services of a university that had the role of collating and summarising the outcome of the process to the council. However, a challenge was received by, among others, Greenwich Leisure Limited who are an organisation originally formed from the London Borough of Greenwich but which now operates a number of leisure and library facilities across the country.

Greenwich Leisure submitted an expression of interest stating that they could, by taking over the county's library services, achieve a reduction in operating costs, an increase in income and a reduction in management support costs. The county council rejected their application stating that *"they only provided limited detail on how the management and operation would work in practice".*

An important point is that because Greenwich Leisure is a mutual not-for-profit organisation, it falls within the designation of 'relevant bodies' from which local authorities are required to consider expressions of interest under section 81 of the Localism Act 2011. Section 88(2) also requires councils to have regard to guidance issued by the Secretary of State, which provides only specified grounds under which they can reject an expression of interest. Of course, if an expression is accepted, a council have to run a competitive process to let the contract and this tends to delay the process!

Mr Justice Collins stated *"if the consultation were the only ground, I might not have granted relief ... but the matter in which GLL's proposals were dealt with, coupled with the view that they did not fall within the consultation exercise, persuaded me that the decision must be quashed ... The most sensible way ahead is to obtain the necessary further details from GLL and perhaps consult further for a shorter period on whether any alternative proposal is forthcoming".*

The conclusion from this case, is that councils have to consider seriously and carefully any expression of interest to take over a service received from a body qualified to submit them under Localism Act powers, whether locally based or not. They must also analyse their proposals even if they appear unrealistic.

We know from our own experience that some community groups have successfully taken over council facilities, and are often operating them with the aid of volunteers at a much lower cost base than that utilised by the council. However, these proposals often face major practical hurdles in achieving a workable and sustainable service.

Does this case perhaps support the proposition that service provision, by mutual bodies, is still something that needs to be taken seriously by local authorities? Let us see who ends up running your local library – if it stays open!

STEPHEN PEARSON
Partner
Freeths

0845 274 6900
stephen.pearson@freeths.co.uk

Public procurement - new regulations bring a few surprises

Mark Johnson, partner in the public services team at Geldards LLP considers the new rules for procuring public contracts.

The European Commission has been on a mission to overhaul the procurement directives since 2011. Their professed aim is to modernise and simplify, open up contracts to small and medium sized businesses (SMEs), and to allow procuring authorities to make greater use of environmental and social criteria in purchasing. After many twists and turns, this culminated in the adoption of three new directives on 17 April 2014 covering public sector contracts, concession contracts (where payment is derived mainly from end users) and contracts procured by utility companies.

Member states now have until 18 April 2016 to transpose these into national law. The UK, represented by the Cabinet Office's Crown Commercial Service, played an active role in lobbying for various changes and they are keen to see the new rules implemented as soon as possible. The ambitious timetable for implementation saw the publication on 19 September of draft public contract regulations. These are expected to come into force in early 2015, once a period of consultation has been completed. Implementation of new regulations for concessions and utilities will follow on shortly after.

A new approach for below threshold contracts

The draft regulations, which apply to all public sector bodies as well as schools, academy trusts, housing associations and clinical commissioning groups, contain some surprises. They have been prepared using the 'copy out' procedure, whereby the text of the directive is simply transposed into the regulations as far as possible, which helpfully includes the numbering system. This is to avoid any accusations of gold-plating the legislation to impose burdens that go further than the EU text. However, this has the disadvantage that sometimes areas of Euro-speak creep in leaving uncertainty or ambiguity.

Practitioners may find it useful to read the original EU text, in particular the lengthy recitals, in understanding and interpreting the rules. Part 4 of the regulations introduces new rules that apply at the domestic level only to below threshold contracts. These are intended to implement Lord Young's recommendations in a report in 2013 on opening up contracts to smaller businesses. They introduce new requirements for central government to advertise contracts of £10,000 or more on the government's contracts finder website. Local authorities and housing associations must do so for contracts of £25,000 or more.

The obligation to advertise only kicks in if the opportunity is put into the public domain. Therefore use of a closed list of bidders, such as with a framework agreement, is not caught. Post award notices are also required. The use of pre-qualification questionnaires for these types of contract is banned and any questions about suitability to bid, must in future be 'relevant and proportionate'. As with much modern legislation, the Cabinet Office intends to make use of more detailed mandatory guidance to further shape the content and best practice.

