



SHARPE FOCUS

NEWSLETTER - EDITION 18

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SHARPE PRITCHARD[®]
Solicitors and Parliamentary Agents

ARE YOU READY FOR THE GENERAL DATA PROTECTION REGULATION?



Data protection anoraks across the European Union (myself proudly included) eagerly awoke on 1 January this year with only one thought in mind: next year the General Data Protection Regulation (GDPR) will come into effect. After years of dialogue, tweaking, pondering and waiting, the GDPR will become applicable in the UK on 25 May 2018. Rejoice!

Although not everyone will be quite as excited about the arrival of the new data protection regime as me, it is something which everyone, particularly public sector organisations, should be aware of and start to prepare for.

What is it all about?

The GDPR will replace the Data Protection Act 1998. While the framework of the GDPR may be familiar – the principles and many of the terms used are similar to those in the Data Protection Act – there is no doubt that in certain key areas the GDPR is a significant departure from the current legislation.

It introduces:

- new accountability principle for data controllers;
- new rules on child privacy;
- a new Data Protection Officer role;

- more obligations on data processors;
- stricter consent for processing;
- significantly higher financial penalties for data breaches;
- greater rights for data subjects;
- wider jurisdictional reach;
- data breach notification requirements; and
- privacy by design.

What can you do?

It is fair to say that currently not all of the new requirements of the GDPR are clearly or commonly understood. Preliminary

guidance on some of these points has started to be produced by the Article 29 Working Party and further guidance from the EU is expected. That said, we would urge organisations not to wait as there is plenty you can be doing now to prepare yourselves for the GDPR, such as:

- understand whether you need to appoint a Data Protection Officer - for public authorities this will be mandatory;
- undertake a data protection audit of your existing data processing practices;
- ensure any new procurements, particularly those for IT systems, and long standing data sharing arrangements are compliant with GDPR;
- assess and understand any potential areas of risk;
- update your data protection policies and privacy statements; and
- establish areas where you may need external legal advice.

The good news is that if you have established and robust data protection practices in place, that work is not wasted as you can build on these practices to ensure compliance with the GDPR. Nonetheless, organisations should not underestimate the enormity of the task in hand. Put simply: there is a lot to do.

What about Brexit?

The Information Commissioner's Office will start enforcing the GDPR on 25 May 2018. This means that, even if Article 50 of the Lisbon Treaty is triggered today, the GDPR will be applicable in the UK for many months before any exit negotiations are concluded. So, organisations in the UK will need to comply with the GDPR for a period of time at least. This much is certain.

What happens to the GDPR after the UK officially leaves the EU is less clear. Most commentators agree that it is likely that the UK will either retain the GDPR in its entirety or adopt a very similar

arrangement. Our view is that adopting the GDPR would be the simplest option for the UK government since the GDPR will already be law in the UK and any UK organisations operating across the EU will need to comply with the GDPR in any event. This approach would certainly help safeguard the position in respect of international data transfer, which will be a key priority for the UK government. With that in mind, we think that the principles of the GDPR will not immediately alter following the UK's withdrawal from the EU. This is something that we will be monitoring very closely as the exit negotiations progress.

Those of you who are thinking (or, indeed, hoping) that Brexit may have made the GDPR redundant will need to think again. It is time to start preparing yourself for the GDPR.

The bottom line

Time is ticking. 14 months is a relatively short period of time in which to affect positive and considered business change. At the very least, organisations should be assessing how the GDPR applies to them and the extent of the work they need to do. Embrace those internal data protection audits and do so as soon as possible.

As the Information Commissioner herself said recently: 'There's a lot in the GDPR you'll recognise from the current law, but make no mistake, this one's a game changer for everyone.'

How we can help

We have a wealth of current experience helping clients from a variety of sectors, including emergency services, regulators, central and local government and the private sector, to prepare for the General Data Protection Regulation. This includes:

- reviewing and updating privacy notices, data protection policies and procedures to ensure compliance with the new regime. In particular, this involves ensuring that they cover all new individuals' rights, contain appropriate procedures for notification of data

breaches and adhere to the enhanced subject access request requirements;

- advising on the requirement for new Data Protection Officer role;
- training and advising on 'privacy by design' for new IT solutions and drafting privacy impact assessment;
- ensuring that the seeking, obtaining and recording of consent meets the new requirements; and
- advising on international data transfers.



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SENIOR PARTNER ASHLEY BADCOCK TO RETIRE



In 1970, US troops entered Cambodia, the half crown ceased to be legal tender, Matt Damon was born and the Who and Jimi Hendrix (who died later in the same year) played to 600,000 people at the Isle of Wight rock festival. And the Beatles broke up.

