

# SP FOCUS

SHARPE PRITCHARD<sup>®</sup>

SP Focus: The newsletter of Sharpe Pritchard

Spring 2010



## Elections

Sharpe Pritchard has been busy advising on electoral law in the run up to the local and parliamentary elections on 6<sup>th</sup> May.

**Ashley Badcock**, Sharpe Pritchard's senior partner and elections specialist and assistant solicitor **Emyr Thomas** have advised recently on issues ranging from campaign funding, electronic counting, the postal vote process and possible challenges to a returning officer's

conduct.

In the last 12 months there have been two trials of election petitions and Ashley acted for the returning officer in both of them. Sharpe Pritchard provides an election "hotline" for returning officers and their teams over the election period, including the evening of the poll.



Ashley Badcock, Partner

## SP appointed to another shared panel

Sharpe Pritchard has been successful in its bid to join a new panel of legal service providers for local and fire authorities in **East and West Sussex**.,

covering a whole range of legal work. The firm is already placed on similar consortia panels, including the London Boroughs Legal Alliance, the

Surrey local authorities, and a group of four east London councils.

### Inside this issue:

More news	2
In Parliament	2
In the Courts	3
Election Petitions	5
PPS 5 and Planning Decisions	7
Seminars	9

## Wandsworth Litigation work goes to SP

**Wandsworth Borough Council** has appointed Sharpe Pritchard as its sole contractor to carry out a range of litigation related services for the next 5 years. The work will include housing, employment and general litigation in various courts and prosecutions in the magistrates' court. Litigation partner **Roy Richards** said "We are looking forward to working with Wandsworth over the next few years. It is a new challenge for us to take



Roy Richards, Partner

on such a range and volume of the litigation work for such a large authority and we are excited at the prospect."

## More Major Projects Work

Sharpe Pritchard have been appointed as external legal adviser to **Hertfordshire County Council's** Shared Managed Service project. The project will involve the procurement of both a service contract for the County Council as well as a framework agreement offering similar services to the district and borough councils in Hertfordshire and Hertfordshire Police Authority.

Hertfordshire already has an

[Continues on page 2](#)

## SP FOCUS

### Projects News

Continued from page 1



Julia Rudin

impressive record of successfully outsourcing transactional and back-office corporate services. It is now seeking to derive further efficiencies through procuring a strategic private sector partner to deliver a greater depth and range of these services and for all such services to be delivered by the same provider / consortium. As the new contracts need to dovetail with the end of the current ones, Hertfordshire was looking for an external legal adviser that had a track record in delivering high quality specialist projects to finite timescales.

This project builds on Sharpe Pritchard's expertise in shared services and its fee earners' first hand knowledge of using transactional back office services.

The core project team consists

of **Julia Rudin**, Partner, **Tim Farr**, Senior Solicitor and **Gemma Duncan**, Assistant Solicitor.

The firm has been appointed as legal adviser to the **London Borough of Tower Hamlets** on its major waste project.

This consolidates the firm's position as one of the leading firms advising in this complex sector.

**Justin Mendelle**, who is part of our team for the Tower Hamlets project said "we have significant experience in advising authorities on all aspects of their waste procurement projects, from initial strategy to full services commencement. Tower Hamlets are in the early stages of their waste treatment project, and we are pleased to be working with

them to develop their strategy."

Sharpe Pritchard also acted on a joint street lighting project for **Cambridgeshire and Northamptonshire County Councils** which completed recently and have been short-listed in two categories at the **Public Private Finance Awards** for best legal adviser (our projects team) and for best waste project, as part of a consortium with Cambridge-shire, Donarbon and Pinsent Curtis (who acted for Donarbon).

The firm also continues to progress work on BSF projects, having been appointed onto **Partnerships for Schools'** legal advisory services framework agreement.

### In Parliament

Sharpe Pritchard acted as parliamentary agents for **Bournemouth Borough Council and Manchester City Council** in the successful promotion of two private Acts which attained Royal Assent on 8<sup>th</sup> April 2010, just before dissolution. The Acts are similar to precedents established in other parts of the UK by private Acts promoted by the firm. They remove partially the exemption enjoyed by pedlars under existing street trading legislation. The Acts also provide council officers and the police with powers to seize articles connected with unlawful street trading, and enable the courts to forfeit such

items. **Alastair Lewis** acted as agent.

The firm are also the parliamentary agents for the Councils of Canterbury, Leeds, Nottingham and Reading, each of whom is promoting similar legislation in Parliament.