Summary of main changes

Leaving aside the purely domestic regime for below threshold procurements, the new rules introduce a number of welcome changes:

- the time limits for requests to participate and return of tenders, have been shortened by a third in most cases and may be shortened even further where electronic portals are used. Authorities must move toward mandatory electronic communication by 2018;
- there is explicit clarification that social and environmental benefits can be taken into account during evaluation. A greater emphasis is placed on "whole life costing" of solutions, so that exit costs, ongoing maintenance liabilities and environmental costs are taken into account;
- the distinction between Part A and Part B services (mainly social, healthcare educational and cultural services) goes, although a new 'light touch' regime is introduced for contracts in these areas that exceed €750,000 in value (about £630,000). Below this level, the new domestic rules on transparency will still apply. There is some ambiguity about whether legal services are subject to full competition. Advice in connection with litigation is now outside the scope of the rules completely, as is legal advice in connection with the 'exercise of official authority'. We can expect authorities to take a broad view of what falls into that category until told otherwise by the courts or mandatory guidance;
- there is a new power to reserve certain types of contract for welfare, social and educational services to social enterprises and mutuals, provided fairly strict criteria are satisfied, including a requirement that the contract does not exceed three years' duration. Note that this does not allow for direct award without competition, simply that the field of bidders can be limited;
- the ability to award contracts to authority controlled companies and partnerships, the so called *Teckal and Hamburg Waste* exemptions, is now specifically drafted into the legislation. There is a welcome clarification that these bodies can trade externally in their activities up to 20 per cent of their turnover without losing the exemption;
- the formerly tarnished negotiated procedure, which the Commission believed was often manipulated to anti-competitive effect, is given a new lease of life as the competitive procedure with negotiation and the circumstances in which it, and its cousin the competitive dialogue procedure can be used are widened. A new innovation partnership procedure is introduced to encourage the development of completely new solutions to problems where the supplier and authority work up a product or service, which they may later commercialise;
- there are new safeguards against corruption, collusion and managing conflicts of interest. In particular, where authority staff may have a vested interest in the outcome of a procurement, for example, where an in-house service is spinning out into a mutual;
- market engagement and consultation prior to formal tenders is actively encouraged and permitted; and
- more light is thrown on the thorny question of when authorities can vary a contract without having to rerun the competition. A new minimal limit of 10 per cent, or 15 per cent for works contracts, is introduced along with welcome clarification of the ability to switch supplier in the case of insolvency or corporate restructuring.

Interestingly NHS commissioners have been given a reprieve from complying with the new regulations until 18 April 2016. It is difficult to understand why, other than possible political sensitivities about tendering healthcare services in the run up to the general election.

Prepare for the changes now

Many of the reforms are welcome clarifications of principles already developed by case law. The changes to procedures, in particular the new domestic rules for below threshold contracts (currently £172,514 for services or supplies, or £4.32 million for works contracts), will require authorities to adjust their systems and processes in readiness. As austerity measures bite deeper and authorities continue to seek better value from suppliers, the procurement and commissioning function is likely to face a very busy period ahead. The new regulations are expected to enter into force in January.

Would your authority like a free in-house surgery on the new regulations?

MARK JOHNSON
Partner
Geldards

07768 645817
mark.johnson@geldards.com

Avoiding negligent disciplinary hearings

An employer's duty of care towards their employees applies at all stages of the employment relationship, particularly in the context of disciplinary action. In a recent case, the Court of Appeal considered whether an employer had breached its duty of care to an employee by instigating disciplinary proceedings - after an initial investigation appeared to show that there was a case to answer. Helpfully, the Court of Appeal has clarified that an employer might be wrong about their concerns without being negligent.

The background

A disciplinary investigation must be undertaken in a manner which is 'reasonable in all the circumstances', judged objectively by reference to the 'band of reasonable responses'. What this means in practice, is that an employer will need to investigate sufficiently to ensure that the substance of the allegations is clear; so these can be put to the employee in sufficient detail to enable a meaningful response. The requirement to comply with the band of reasonable responses applies to all stages of the investigation. Employers also owe a duty of care to employees and any failure to comply with that duty, which results in loss or injury (including psychiatric), can cause action against the employer.

In *Coventry University v Mian [2014] EWCA Civ 1275*, an employee argued that her employer had breached its duty of care by initiating disciplinary proceedings without undertaking a sufficient initial investigation.

The facts

The claimant, Dr Mian, was employed by Coventry University as a senior lecturer. One of Dr Mian's colleagues, Dr Javed, left Coventry University in 2006 to take up a post at Greenwich University.