Also in 1970, Ashley Badcock started work as an articled clerk at Sharpe Pritchard, which was then a somewhat smaller firm with offices in Kingsway and Westminster. Ashley qualified in 1973 and became a partner only a year later, demonstrating that the partnership back then knew they had someone special on their hands. Ashley was senior partner of the firm from 1995 until his retirement at the end of March 2017.

It is fair to say that the success of Sharpe Pritchard is largely down to Ashley. Single handed he took up the task of trainee recruitment at the firm before he became senior partner

and carried on with it until he retired. A large number of the current workforce were hand-picked by him.

Ashley steered the firm brilliantly through rapidly changing times, from being a firm which was known mainly for its agency litigation and Parliamentary practices to one which now has a national reputation for public law work across the board, cited in the legal directories as leaders in its field in a number of areas.

Professionally, Ashley specialised in contentious work, with a particular leaning towards construction disputes.

He was also one of the country's leading practitioners in electoral law, and acted for many returning officers on most of the high-profile cases in his time.

Ashley is a tennis fan, playing regularly, and is also a keen beekeeper. His Holborn Honey is delicious. He is a devoted family man and he will now be able to spend more time with his wife Fabienne, his children and grandchildren.

Following Ashley's retirement, I now have the honour of being the new senior partner and Julia Rudin is the new managing partner. Both of us were recruited by Ashley in 1990. The fact that his role has had to be divided between the two of us demonstrates how much he put into it!

Election law work will continue to be carried out by Emyr Thomas and construction disputes by Sharpe Pritchard Adjudication, headed by Justin Mendelle.

Everyone at Sharpe Pritchard wishes Ashley all the very best for his retirement, and we are sure that sentiment is shared by his clients and many friends in the legal profession. After 47 years he has left the firm in great shape, and we take pride in all he has achieved here.



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APPOINTMENT TO CROWN COMMERCIAL SERVICES LEGAL PANEL



Sharpe Pritchard wins Tier 1 place on Central Government Panel as part of innovative PwC consortium

Sharpe Pritchard LLP, as part of a consortium with PwC, Howes Percival and Holman Fenwick Willan, has won a place on the Crown Commercial Services General Legal Panel as a Tier 1 Provider.

Alastair Lewis, Senior Partner of Sharpe Pritchard LLP commented: "This is a marvellous achievement and a great example of a successful collaboration between four firms with expertise and experience which complement each other. Between us we are putting forward a best of breed solution to enable the government to benefit from the combined strength of the four firms."

Julia Rudin, Managing Partner said: "This is a great example of the government's drive to diversify the sector and look for specialist firms to provide added value and innovation."

The new panel, which will be in place for at least two years and is valued at up to £400 million, replaces the previous multi-lot CCS Legal Services Framework with a single

arrangement which covers a wide range of legal services specialisms. Sharpe Pritchard already has a strong track record of advising on important public sector projects and very well established working relationships with several government departments. We are delighted to have this opportunity to continue to develop our work with central government.



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FIVE COUNCILS SAVE £50 MILLION IN OUTSOURCING DEAL WITH INNOVATION HUB

Five district councils decided to work together with a view to outsourcing a range of services. The aim was to ensure that the combined contracts would be large enough to achieve substantial savings resulting from major economies of scale. The five councils, Hart, Havant, Mendip, South Oxfordshire and the Vale of White Horse, share common aims but are not close geographically.

The distance between them was not seen as a barrier to working effectively together. They entered into an agreement committing them to carry out the joint procurement.

Procurement process

An advertisement was published in the Official Journal of the EU in March 2015. Two separate contracts were let; one for revenues and benefits, finance, HR, ICT and a range of support services (Lot 1) and the other for property, parking and facilities management (Lot 2). It soon became apparent that the opportunity was provoking a significant degree of interest from the market.

The procurement was carried out by way of competitive dialogue. This allowed the bidders to shape their solutions to accord with the councils' requirements. Once the dialogue had resulted in the councils having solutions on the table, which would enable

the services to be delivered effectively, they invited the bidders to submit their final tenders.

The outcome

Following evaluation of the final tenders, Lot 1 was awarded to Capita and Lot 2 to Vinci Construction, as lead member of a consortium that includes Indigo and Arcadis. The contracts were signed on 4 April last year. They are for a period of up to nine years two months with the opportunity of extensions for up to five years.

It is estimated that the savings resulting from the transaction will be in the region of £50 million.

A number of members of staff from each of the councils are transferring to the new providers. They will form a merged workforce, providing services from centres of excellence. Among the features of the

contracts is an innovation hub to develop ideas for greater efficiencies in the management and delivery of council services.