For the **Local Government Association**, Alastair has also drafted a Bill to provide a power of general competence for local authorities. Such a power is seen as a sensible response to the recent LAML case, now going to the Supreme Court. The draft Bill has been published by the LGA and sent to the DCLG Select

Committee for consultation.

Whatever the state of the parties after the general election, it does seem that proposals for the **High Speed Line 2** railway will be progressed. Although the newly established Infrastructure Planning Commission is now the deciding authority for railway infrastructure, the government has indicated that HS2 would be authorised by Hybrid Bill. The firm acted for the majority of local authorities in the Hybrid Bill process on both HSI (the Channel Tunnel Rail Link Act) and the recent Crossrail Act.

*"A power of general competence is seen as a sensible response to the recent LAML case, now going to the Supreme Court"*

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### Regeneration and Total Place in London

Sharpe Pritchard senior solicitors **Aidan Dickinson** and **William Bartlett** advised the **London Borough of Greenwich** on its recent regeneration project for the Kidbrooke Development Area. The project is one of the largest regeneration projects in Europe. The development area consists of 109 hectares of land around Kidbrooke rail station in south east London and is dominated by the Ferrier Estate which was built in the late 1960s and early 1970s. The firm advised

the council on the compulsory purchase order that was required to deliver key elements of the scheme. A public inquiry into the order was held in January.

The firm has also been appointed by the **London Borough of Enfield** to provide legal services in relation to its Ladderswood Estate redevelopment. The proposed £80 million place shaping scheme has been worked up with the support of residents through

the Ladderswood Estate Residents' Design Panel. The Sharpe Pritchard team is headed by property partner **Jo Pickering**. Jo said "this is an excellent fit for the firm. We have been involved in a number of regeneration projects recently across our property, procurement, construction and planning teams. We are looking forward to working with Enfield on this important project."



Aidan Dickinson

## In the Courts

### Judith Elizabeth Wilson ("W") v Ashford Borough Council ("A")

Costs—Planning Enforcement—Abandonment of Appeal—Legitimate Expectation

Sharpe Pritchard acted for the respondent local authority in this Administrative Court case.

W appealed against a magistrates' court's decision that she should pay A's costs. A had served an abatement notice upon W, and W had appealed to the magistrates' court. W's appeal was dismissed and she appealed to the Crown Court. The court sent the parties a notice of hearing which said that if an appellant wished to abandon an appeal, the appellant had to give notice at least three clear days before the date of the hearing or they would have to pay costs. W then abandoned her appeal more than three days before the hearing. The court made no order for costs. A applied to the magistrates' court for costs under s. 109 of the Magistrates' Courts Act 1980. W was duly ordered to pay £5,721 in costs. The court determined whether (1) an application for costs under s.109 was precluded given the wording of the notice sent by the Crown Court; (2) an application under s.109 and an award for costs amounted to an abuse of process because the notice gave rise to a legitimate expectation that no order for costs would be made if W abandoned the appeal more than three clear days before the hearing.

- (1) It was held that under rule 12(5) of the Crown Court Rules 1982, the Crown Court could not award costs on an appeal abandoned at least three days before the hearing. Rule 12 however is subject to s.109 of the 1980 Act. Lord Justice Leveson said that the proper construction of the legislative provisions derives from the fact that, more than three days before the hearing, an appellant can abandon an appeal without leave; thereafter, he or she requires leave. If leave is not required, there is no purpose in bringing the parties to the court for a hearing. Thus, if costs are the only issue, s. 109 provides that the Magistrates can deal with the matter. The magistrates could therefore award costs.

*"The doctrine of legitimate expectation prohibited one party from relying on strict rights which it had said would not be enforced, leading the other party to act to its detriment".*

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### In the Courts

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[Wilson v Ashford BC](#) continued from p. 3

- (2) The doctrine of legitimate expectation prohibited one party from relying on strict rights which it had said would not be enforced, leading the other party to act to its detriment. Here however, there was no question of the court suggesting that it would not enforce rights for its benefit to the detriment of W; the court was unaffected by any costs order: it was a third party which was affected, namely the local authority. The appeal was dismissed.

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### [Morge \(“M”\) v Hampshire County Council \(“H”\)](#)

[Appeals—Variation of Order—Works for Busway](#)

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Sharpe Pritchard assisted the applicant local authority in this Court of Appeal case, where James Findlay QC of 2-3 Grays Inn Square was instructed.