In 2007, Greenwich University contacted Coventry University expressing concern about a 'large disconnect' between statements made in Dr Javed's reference and his performance. The reference, on Coventry University headed notepaper, was apparently from Dr Mian and signed by her. It contained her direct dial telephone number and was over three pages long. However, the reference contained many inaccuracies and significantly overstated Dr Javed's qualities and qualifications.

Greenwich University confirmed to Coventry University that it had written to Dr Mian, at her workplace, using the correct address. The request would have been placed in Dr Mian's pigeonhole in the administrative office of the building where she worked; a different building to the one Dr Javed worked in at that time.

Dr Mian's line manager was shown the reference and said that it was unlikely that the signature at the bottom of the reference was Dr Mian's. Dr Mian's computer was searched, which revealed three other draft references in Dr Mian's name for Dr Javed. All of which were similar to the reference supplied to Greenwich University.

Dr Mian was invited to a preliminary meeting, having been given a copy of the Greenwich reference in advance, and was told that she could be accompanied by a union representative or colleague. At the meeting, Dr Mian denied writing the reference. She said that she had agreed to be a referee for Dr Javed and that he had sent her the references he would like her to produce, which she saved onto her computer. These contained false, misleading and inaccurate statements that she had refused to use.

Dr Mian had written short references for him instead but had deleted these from her computer. She had retained the longer references prepared by Dr Javed to keep him quiet, and said she felt intimidated by Dr Javed but had not raised this with her line manager.

Following further enquiries, which suggested that she had a good working relationship with Dr Javed, the university decided that there was a case for gross misconduct. The disciplinary allegation was that Dr Mian had been complicit with Dr Javed in the preparation of false and misleading employment references, but not that she had supplied a misleading reference to Greenwich University herself.

Dr Mian was invited to a disciplinary hearing, but was signed off sick. A two day hearing went ahead in her absence and the allegations were dismissed.

Dr Mian did not return to work for Coventry University but left to take up employment elsewhere. She brought proceedings arguing that, in commencing disciplinary proceedings without undertaking further enquiries, the university had been in breach of contract and/or negligent which caused her psychiatric injury. She argued that, had such enquiries been undertaken, the disciplinary process would have been avoided altogether.

The trial judge upheld Dr Mian's claim, and Coventry University appealed.

The decision

The Court of Appeal upheld the appeal and said the way in which Coventry University had conducted its investigation, and subsequent disciplinary hearing, was not in breach of its duty of care and contractual obligations towards Dr Mian.

The court said the judge had confused the question of whether the allegations made in the disciplinary proceedings were true with whether there were reasonable grounds to suspect that they were true; ending up substituting his own judgment for that of the university.

What should the judge have considered? He should have looked at whether the decision to instigate disciplinary proceedings had been 'unreasonable', in the sense that no reasonable employer would have commenced disciplinary proceedings in the same circumstances.

The court highlighted that the university might have decided to take Dr Mian's explanation at face value and taken the matter no further, given her otherwise excellent reputation; but the fact that it chose to pursue the allegations remained reasonable. The evidence on both sides could then be considered at the disciplinary hearing.

The court accepted the university's case that, objectively, a reasonable employer could have concluded that there was a case for Dr Mian to answer on a charge of gross misconduct; and that their view was well founded on the evidence available when the disciplinary investigation began.

What does this mean for me?

Although this case is fairly fact specific, it illustrates that employers are able to commence disciplinary proceedings on preliminary facts which show a case to answer - provided they do so reasonably. Formal disciplinary proceedings are likely to be stressful for employees, but if the employee does become unwell then the employer is unlikely to be liable; as long as they can show that they acted within the 'band of reasonable responses'. This gives employers quite a wide discretion. As the Court of Appeal observed, different employers may come to different conclusions and may be wrong without being negligent.

It is interesting to note that one of the court's judges commented that although the university was not liable to Dr Mian in damages, their procedures and investigative processes could be improved. They might have managed the situation better for Dr Mian and prevented the claim from arising at all. The court also noted that the allegations were considered at length in the disciplinary hearing and were not dismissed out of hand. The result may have been different had there been no evidence at the subsequent disciplinary hearing to support the allegations, in respect of which the university had decided there was a case to answer.