Sharpe Pritchard acted for the five councils from the beginning of the transaction. We advised on the procurement process and prepared the draft contract documents, negotiating the terms with the bidders. We also prepared the agreements between the councils to enable the joint procurement and joint management of the contracts to take place.



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SHARPE PRITCHARD STRATEGY LAUNCHES WEBSITE

Sharpe Pritchard has long been known for its strategic and innovative approach in its provision of legal advice on major projects and public sector contracts. Taking this one step further, the firm has launched a new service offering strategic advice and consultancy on all aspects of project and major contract management with the appointment of Debbie Bondi and the launch of a new website www.spstrategy.co.uk.



Tim Farr, a partner in the Sharpe Pritchard projects team explains, 'We are often called in to advise on a procurement or a contract some time after the project was scoped and put in motion. It was often the case that we might have to unravel structures that were not fit for purpose or we might see projects stall for reasons that might have been avoided. We saw an opportunity to offer a new service to our clients that would help improve the success of their projects and major contracts, and put failing projects back on track with a minimum of fuss.'

Debbie Bondi joined Sharpe Pritchard in late 2015 and has extensive experience of leading and supporting transformation in the public, not-for-profit and private sectors. She has been instrumental in developing the range of services to be offered by Sharpe Pritchard Strategy and in launching the new website.

The range of strategic support offered covers the entire lifecycle of a project, from setting development objectives for a new project to procurement and project management.

Our new website details our full range of services including:

- project launch and management;
- procurement support;
- process assurance;
- strategic decision support;
- business and culture change;
- technology support; and
- project recovery.

If you have any feedback, we would like to hear from you. Please contact us at strategy@sharpepritchard.co.uk.



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SHEFFIELD MUSIC HUB HELPING TO FUTUREPROOF A VITAL PARTNERSHIP



Sheffield Music Hub is a vibrant organisation which enables children and young people from all backgrounds and every part of Sheffield to deepen their enjoyment of music and to progress to the highest levels of excellence.

The highly-regarded Music Hub is governed by an advisory board made up of representatives from schools, music organisations, parents and carers, young people and the voluntary sector, including Sheffield City Council which is the accountable body for the Hub.

Building on their successes to date, the governing board of the Sheffield Music Hub was conscious of changes in the environment in which they were operating, including further pressures on funding and the potential for new performance indicators and requirements to be introduced.

Sheffield City Council sought proposals from consultants to conduct a strategic study, identifying options for an improved organisational structure, governance arrangements and operating model. The objective was to help the Music Hub to build organisational resilience and face the future with increased confidence. They wanted to be prepared for whatever uncertain and challenging times lay ahead, to draw on and consolidate existing excellent practice

and to extend innovative partnership arrangements with other key local stakeholders.

Sharpe Pritchard Strategy was appointed, as our proposals offered a unique combination of skills. These include detailed knowledge of alternative delivery vehicles in the public sector including:

- trading companies;
- partnership arrangements;
- organisational design;
- improvement and transformation; and
- strategic road mapping.

This in-depth knowledge blends organisational, commercial and legal excellence with practical experience of delivery.

The Sharpe Pritchard Strategy team, led by Debbie Bondi, took time to listen to and really understand the stakeholders for the Sheffield Music Hub. We collated and analysed information gathered from stakeholder interviews, market intelligence and benchmarking with other Music Hubs.

Following this we identified three main options for the council and the Music Hub to consider, namely:

- leaving organisational arrangements broadly the same, whilst focusing on ten areas for improvement identified by the study;
- establishing an organisational model independent from the council, with the potential to acquire charitable status; and
- merging with council's own, recently established, school improvement company.

The advantages and disadvantages of the options were explored in depth, in a user-friendly format. Particular consideration was given to potential future changes to the environment in which Music Hubs operate, including changes in funding levels and organisational arrangements. The implications of each possible course of action were clearly laid out so that senior stakeholders were well informed on all options, the potential risks and how they might be mitigated.

The final report provided Sheffield City Council and the Music Hub with the information they required to make informed decisions about the future of the organisation, with confidence. The city council's project sponsor said all members of the organisation have been exceptional in all areas and I cannot recommend their professional and personal skills highly enough.



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SUCCESSFUL SERVICE DELIVERY MODELS: WHERE TO FOR SCHOOL SUPPORT SERVICES?



The saying goes that ‘a week is a long time in politics’. That certainly rings true at the moment in the field of education. Against this fast-changing backdrop some things will always be the same. One example is the need for all maintained schools and academies to have good quality service provision for teaching and learning and the back office functions that are necessary for successful operation.