H applied to vary an order which prevented it from carrying out works on a new busway pending the outcome of an appeal by M. H had granted planning permission for the creation of a new busway along a disused railway line. The line had vegetation along its sides and was home to badgers and bats. M had objected to the grant of planning permission and had unsuccessfully applied for judicial review. She was later granted permission to appeal against that decision, and interim relief was also granted, preventing H from implementing the planning permission or carrying out any preparatory works until the appeal was determined.

The appeal date was provisionally fixed for March 2010. The original judicial review proceedings had already caused significant delay to the works, and H was concerned that if it was unable to proceed with preparatory works before the appeal hearing, there was a risk that it would lose some or all of the government funding for the busway. H had estimated that it would take 15 months to complete the works. The funding was conditional on the work being completed and all funding money spent by 31 March 2011. The court was persuaded to fix the application to vary before the substantive hearing.

M argued that there was no need for the order to be varied before the appeal hearing. M submitted that (1) H had exaggerated the timing problem and there was no evidence that it had approached the government to notify them of the delays and request an extension; (2) if H succeeded in the March 2010 appeal, there was no reason why substantial completion of the works could not be achieved by March 31, 2011; (3) the proposed works would have a significant impact on the environment and on wildlife in particular.

It was held that (1) M’s argument that H had exaggerated the problems with timing was not persuasive. (2) There was no reason to question H’s argument that 15 months was realistic and incapable of shortening. At the date of the application there were only 14 months until the 2011 deadline, so the position was already tight and there was risk of the project not going ahead if the variation works sought could not begin until March 2010, whatever the outcome of the substantive appeal. (3) The harm to wildlife was unlikely to be significant if the variation was allowed. It was held that the balance of convenience was in favour of granting the variation. The application was granted.

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# SP FOCUS

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## Election Petitions: Emyr Thomas

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With the parliamentary and local government elections upon us, returning officers and their teams may be considering what options are open to the disgruntled candidate or elector who seeks to challenge the result of an election.

### **Problems at the count? Act quickly!**

If following the declaration something significant happens which could give rise to a challenge (for instance a bag of postal ballot papers is delivered unexpectedly) it is possible under the election rules to apply to the county court for an order that the sealed envelopes, including the ballot papers, be opened and inspected. This process can be used to assess whether there might be grounds for an election petition. On no account should any unofficial count or opening of envelopes take place after the declaration without a court order. Sharpe Pritchard have advised and acted on a number of such applications in recent years.

### **Means of challenge**

The only way in which the result of a local government or parliamentary election can be challenged or questioned is by means of an election petition. The petition is the document issued in the High Court which starts the challenge.

### **Deadlines**

The petition must be issued within a 21 day period. In the case of a local government petition it is within 21 days from the date of the election. In the case of a parliamentary petition it is 21 days from the date of the return. Where a petition includes a complaint of a corrupt or illegal practice which involves, to put it broadly, unlawful payment of money or a promise to make a payment after the election, the key date is 28 days after the date of the payment or promise.

### **Who may present a petition?**

In the case of a local election it can only be presented by an unsuccessful candidate or by four or more people who had a right to vote at the election. The same applies with a parliamentary election, except that any one elector who voted or had a right to vote in the election may present a petition. If the returning officer's conduct is complained of, he may be a respondent to a petition. The successful candidate must always be a respondent.

### **Contents of the petition**

The petition must set out the petitioner's capacity to present the petition, the date and result of the election, (and in the case of a Parliamentary election, the date the return was made), the date from which the time for lodging the petition is calculated (if not calculated within 21 days), the grounds on which relief is sought and the relief claimed.

### **Grounds for challenge**

A local government election may be challenged on the ground that the person whose election is questioned was at the time of the election disqualified or was not duly elected, or on the ground that the election was avoided by corrupt or illegal practices, for general corruption or for employing a corrupt agent. Whether a



Emyr Thomas

## SP FOCUS

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### Election Petitions (continued from page 5)

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candidate “was not duly elected” usually means that the candidate did not have a preponderance of the votes. The remaining grounds all concern what generally may be called wrongdoing in respect of the election.

#### **Acts or omissions by the Returning Officer**

No parliamentary or local election will be declared invalid because of an act or omission on the part of the returning officer or any other person in breach of an official duty in connection with the election if it appears that the election was conducted so as to be substantially in accordance with election law and the act or omission did not affect the result. If it is shown that an election was not conducted in accordance with election law, the election will only be set aside if either the breach was serious enough to make a significant difference to the election process; or if the breach, though itself trivial, did actually affect the result.