SARAH LAMONT
Partner
Bevan Brittan LLP

0870 194 8943
sarah.lamont@bevanbrittan.com

Proposals for planning reform Potential changes to permitted development rights

The Department for Communities and Local Government's consultation paper *Technical Consultation on Planning* was issued in July this year. It introduces a number of proposals for additional reform of the planning system and has provoked much thought and discussion within the planning community.

The 98 page document details a large number of proposed changes that are aimed at facilitating development and future housing growth, which if adopted, may have a profound effect on local planning authorities.

The following six areas are highlighted for improvement:

- neighbourhood planning;
- reducing planning regulations to support housing, high streets and growth;
- improving the use of planning conditions;
- improvements to the planning application process;
- amending environmental impact assessment thresholds; and
- improving the development consent order process.

The deadline for responding to the proposals expired on 29 September 2014 and perhaps unsurprisingly, many bodies including but not limited to the Law Society, the Local Government Association (LGA), the District Councils' Network, London Councils, the Royal Town Planning Institute, the Home Builders Federation, the Planning Officers Society and numerous local planning authorities, have provided responses to the proposals.

This article focuses on just one of the areas referred to above that has been earmarked for improvement and which may prove to be controversial.

Reducing planning regulations to support housing, high streets and growth

The proposals include amendments to the Town and Country Planning (General Permitted Development) Order 1995 (as amended) and the Town and Country Planning (Use Classes) Order 1987 (as amended) to:

- allow changes of use from light industrial, warehouse, storage buildings to residential;
- allow changes from some sui generis uses such as laundrettes, amusement arcades, casinos and nightclubs, to residential;
- allow changes of use from office to residential, to operate on a permanent rather than temporary basis (this is currently due to expire in May 2016);
- retain the provisions that make it easier for homeowners to improve and extend their homes; and
- enable shops on the high street to change their uses more easily and quickly without the need for planning permission; however it is proposed that planning permission be required for the change of use to betting offices or pay day loans shops, which will negate the need for planning authorities to use Article four directions to limit changes to such uses otherwise permitted.*

*** This list is not exhaustive. For further details, reference should be made to Technical Consultation on planning issued by the Department for Communities and Local Government (July 2014).**

The proposals also include amending the provisions so that where prior approval for permitted development has been given but the proposed development has yet to be implemented, the right cannot subsequently be removed by an Article 4 direction.

It is noted that the LGA's response to the consultation is primarily focused on the proposed changes to neighbourhood planning, extension of permitted development rights, use class changes and planning conditions.

The LGA has commented that *"It is disappointing that the majority of proposals contained in the consultation seek to impose additional control from the centre and reduce the ability of local people and businesses to have a say on planning issues that impact their house, business and high street. Many of the proposals represent further top-down piecemeal changes, which lack regard to local circumstances, add further confusion to the system and undermine the premise of a locally plan-led system that government promised to local areas."*

The LGA have opposed the measures to put the permitted development rights to change of use from office to residential on a permanent basis, removing the exemptions that are currently in place. They state "*The proposals to remove these exemptions and replace them with a general test to consider the impact of the loss of the strategically important office accommodation within the local area will create difficulties for local planning authorities in protecting local employment centres and is not a sufficient safeguard."*

The LGA has also commented that the measure, such as changes to office to residential permitted development rights, has resulted in a number of unintended consequences, being:

- a loss of occupied and viable office space impacting on jobs and economic growth;
- risks of poor quality residential accommodation;
- that measures have left councils operating at a loss, in that the nationally set £80 prior approval fee does not fully cover the cost of dealing with prior applications; and
- a loss of much needed affordable housing and infrastructure.

The Law Society has also responded to the consultation, raising concerns about many of the proposed changes to permitted development rights.

The Law Society's response, which was prepared by the Planning and Environmental Law Committee, disagrees with the proposals for permitted development rights to allow a change of use from light industrial, storage and distribution to residential use. They remark that it cannot see justification for this policy or the government's recent legislative approach and that it is extremely concerned that this proposal runs entirely contrary to the central thrust of recent government policy, namely the strengthening of the local plan through the NPPF and neighbourhood planning, and the ethos of a 'plan-led' system, potentially leading to an unsustainable pattern of development.