In this article, first published in *MyAcademy*, education projects solicitor Catherine Newman looks at the future for successful service delivery models in support services for schools.

This issue is heightened by the still anticipated proposals to introduce a new national funding formula with devolvement of resources directly to schools, rather than via the local authority. This means all schools will need to find ways to continue to access good quality, flexible, cost effective services.

Many academies choose to receive services from local authorities so the potential to work collaboratively across the maintained and academy sector remains very relevant. There is a growing trend to establish new organisations for the specific purpose of delivering services to schools that local authorities can no longer guarantee to provide.

The overall driver for a successful school services delivery model is meeting the requirements of the schools themselves. These will be determined by local factors: the strength of the relevant local authority, the number of (particularly sponsored) academies in the area and the prevalence of other quality service providers.

There’s no one size fits all. This is reflected in the range of models in operation and emerging, including joint

procurements or local authority led procurement for specific services, schools companies, public or private sector ventures and different forms of employee-led mutual.

In a number of areas, school improvement services are being delivered through a body which is separate from the local authority but which is able to harness existing local authority expertise. Through that organisation, participating parties are able to collectively agree a financial and practical basis to offer support to all schools in need, be they maintained or academies. Options may seem complicated but exploring straightforward questions can help:

- What services are required?
- Who wants to work together?
- Who should receive the services?
- Where is the current expertise and how is it funded?
- How the services should be funded in the future, for example, top slice contributions, rate cards for pick and mix, grant funding, local authority funding, commercial operations?
- What influence, if any, should the local authority have and should there be a relationship between the organisation and the local authority?

- How should appointment rights to any board operate? How will success be measured? Who will be responsible for doing that and what happens if something goes wrong?

Thinking about these things will help to shape answers to more technical questions as to:

- What is the purpose of any intended organisation, for example, commercial, social enterprise, mutual, co-operative?
- What is the appropriate legal form of any intended organisation, for example, company limited by guarantee, community interest company, co-operative and community benefit society, trust?

A good starting point is for all interested parties to explore these issues and to draw up a non-binding memorandum of understanding. Although not legally binding, a memorandum of understanding is a useful tool for focussing constructive discussion and recording common intentions.

It is also important to remember that the timescales for authorisation processes, to enter into formal arrangements, will vary between parties depending on individual governance arrangements.

Finally, it is essential to have a clear information sharing strategy so that individual governing boards can make informed choices as to whether or not the intended model is right for them. Getting this right can mean the difference between an option being viable or not.

So, whilst the pace is fast and the financial backdrop challenging, change also allows schools to come together to harness expertise and establish service delivery models which can be flexible and bespoke. With a fair wind, that could be a positive opportunity.



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ACADEMY CONVERSIONS FROM WITHIN A PFI



In March 2016, the white paper *Educational Excellence Everywhere* was published by then Education Secretary Nicky Morgan. Promising significant acceleration of the academisation policy, the proposal that all schools convert to academies by 2022 come-what-may was soon watered down. Political and media attention has subsequently turned to plans for new grammar schools.

A year later and in spite of government upheavals, the process of academy conversion has quietly continued unabated. This remains true of schools within existing Private Finance Initiatives (PFIs), many of which began as part of the Building Schools for the Future programme during the five years leading up to 2010.

Schools PFIs and implications for academy conversions

Under a schools PFI, a contractor takes responsibility for building or refurbishing school facilities and then for maintaining them over a period of around 25 years. As the name suggests, the contractor will have used private financing to pay the building costs. In return, the local authority party to the PFI pays the contractor a monthly unitary charge. The object was that impressive school premises would be built and maintained by the private sector, while the costs to the public sector are spread over a quarter of a century. PFIs are designed to be finely balanced in terms of the roles and incentives for the parties.

The existence of a PFI raises additional hurdles for would-be academies during

the conversion process: the original arrangements between the local authority and PFI contractor will not have envisaged the involvement of semi-autonomous academies. An academy will not become a party to the PFI itself, and there are key implications in terms of:

- the local authority's obligation to afford the PFI contractor access to school premises which will be occupied by a proposed academy; and
- how a proposed academy contributes to the local authority's PFI costs, and how changes in these costs are passed on.

Consequently, there is a solution which sees additional documents entered into as part of the academy conversion process. The academy and the local authority enter into a 'school agreement' which governs the relationship between the two in terms of the ongoing PFI, whilst a tri-partite 'principal agreement' is signed by the academy, the local authority and the DfE. Under the principal agreement, the DfE agrees to cover certain potential costs to the local authority if the academy breaches its obligations under the school agreement.