#### **Security for costs**

At the time of presenting the petition (or within 3 days of doing so) the petitioner must give security for costs payable by him to any witness summoned on his behalf or to any respondent. For a local election, the security will be no more than £2,500; for a parliamentary election, no more than £5,000.

Within 5 days after giving security, the petitioner must serve on the respondent and the Director of Public Prosecutions (i) a notice of the presentation of the petition, (ii) details of the security given and (iii) a copy of the petition.

#### **Recent experience**

Sharpe Pritchard acted for the returning officer in **Maley v (1) Hackney and (2) Sutton** which resulted in the only trial (so far) of an election petition in 2010. The election was for the Northwood and Birches Head ward of Stoke-on-Trent City Council and was a close-run thing, the successful candidate being elected (following a series of recounts on the night) by one vote. The petition arose because of the closeness of the result. Two further recounts by the Court confirmed the declared result. However, the petitioner argued that the documents kept by the returning officer did not entirely match the votes counted and the petition, despite the various recounts, was maintained on that basis. Following a 2 day trial, the petition was dismissed.

This case stressed the importance both of the documents which are kept following an election, and their accurate compilation. Returning officers and their teams should make notes of any controversial matters which arise during the count and the way in which they are dealt with. This applies particularly to the postal vote opening process when records should be kept of the outcome of the verification at the end of each opening session. Such notes could be invaluable if the election is later challenged.

#### **Steps to take if served with a petition**

The Returning Officer should check that the petition and accompanying documents have been served within the strict time limits described above. The process of service is also important since it is case law to say that imperfect service can lead to the petition being struck out. Returning officers should therefore ensure that notes are made of the exact times and dates at which petitions or other documents are delivered, and a note should be made of where documents were received. Envelopes and covering letters should be kept and date stamped, times noted and a note taken of the precise documents which fall out of the envelopes in which documents have been delivered.

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*“The Returning Officer should check that the petition and accompanying documents have been served within the strict time limits”*

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### PPS5 and its Application to Planning Decisions: Brian Hurwitz/William Bartlett

PPS5: Planning for the Historic Environment was issued on 23 March 2010. The Government's current practice is to separate policy from guidance. So whereas PPG15 and PPG16 (both cancelled) contained policy and guidance, PPS5 is focused on policy and contains a mere seven paragraphs of key guidance. The remainder of the guidance is set out in a separate Practice Guide published jointly by DCLG, English Heritage and DCMS.

The context for PPS5 is to set out planning policies on the conservation of the historic environment. Its policies relate to features of the historic environment that are significant because of their historic, archaeological, architectural or artistic interest and which are therefore termed "heritage assets". When considering applications for planning permission or listed building consent LPAs are to take into account the specific development management policies (HE6 to HE12). These policies, by virtue of paragraph 3, "can be applied directly by the decision maker when determining whether development should proceed".

PPS5 (like PPS4 and other emerging PPSs) gives greater significance than previously to the development management policies, especially when undertaking the statutory tests of s38(6) Planning and Compulsory Purchase Act 2004 and s70(2) Town and Country Planning Act 1990. The PPS5 guidance that development management policies can be applied directly goes further than that contained in PPS1: General Principles, paragraph 13 of which states:

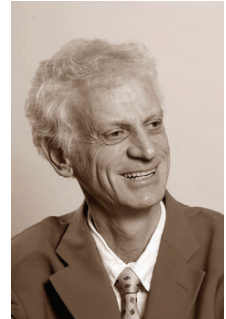
"The Courts have held Government statements of planning policy are material considerations which must be taken into account, where relevant, in decisions on planning applications".

PPS5 goes further than its predecessors in other ways. For example in relation to the setting of listed buildings, previously covered in paragraphs 2.16 and 2.17 of PPG15, policy HE10 of PPS5 now requires LPAs to treat favourably applications that preserve the positive elements of the setting of the heritage asset. It also includes a specific requirement of weighing any harm against the wider benefits of the application.

The policies in PPS5 apply both to designated heritage assets and non-designated assets which have "a degree of significance meriting consideration in planning decisions". The decision-maker will need to apply the relevant policies according to whether or not the asset is designated.

The Guide sets out the steps to be adopted by LPAs in determining the significance and achieving optimum use of heritage assets. LPAs will need to carry out detailed work on preparing an evidence base to identify the significance of heritage assets and enable ongoing monitoring. LPAs' decision-making will need to be informed by this evidence base. Previously designation was the decisive factor in considering the importance of heritage assets. Now, however, if a heritage asset is not designated that fact will not preclude the decision-maker from allocating it significance. The Guide explains that non-designated assets may have at least equivalent importance to many places that are designated. It emphasises that in making decisions LPAs must take a holistic long-term view and intelligently manage change: "change, including development, can sustain, enhance or better reveal the significance of an asset".