The Law Society has also criticised the proposals to allow changes of use from some sui generis uses to residential, stating that this proposal *"effectively removes the importance of local knowledge, both at local community level, from the development control equation"* and *"has the potential to strike at local and town centres at the very time they need local authority and local community support."*

The proposals to allow permitted development rights for larger extensions to dwelling houses to be made permanent, has also come under heavy criticism from the Law Society. They have stated *"This proposal runs entirely contrary to the core principals of the NPPF in the context of the local plan, neighbourhood planning and local participation, and no evidence has been presented to justify it...The Society would instead suggest a further, temporary extension of permitted development rights allowing larger extensions for dwelling houses at this stage, to enable the impact to be evaluated."*

With regard to the permanent change of use from office to residential the Law Society has suggested a three year extension, rather than a permanent change, so that effects can be evaluated.

Bearing in mind the criticism made to the proposals it will be very interesting to see, what, if any, of the proposals are taken forward by the government. At the time of writing this article the government has not, as yet, published the summary of responses to the proposals. No doubt the summary and ultimately the outcome, will make interesting reading in due course.

DENISE STEPHENSON
Partner
Sharpe Pritchard

020 7405 4600
dstephenson@sharpepritchard.co.uk

RACHEL HEY
Assistant Solicitor
Sharpe Pritchard

020 7405 4600
rhey@sharpepritchard.co.uk

Property in practice - practical implications of the Anti-social Behaviour Act 2014

Throughout the course of this government there has been a drive to overhaul the anti-social behaviour remedies available to landlords, with the aim of speeding up the process of tackling such conduct and driving down the costs. Teresa May stated she wants to "empower victims and communities" and will "introduce faster and more effective powers to stop the dangerous and yobbish behaviour of those who make victims lives a misery".

When the act is entirely in force, it will abolish most of the current tools and powers that the public are familiar with and will be replaced with:

- criminal behaviour orders injunctions (CBO);
- community protection notices;
- community protection orders (public spaces);
- community protection orders (closure);
- directions powers;
- a new absolute ground for possession;
- amended discretionary grounds for possession; and
- a new discretionary ground for possession relating to rioting.

Local authority landlords will be most affected by the revised injunctions and absolute possession power, although other tools will have a wider effect on non stock-holding authorities too.
The injunction and possession powers were initially due to come into force in 20 October 2014. Due to public funding issues in the youth court, the civil injunction has been postponed until sometime in 2015. The other provisions are in force from 20 October.

The injunction clauses of the bill were a source of intense debate between the House of Commons and the House of Lords. The most significant arguments were:

- whether the test should be a civil or a criminal test;
- which court these injunctions should be heard in; and
- what the legal test should be.

On the one hand it was argued that as the injunction was a replacement for the anti-social behaviour order (ASBO), that the matter should be heard in the magistrates court with the test being that the person has engaged in "harassment, alarm or distress" with the standard of proof being "beyond reasonable doubt". That was strongly opposed by housing providers who have been used to dealing with these injunctions in the civil courts; on the basis that the behaviour caused a 'nuisance or annoyance to persons' and the standard of proof was on the 'balance of probabilities'.

Eventually, a middle ground was found. The new injunctions will be civil injunctions on the civil burden of proof, but defendants under the age of 18 will be heard in the magistrates' court and adults in the county court. In a housing related context, the test remains the same for an anti-social behaviour injunction (ASBI). For outside the housing context, it has the arguably higher test of harassment, alarm or distress. A housing provider must also prove that conduct is 'housing related' before it can obtain an injunction.

Consultation will be required, but this should not deter without notice applications. That consultation can take place after the without notice hearing but before the return date hearing.

The clauses drafted within an order can be positive or negative. For example, drug rehabilitation orders can be contained within an injunction alongside exclusion orders. If a positive requirement is imposed, then a person responsible for overseeing the compliance should be appointed as a supervisor. Alongside the obvious issues of a lack of funding for such courses, it is wondered whether there will be an appetite for people to put themselves forward for this supervising role. Any injunction made against a child can last for a maximum of 12 months. Yet an injunction against an adult can be for a specified period of time or until a further order, which allows for a lifetime order in theory. Power of arrest can still be attached to these new injunctions if there has been a use or threat of violence or a significant risk of harm. Power of arrest cannot be attached to a positive requirement.

Breach of the injunction is a contempt of court and will be treated in the same way as the ASBI thus far. The claimant can apply for a warrant of arrest for the defendant or use the committal procedure route by filing an N244 application notice, using the rules in part 81 of the Civil Procedure Rules. The timescales will depend on whether a power of arrest attached to the clause is breached.

There are several issues that could lead to challenges when the new injunctions are introduced. First, the act specifies that a tenant can have an exclusion order from their own home if they are over the age of 18, and if they use or threaten violence or there is a significant risk of harm.