The PFI contract itself also needs to be adapted to recognise the existence of the academy. This is done by way of a variation; in the context of the PFI, the academy is added to the list of bodies for which the local authority assumes responsibility, while the PFI contractor adds the academy to the list of bodies named on the insurance policies taken out for the project. As an academy is normally granted a 125 year lease of the school site, the land arrangements prevailing under the PFI will also likely need some modification to accommodate this.

Sharpe Pritchard's education team has advised on many academy conversion projects including those from within live PFIs, and we recognise the multitude of stakeholders and interests that can be involved. We can advise and give support on the conversion process and legal documents, adapting to the different challenges each conversion can bring.



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PLANNING LAW CASE UPDATE



Our planning lawyers continue to be involved in important cases in the Planning Court. In this issue, we analyse two recent cases in which Sharpe Pritchard acted and which are of importance to local planning authorities and developers. The first deals with the interface between the requirement to give prominence to development plan policies and the effect of other material planning considerations. Senior associate William Rose and trainee solicitor Emily Knowles explain the latest thinking in a series of cases about the presumption in paragraph 14 of the National Planning Policy Framework (NPPF) in favour of granting planning permission for sustainable development.

The second case is about the timing of the making of proposed neighbourhood plans and their relationship with local plans and related European and environmental law. Partner Trevor Griffiths and trainee solicitor Jasmine Mahboobani explain the approach taken by the Court of Appeal.

East Staffordshire Borough Council v Secretary of State for Communities and Local Government & Anor [2016] EWHC 2973 (Admin)

An inspector allowed an appeal against the council’s refusal of planning permission for 150 houses. While the development was in conflict with the local plan, the inspector considered that he was entitled to apply a broad presumption in favour of sustainable development. In the High Court,

Mr Justice Green found that the inspector had misdirected himself in three ways:

- applying the sustainable development presumption incorrectly;
- failing to carry out a balancing exercise; and
- incorrectly finding that the proposal amounted to sustainable development.

The relevant law

Section 38(6) of the Planning and Compulsory Purchase Act 2004 (PCPA) and section 70 (2) of the Town and Country Planning Act 1990 (TCPA) require planning applications to be determined in accordance with the development plan unless other material considerations indicate otherwise. Paragraph 12 of the NPPF gives further

guidance. Paragraph 14 of the NPPF refers to the presumption in favour of sustainable development as ‘a golden thread’ running through plan-making and decision-taking and that developments that accord with the development plan should be approved without delay.

Analysis of paragraph 14 NPPF

The inspector acknowledged that the proposed development conflicted with the plan and decided that the advice in paragraph 14, to grant permission if a proposal accords with the development plan, did not apply. The inspector took the presumption of sustainable development to be a material consideration and the starting point. The judge disagreed and held that, where a proposal conflicts with the local plan, the decision maker should start from the position that it conflicts with paragraph 14, is not consistent with the presumption of sustainable development and should therefore be refused. As a result, he held that the inspector had materially misdirected himself as to the test to be applied.

Relying on *Cheshire East BC v (1) Secretary of State for Communities & Local Government (2016) EWHC 571 (Admin)*, the judge acknowledged that the NPPF is not the only material consideration and that there is scope for discretion where paragraph 14 suggests that a proposal should be refused. However, the outcome arrived at by the application of paragraph 14 should carry considerable gravitational pull and should yield only exceptionally where there are objective and substantial reasons as to why the development should still be permitted. He said that this followed from:

- the need for predictability, efficiency and transparency in planning decisions;
- the need for decisions to be taken consistently with the local plan, given that it is a document that has been widely consulted on; and
- the phrases ‘golden thread’ and ‘means’ in paragraph 14 indicate that the test under paragraph 14 covers the overwhelming majority of cases.

The balancing exercise and the concept of sustainable development

The inspector decided that the social, economic and environmental benefits of the proposal were significant and outweighed the limited harm caused and the proposal would represent sustainable development. But the judge held that the inspector had not conducted a proper balancing exercise and that if a decision maker wants to approve a proposal which is not consistent with the local plan, the reasons must be clearly set out in the decision and the decision maker must address the weight put on those reasons. The inspector had not explained how or why the failure of the proposed development to bring about various benefits, as set out in relevant policy in the plan, should be ignored or overridden.

The judge also said that the inspector was wrong to find that the proposal was sustainable development. The inspector failed to explain how it was sustainable given its inconsistency with the local plan.