This places an onus on LPAs to take a proactive approach to conservation in plan and decision-



Brian Hurwitz

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### PPS5 and its application to planning decisions (continued from page 7)

*“This places an onus on LPAs to take a proactive approach to conservation in plan and decision-making to achieve the optimum viable long-term use of heritage assets”*

making to achieve the optimum viable long-term use of heritage assets. They are charged with assessing the significance of the heritage assets and ensuring best use of them, with the Guide also acknowledging that the historic environment can play a key role in driving and sustaining regeneration. As the Guide explains, finding the optimum viable use for a heritage asset may require LPAs to apply other development plan policies flexibly and imaginatively to achieve long-term conservation. In order to carry out their functions properly and comply with PPS policies LPAs will need to use expert advice to inform their decision-making where the need to understand the particular significance of the heritage asset and the impact of the proposed development demands it.

LPAs are responsible for ensuring that sufficient detail is provided to be able to evaluate the effects of proposed development on heritage assets. The Guide seeks to ensure a consistent approach for all types of heritage asset (archaeological, historical, architectural, artistic). Evidence suggests that previously while LPAs required archaeological impact assessments to be carried out as part of the decision-making process, they did not normally require such detailed assessments in respect of other type of heritage asset (despite the guidance in Annex B of PPG15). The Guide explains the level of information LPAs should expect to receive in order to be able to determine applications. The emphasis is on pre-application discussions to identify the significance of any heritage assets affected and to understand the potential impact involved. By adopting a significance-based approach, which applies to all heritage assets, and advising LPAs to apply development management policies directly, PPS5 seeks to ensure that LPAs take a more active role in managing heritage assets.

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## From the Archives

Sharpe Pritchard have acted in some of the most important local authority cases.

In **Western Fish Products v Penwith District Council** (1978), we acted for the council in the Court of Appeal case that established an important precedent in relation to estoppel. The hearing of the appeal lasted 28 days and the case concerned comments made by a planning officer in a meeting and in a letter about whether a factory development had existing use rights.

The Court held, amongst other things, that estoppel could not be raised against a statutory body exercising its statutory discretion and in any event the letter was not a representation and the appellant started works on basis of its own beliefs.

The case laid the ground for later authorities, including **R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd** (2002) in which the House of Lords held that concepts of private law estoppel should not be extended into the public law of planning control, which binds everyone. Sharpe Pritchard also acted for the local authority in that case.

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## Seminars

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SP Focus: The newsletter of  
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Address  
Elizabeth House  
Fulwood Place  
London WCI V 6HG  
Phone: 020 7405 4600  
Fax: 020 7405 4646  
E-mail: [enquiries@sharpepritchard.co.uk](mailto:enquiries@sharpepritchard.co.uk)  
Web: [www.sharpepritchard.co.uk](http://www.sharpepritchard.co.uk)

### Recent:

**Brian Hurwitz** addressed the CLT Annual Planning Law Update Conference on 23 February, speaking on Climate Change: Law and Policy.

3 Members of the planning team addressed the London and Home Counties Planning Law Forum at City Hall on 12 March 2010 on building flexibility into section 106 agreements, delegation and decision-making, and a planning case law update.

On March 11, the firm joined forces with barristers from 2/3 Grays Inn Square to present a day long local government conference at the Royal Aeronautical Society in London. Talks were given on a variety of hot topics, including conduct, judicial review, local democracy and procurement. Feedback was very good and indicated an appetite for this to be a regular date in the diary.

In April, partners **Denise Stephenson** (planning), **Colin Ricciardiello** (litigation) and **Keith Simkins** (projects) gave talks at the Law Society about the interaction between planning and procurement. Links to Colin's and Denise's papers can be found on our website in the Articles section.

### Coming up:

**Denise Stephenson** will address the CLT Seminar on the **Community Infrastructure Levy and Section 106 Obligations** on 20 May 2010.

In addition, Denise will be giving a talk on the **Community Infrastructure Levy** at the Commercial Property Update Conference on 8 July 2010.

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This newsletter and the articles to which links are provided are intended to provide overviews of legal principles. They are not intended to be a comprehensive guide or to constitute legal advice. For further information and advice please call us on 020 7405 4600.