However, the act is silent on exclusions from other areas. Currently, many injunctions will specify an exclusion zone that does not necessarily include the perpetrator's own property. For example, a shopping area where they have been committing theft regularly. As it is not specifically set out in the legislation, some commentators suggest that there may be challenges to exclusions not specifically in relation to the perpetrator's home. However, the current ASBI does not specify that exclusion zones can be applied for. Yet they are regularly granted, so it is likely that the courts will exercise common sense in imposing appropriate terms that may include exclusions of different areas.

Often, anti-social behaviour is perpetrated by a group or family. If the group contains people under and over 18, then the original drafting of the act would have meant that two different applications would have had to be issued; one for the children in magistrates' court and one for the adults in county court. The Law Society Housing Committee, of which the writer is a member, proposed an amendment to allow for transfer between the two courts for group applications. The whole thrust of the act is to empower victims, speed up the process and cut costs. As originally drafted, there would have been a duplicate in costs and stress on witnesses having to attend two trials. Therefore, if there is a situation where a group application would be appropriate, then it is acceptable to make an application to the county court for the matter to be heard in the magistrates' court - once the matters have been issued separately and then joined together for further directions and hearing.

Another controversial issue is the new absolute ground for possession. This means that a judge hearing the matter does not have the opportunity to consider whether it is reasonable in the circumstances to order possession. On the face of it, if the ground is made out, a possession order must follow. The act introduces a new mandatory ground for possession that can be used by local authorities and private registered providers where: a serious criminal offence has been committed; there has been a breach of the civil injunction (when commenced) or criminal behaviour order; if the property has been closed for more than 48 hours; or there has been a breach of a noise abatement notice. Landlords must serve a notice and offer a review. This is for local authorities but it is highly recommended that private registered providers also offer a review to avoid challenges.

Any proceedings that do not require judicial discretion have come under challenge in recent years. This follows *Manchester City Council v Pinnock*, in that where discretion is removed from the court the defence of proportionality can be raised. The proportionality of the decision can look at the individual circumstances of the defendant or their family, and therefore is very similar to the test of reasonableness. The defence of proportionality has to be specifically raised by the defendant and cannot be raised independently by the court. Solicitors representing landlords are now frequently seeing proportionality challenges for matters that do not involve judicial discretion. It must be queried whether this actually speeds up the process of applying for possession and drives down costs.

In what can only be described as a knee-jerk reaction to the riots that spread across the country a couple of years ago, the government has introduced a new ground for possession.

This is for local authorities and private registered providers, where a tenant or adult residing in the dwelling house has been convicted of an indictable offence that took place at the scene of a riot in the United Kingdom. This has been criticised for penalising social housing tenants, as it does not apply to those in the private rented sector or owner occupiers. It is thought this will be used rarely. One police officer recently commented that the police are reluctant to define something as a riot because that means that the police have effectively lost control of the situation.

The current discretionary grounds for possession have been amended and this has been in force since 13 May 2014. The existing ground 2 (for secure tenants) and ground 14 (for assured tenants) have been changed to include conduct 'causing or likely to cause a nuisance or annoyance to the landlord or a person employed by the landlord in connection the exercise of the housing management functions'. Clearly this is introduced to ensure that staff are adequately protected from anti-social behaviour while carrying out their duties. However, it is not a drastic change as nearly all tenancy agreements will include such a clause. Therefore, grounds 1 (for secure) and 12 (for housing providers) would always have been available if staff had been threatened.

Landlords should make sure that their tenancy agreements allow them to use this amended ground. Some older tenancy agreements set out the text of each ground, rather than saying that 'grounds in the Housing Act as amended from time to time apply'. If they have contractually limited themselves to the text of certain grounds then they may not be able to rely on this amendment, or indeed the riot ground for possession, or the new mandatory ground until the tenancy is varied.

Local authorities are advised to revise their policies and procedures in light of the Anti-social Behaviour Act. Time will tell as to the challenges that may be brought and how the provisions will be used effectively, and whether there is an improvement in terms of speed and costs from the existing raft of remedies.

JANE PLANT
Associate Solicitor
Weightmans

0121 200 3486
jane.plant@weightmans.com

Election advantage as an irrelevant consideration or improper purpose

Introduction

In April 2012, when Boris Johnson was standing for re-election as Mayor of London, an organisation ('C'), whose purpose was to support gay people who voluntarily seek a change in sexual preference and expression, applied to place an anti-gay advert on London buses operated by Transport for London (TfL).