Further developments

The judge agreed to grant permission to appeal to the Court of Appeal because of the importance of the decision and the existence of conflicting case law. The case is likely to be heard in Spring 2017. Importantly, the Cheshire East case has been granted permission to appeal to the Supreme Court and judgment is expected soon.

R (on the application of DLA Delivery Ltd.) v Lewes District Council and Newick Parish Council [2017] EWCA Civ 58

This case related to a challenge to the Newick Neighbourhood Plan (NNP). The Court of Appeal upheld the approach taken in previous High Court judgments that a neighbourhood plan can come forward ahead of an up-to-date local plan.

General conformity

The case concerned the statutory requirements of the Town and Country Planning Act 1990 for a neighbourhood plan to be in general conformity with the strategic policies contained in the development plan. The court decided that the neighbourhood plan must 'not be otherwise than in general conformity with those strategic policies' and that whether there was sufficient conformity

with the strategic policies is a matter of planning judgment.

Habitats Directive and Suitable Accessible Natural Green Space (SANG)

The court decided on the correct approach to policy making where a SANG is needed to compensate for development within a certain distance of a European Site. In the present case, the sites allocated for housing in the NNP were all within seven kilometres of Ashdown Forest, a European Site. At the time of examination of the NNP, no site for a SANG had been identified. Lord Justice Lindblom did not consider that it was necessary for the development plan to resolve which sites would be suitable for SANGs nor on the timing of their provision. While noting that the plan's examiner should have addressed the lack of positive evidence when examining whether a SANG would be put forward, the court decided that as a SANG had subsequently been identified and planning permission was obtained for it, it would exercise its discretion to refuse relief.

Breach of Environmental Assessment of Plans and Programmes Regulations 2004

In relation to the approach to strategic environmental assessment of neighbourhood plans, the court accepted that it was appropriate for the district and parish councils to rely on the strategic environmental assessment of the forthcoming local plan. While finding on the facts that the screening opinion did not go far enough in explaining why there were no likely significant effects and hence a breach of regulation 9(3) of the regulations, the court again refused relief. It found that it was inconceivable that the outcome of the strategic environmental assessment screening exercise would have been different even if the reasons for determination in the scoping reports had been more detailed.

Conclusions

The Court of Appeal has made it clear that it is not unlawful for a neighbourhood plan to be brought forward ahead of an up-to-date local plan. But the link between them needs proper consideration. In particular, the local planning authority will need to take account of the NPPF and its requirements on housing supply policies.

Recent government proposals, such as those in the Housing White Paper, the Neighbourhood Planning Bill and changes to the NPPF, will also be important. It will be interesting to see whether any intervention follows from the Supreme Court.

Sharpe Pritchard acted for the local authorities in both of the above cases and also for Cheshire East Borough Council in the Supreme Court case. William Rose and Trevor Griffiths regularly act on planning cases in the higher courts and the Sharpe Pritchard planning group advise on all aspects of major and complex planning proposals.



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NEW SUITE OF JCT CONTRACTS

TOP CHANGES FOR PUBLIC SECTOR CLIENTS

The JCT is in the process of updating its standard form building contracts and related contracts. To date, it has published new editions of the Design and Build (D&B) and Minor Works (MW) suites. The top five changes to note for public sector clients are...

1 Incorporation (with minor changes) of the provisions of the Public Sector Supplement 2011

The JCT published the supplement in 2011 to encourage public sector employers to use its contracts by enabling them to use a JCT contract to:

- meet the government's fair payment principles as outlined in its Fair Payment Charter;
- meet obligations in relation to transparency and freedom of information requests; and
- facilitate the use of Building Information Modelling (BIM) protocols in line with the Government BIM Strategy.

Among other changes, the payment provisions have therefore been significantly revised, including in relation to:

- loss and expense claims;
- interim valuation dates; and
- notice requirements.

2 Incorporation of provisions to reflect aspects of the Public Contracts Regulations (PCR) 2015

The Public Contracts Regulations apply to all contracting authorities and have an impact on most procurements carried out by public sector bodies. As such, the relevant provisions have been incorporated via (a) a new Supplemental Provision, in relation to: (i) information on; (ii) exclusion of; and (iii) prompt payment to, sub-contractors, and (b) new termination grounds relating to: (i) modifications to the contract; (ii) mandatory grounds for exclusion; and (iii) European Court of Justice determinations.

3 Incorporation of JCT 2015 amendment addressing the Construction (Design and Management) Regulations (CDM) 2015, in relation to health and safety obligations

Provisions have been incorporated to:

- reflect the obligation to appoint a principal designer; and
- document the applicability of the regulations to sub-contractors.

4 Introduction of options to provide performance bond or parent company guarantee in D&B contract

Introduction of these options recognises the almost universal amendment currently made by employers to JCT contracts, being the requirement for provision of one or more forms of security such as a bond or parent company guarantee, and frequently both.

5 increased flexibility in relation to the granting of third party rights in D&B contract

There is now an option for sub-contractors to provide third party rights as an alternative to collateral warranties. While at law there is no difference between the two forms, there has in practice been a slow uptake of third party rights. The JCT's addition here should therefore continue the move towards using third party rights as a means of providing protection for third parties. Parties will be free to use their own agreed forms of either document.

Other points to note

- The insurance provisions have been amended to allow for alternative solutions if tenants or domestic homeowners have difficulty obtaining joint names insurance for existing structures. Moreover, the provisions have been consolidated for all insurance types, for ease of reference, in relation to:
 - evidence of insurance;
 - insurance claims; and
 - reinstatement work.
- Part 2 of the D&B Contract Particulars has been deleted due to the incorporation of provisions related to collateral warranties and third party rights into Part 1.

Implications

The changes above demonstrate the JCT's recognition of important market trends and its continued relevance in the modern day construction market.



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SHARPE PRITCHARD ADVISES WAKEFIELD COUNCIL ON LONG-TERM £200 MILLION FACILITIES AND PROPERTY MANAGEMENT CONTRACT



The procurement team at Sharpe Pritchard has advised on an innovative and pioneering long-term year total facilities and property management contract for Wakefield Council. The contract has been awarded to Engie, and has a value in excess of £200 million and aims to deliver a minimum saving of £10 million for Wakefield Council through the modernisation of services.

Sharpe Pritchard were lead legal advisors on the project from its inception through to completion. The team, led by partners Tim Farr and Justin Mendelle, worked closely with the council to determine the scope of the procurement and were involved at every step of the process, from publication of the OJEU notice to contract signature.

Partner Justin Mendelle commented, 'This is an enormously exciting and ground-breaking procurement.'

In addition to the services that the council has procured for its own portfolio, it has also procured cleaning, catering and building repairs services for all schools maintained through public funds

in the Yorkshire and Humber region, which will be accessible through a framework agreement.

It is anticipated that this will bring about a positive step-change in the delivery of services to both the council and the bodies that choose to make use of the framework agreement.



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SHARPE PRITCHARD EXPANDS PROJECTS TEAM



Steve Gummer

Steve Gummer re-joins the firm from Allen and Overy as an associate in our infrastructure group. Steve trained at Sharpe Pritchard and specialises in complex infrastructure projects, including renewable energy and waste transactions.



Uzma Raja

Newly qualified solicitors Uzma Raja and Shane Hubbard join the team, having completed their training with Sharpe Pritchard in February 2017 bringing additional strength to our construction, commercial and technology groups.



Shane Hubbard



Nicola Tilche

Trainee solicitor Nicola Tilche joins from the Law Commission for England and Wales and will specialise in commercial contracts and public procurement.

Paralegal Tola Odedoyin provides support to the team, with particular involvement in construction contracts and adjudication.



Tola Adedoyin

SOUTHEND-ON-SEA BOROUGH COUNCIL



Better Queensway: Better Housing, Better Living, Better Place involves the regeneration of the Queensway Estate, which is situated to the north of Southend town centre, in close proximity to Southend Victoria train station. There are 441 residential units located on the site, situated primarily in four tower blocks. The council intends to develop this site ensuring that social tenants and leaseholder's needs will be at the heart of this community. The project involves the provision of new housing (including affordable housing) and changes to the highway, promoting better connectivity between the sites to the north and south of Queensway.

Sharpe Pritchard has been appointed as legal advisors to the Southend-on-Sea Borough Council to provide strategic

legal advice on this scheme, including advising on:

- procurement issues and the appointment of a preferred partner to deliver the proposed scheme;
- housing law and in particular tenancy rights;
- land assembly issues;
- planning issues; and
- compulsory acquisition powers for the project.

This appointment follows on from the appointment of SP Strategy in October 2015 who advised the Southend-on-Sea Borough Council on strategic and commercial issues on the proposed regeneration of the Queensway Estate.



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LONDON BOROUGH OF SOUTHWARK

Professional technical services procurement.

We have been appointed to advise on and prepare a suite of professional services procurements for the following types of work: architectural services, mechanical and electrical services, cost consulting services and clerk of works services. The procurements are likely to be run using the competitive procedure with negotiation, meaning that the council will have the ability to enter into discussions with the bidders to help shape how the services will be delivered. This is a high value, complex procurement which will be significant interest to construction professionals across the industry.