The proposed advert was in response to one by Stonewall, an organisation working for equality for gay people. After obtaining the views of the Mayor, TfL decided not to display C's advert. C challenged that decision in judicial review proceedings but was largely unsuccessful before the Court of Appeal: *R (on the application of Core Issues Trust) v Transport for London [2014]* EWCA Civ 34.

The Court of Appeal held that TfL's decision not to display the advert had not breached Article 10 ECHR (as alleged by C) as the advert was likely, if displayed, to cause offence to large numbers of the public. However, the Mayor was added to the proceedings as a defendant and the case was referred to the Administrative Court. This was to decide whether the Mayor had made the impugned decision and, if so, whether he had taken into account the improper purpose of furthering his campaign for re-election, as further alleged by C.

The law

In the Administrative Court, the law on taking into account electoral advantage as an irrelevant consideration or improper purpose was summarised by Lang J, who referred with approval to the speech of Lord Bingham in *Porter v Magill [2002]* 2 AC 357, where he analysed the relevant legal principles in the following terms: *"...powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise".*

In *R v Tower Hamlets London Borough Council, Ex p. Chetnik Developments Ltd [1988]* AC 858,872 a clear statement of this principle was expressly approved by Lord Bridge of Harwich *"Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which parliament when conferring it is presumed to have intended".* The principle is routinely applied, as by *Neill LJ in Credit Suisse v Allerdale Borough Council [1997]* QB 306,333 who described it as *"a general principle of public law".*

In *Porter v Magill* the House of Lords held that powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party. But in doing so Lord Bingham explained that: *"Whatever the difficulties of application which may arise in a borderline case, I do not consider the overriding principle to be in doubt. Elected politicians of course wish to act in a manner which will commend*

them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision taking and administration.

"Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers are conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise."

Support for the approach of the House of Lords in *Porter v Magill* is to be found in *R v Board of Education [1910]* 2 KB 165 at 181 where Farwell LJ said *"if the board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous and that no political consequence can justify the board in allowing their judgement and discretion to be influenced thereby".*

This passage was accepted as correct by Lord Upjohn in *Padfield v Minister of Agriculture, Fisheries and Food [1968]* AC 997 at 1058, 1061. Support for the approach of the House of Lords in *Porter v Magill* is also to be found in the case of *R v Port Talbot Borough Council and Others Ex p Jones [1988]* 2 ALL ER 207 at 214, where council accommodation had been allocated to an applicant in order that she should be the better able to fight an election. Nolan J held that decision to be based on irrelevant considerations.

If an authority takes into account an irrelevant consideration, the position is as stated by Lord Esher MR in the Court of Appeal in *R v Vestry of St Pancras (1890)* 24 QBD 371: *"If people who have to exercise a public duty by exercising their discretion take into account matters, which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion".*

It is sufficient to establish illegality that an irrelevant consideration has been taken into account and that, if the irrelevant consideration had not been taken into account, there is a possibility that the decision may have been different. That approach was approved by the Court of Appeal in *GE Simplex Holdings v Secretary of State for the Environment [1988]* 3 PLR 25 and in *R v Lewisham LBC ex parte Shell UK [1988]* 1 ALL ER 938.

There is no principle that merely because some consideration or purpose may be described as 'political' it is a matter to which an authority is entitled to have regard or to pursue. Lord Upjohn said in *Padfield v Minister of Agriculture Fisheries and Food [1968]* AC 997: *"[The Minister] may have good reasons for refusing an investigation, he may have, indeed, good policy reasons for refusing it, though that policy must not be based on political considerations which... are pre-eminently extraneous."*

The public purposes for which statutory powers are conferred on public authorities, do not include the promotion of the private interests of particular political parties or their members. Functions are not vested in a local authority, or in any minister or other public body, to be used for the advantage of any particular political party or members of it.

It does not follow from the conclusion that a local authority may not promote the political or electoral interests of a particular political party or its members, that there is no proper role for political parties or politics or for the views of the electorate in local government. There will inevitably be a range of views that may reasonably be held as to how the functions vested in a local authority should be discharged in the public interest. Those who share a common view as to how the public interest may best be served, are entitled to organise themselves to seek to implement their view. For example they may seek to persuade the electorate that they should be elected to pursue policies, which will reflect their view of the public interest. When elected, in making decisions as members of a local authority, they are entitled, subject to the terms of the enactment conferring the function to be discharged, to give weight to that view and to the fact that it commanded support from the electorate.