We are well placed to assist and advise the council on this procurement because of our

extensive experience in advising on work of this nature. In particular, we regularly advise on public sector procurements and commercial and professional contracts for construction services. We are members of the LBLA and have been and are retained by Southwark on a range of matters, including professional services contracts, general construction work and framework agreements.



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LITIGATION TEAM EXPANDS

We are pleased to welcome two newcomers to our litigation team.

Trainee solicitors Amy Brown and Jasmine Mahboobani join our dispute resolution and litigation team to work on prosecutions, housing disputes, judicial review and injunctions.



Amy Brown



Jasmine Mahboobani

CASE REPORT: *LONDON BOROUGH OF CROYDON V GEORGE SMITH*

Fly tipping is a massive issue for local authorities in rural and urban areas. Recent cases have hit the headlines in the national press and DEFRA have just published annual statistics which show that from April 2015 to March 2016, local authorities dealt with 936,000 fly tipping incidents. One of the most notorious cases to hit the headlines recently was dealt with by Sharpe Pritchard's Simon Kiely.

On 25 January 2017, George Smith was sentenced to a total of 52 weeks' imprisonment (the maximum prison sentence available to a magistrates' court) for a total of four separate fly-tipping incidents committed within the London Borough of Croydon. This sentence comprised 26 weeks custody for three offences which took place at the same location in South Croydon, and a further, consecutive sentence of 26 weeks custody for one offence in Thornton Heath. Mr Smith was also convicted for failing to hold a waste carrier's licence, and for failing to attend an interview as required under statutory powers. The court deprived him of the two vehicles he used in the commission of these offences, which will now be sold or destroyed by the council.

Mr Smith had been found guilty of these offences on 4 January 2017 at the conclusion of a contested trial conducted by Associate Solicitor Simon Kiely on behalf of the local authority.

Background

The four fly-tipping offences which Mr Smith was prosecuted for took place in 2016. The first three offences all involved the use of an X-reg white tipper truck. Two of these incidents took place in an alleyway to the rear of residential premises in South Croydon and were captured on local residents' CCTV cameras. The footage captured of the incident on 15 March 2016 showed Mr Smith reversing the vehicle down the alleyway, raising the tipper and opening



the rear gate of the truck, and then driving away at high speed causing the piled up builders' waste and rubble on the tipper to slide off on to the floor in a cloud of dust and dirt, and fully blocking access to the alleyway for all local residents.

This vehicle was spotted by officers on Thursday 7 April 2016 and was then seized using statutory powers. However, by Monday 11 April 2016, Mr Smith had already purchased a replacement white tipper truck, this time with an 04-reg plate and distinctive logos of the former owner's business on the front and side panels, and used this vehicle to collect waste and fly-tip it again in the same alleyway in South Croydon. This incident was again captured on CCTV. This second vehicle was also then spotted and seized by the council on 13 April 2016.

The prosecution also subsequently discovered that Mr Smith had been involved in a further fly-tip offence in nearby Caterham, within the neighbouring Tandridge borough, for which Mr Smith was convicted in October 2016. This conviction was relied upon both as bad character at trial, and as an aggravating factor for sentencing purposes.

During the investigation the council required Mr Smith to attend an interview to discuss his offending using their statutory powers under section 108 of the Environment Act 1995. While Mr Smith attended the council's offices at the date and time requested, he refused to be interviewed.

Mr Smith admitted at trial that he did not hold a waste carrier's licence from the Environment Agency which is a statutory requirement for anyone transporting waste. He explained that he had applied for one only to have been refused due to previous convictions for fly-tipping in 2009.

When sentencing Mr Smith to 52 weeks' immediate custody, District Judge Hammond described the offences as acts of 'wanton vandalism' and found them to be of the upmost seriousness.

She commented that Mr Smith's actions had caused considerable harm to the environment and local residents and that it was noted he had derived income and enriched himself to the detriment of the community.

This case has received extensive national media coverage, including articles in the Daily Mail, The Metro and The Evening Standard, and a feature on BBC's The One Show.

Mr Smith's sentence, together with the associated media coverage, sends a strong message to any would-be fly-tippers as to the consequences they face for their actions.



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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.

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 **@sharpepritchard**

Sharpe Pritchard, solicitors and parliamentary agents, focus on public law and act for a large number of public sector bodies and corporate clients. Our experienced team of lawyers, many of whom have worked within the public sector, advise on:

Academies and free schools	Employment	Planning, highways and environmental law
Commercial	General public law	PPP and PF2 projects
Construction	IT and information law	Procurement
Education	Litigation and dispute resolution	Real estate
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