The verdict

So what happened to Boris? Mrs Justice Lang decided that he was not motivated by the improper purpose of advancing his mayoral election campaign and was entitled to hold and give effect to his view that C's proposed advertisement was offensive and unacceptable.

Success for Boris in the court and at the hustings. Yet the underlying legal principles affirmed in *Porter v Magill* remain intact.

TONY CHILD
Consultant
Browne Jacobson

020 7337 1017
tony.child@brownejacobson.com

Free CPD training - 2014/2015 programme

We are delighted to announce an exciting and diverse programme of over 30 training events in 2014/15 from our new legal partners: Bevan Brittan, Browne Jacobson, Freeths, Geldards, Sharpe Pritchard, and Weightmans.

The seminars will be presented by lawyers from these six firms, each of whom are specialists in their field, and in locations across the East Midlands. This includes Leicester, Nottingham and Derby, with some courses repeated in Birmingham. Furthermore, a number of courses will be available via video conferencing.

Detailed course outlines will be available on **emlawshare.co.uk**

To book a place and find out more about video access, contact Julie Scheller on 0845 272 5701 or email julie.scheller@freeths.co.uk

Remember the courses are FREE!

Date	Title	Repeated in West Midlands
Thursday 18 Dec	**Health Integration** Legal issues associated with the integration of health and social care	
Tuesday 13 Jan **2015**	**Procurement** The new Public Contracts Regulations –what to expect and how to be prepared	■
Thursday 15 Jan	**Local Authority Debt Recovery** Insolvency as an effective recovery tool	
Thursday 22 Jan	**Handling Maladministration Allegations (workshop format)** Practical advice on dealing with complaints about maladministration	
Thursday 29 Jan	**Employment Law Issues for Local Government Lawyers** A general update on employment law issues which are relevant to in-house lawyers	
Thursday 5 Feb	**Criminal Litigation** Advocacy and prosecutions	■
Thursday 5 Feb	**Criminal Litigation Practical Workshop**	■
Thursday 12 Feb	**RIPA**	
Wednesday 18 Feb	**Introduction to Judicial Review and Case Law Update**	■
Tuesday 24 Feb	**Equalities Act** Two key aspects of the law on Equalities	
Wednesday 25 Feb	**Planning, including Environmental Issues (3)** Strategic Environmental Assessment, Environmental Impact Assessment and Habitats Regulations Assessment	
Wednesday 4 Mar	**Localism Act** Localism or growth (or both)? Three years on	
Tuesday 10 Mar	**Planning, including environmental issues (1)** The effect of the Government's on line Planning Practice Guidance	■
Wednesday 25 Mar	**Planning, including Environmental Issues (2)** Planning update and developments in EIA	■
Wednesday 22 Apr	**Planning, including Environmental Issues (3)** Strategic Environmental Assessment, Environmental Impact Assessment and Habitats Regulations Assessment	■

2015-2016 programme

The 2015/16 training programme will start in April, and with over 40 courses, this will be our most ambitious programme. We will have new courses in Sheffield while also repeating our most popular ones in Birmingham. We are also looking to expand the use of videoing, so that courses run in our traditional centres of Nottingham, Leicester and Derby can be seen elsewhere.

EDITORS

Jayne Francis-Ward
Chair of the EM LawShare Management Panel

E: jayne.francis-ward@nottscc.gov.uk

Stuart Leslie
EM LawShare Co-ordinator

T: 01773 822 792
E: sl.emlawshare@yahoo.com

LEGAL PARTNERS

Annie Moy
Sharpe Pritchard

T: 020 7405 4600
E: amoy@sharpepritchard.co.uk

SHARPE PRITCHARD
Solicitors and Parliamentary Agents

Bethan Evans
Bevan Brittan

T: 0870 194 8993
E: bethan.evans@bevanbrittan.com

Bevan Brittan
The public services law firm

John Riddell
Weightmans

T: 0116 242 8925
E: john.riddell@weightmans.com

Weightmans

Mark Johnson
Geldards

T: 07768 645817
E: mark.johnson@geldards.com

Geldards
law firm

Philippa Dempster
Freeths

T: 0845 274 6901
E: philippa.dempster@freeths.co.uk

FREETHS

Richard Barlow
Browne Jacobson

T: 0115 976 6208
E: richard.barlow@brownejacobson.com

brownejacobson LLP