SHARPE FOCUS

Edition 34

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NUTRIENT-NEUTRALITY – THE LATEST UPDATE

Solicitor, Rebecca Stewart, who is a member of our planning and parliamentary team, examines the judgment by the Court of Appeal, in the case of R. (on the application of Wyatt) v Fareham BC [2022] EWCA Civ 983 and outlines what this means for LPAs, developers and landowners.

The Habitats Regulations 2017 ("the Regulations") require local planning authorities ("LPAs") to take certain steps before approving plans or projects (such as a planning application or a local plan) if there is a likelihood of a significant effect on any European designated nature conservation site (such as a Special Protection Area or a Special Area of Conservation).

If a local authority considers that significant effects are likely, it must carry out an 'appropriate assessment' of the development to satisfy itself (beyond all reasonable scientific doubt) that there will be no adverse harm to the integrity of the site in question, which usually involves taking into account potential mitigation measures.

Many of England's most significant water bodies and wetland habitats are designated as protected sites under the Regulations and Natural England ("NE") has identified nutrient pollution as a major environmental issue for a number of these sites across the country.

Consequently, NE has issued multiple rounds of guidance to certain LPAs setting out the approach that they should take to the appropriate assessment where particular sites are at risk. The advice contains a methodology for demonstrating so-called 'nutrient-neutrality', which involves producing a 'nutrient budget' for a proposed development site and showing that the nutrient load created through additional wastewater from a proposed development will be properly mitigated so as to not cause further pollution of the site.

Since the issuing of NE's advice, the need to achieve nutrient-neutrality has posed a significant hurdle for developers seeking planning permission near protected sites. Securing appropriate mitigation can be difficult and the associated costs can also be great, for instance where a developer is looking to purchase nitrate-credits.

Nitrate credits are generated by third party landowners utilising their land in ways which off-set nitrate e.g. by creating new wetlands or other habitats. However such land can be expensive (particularly where it is in short supply) and, further, mitigation land is required to be within the same water catchment area and in some areas suitable third party land is unavailable. Furthermore, affected LPAs are under significant pressure, given the inherent tension between the need to deliver housing and NE's advice to only approve schemes where nutrient-neutrality is achieved.

Recent case law has confirmed that this issue will remain a continuing concern for developers and LPAs. Furthermore, an update by NE to the nutrient-neutrality advice in March this year has broadened its reach such that more authorities are now affected by the guidance. The updated advice provides further guidance to LPAs on the approach that should be taken when carrying out an appropriate assessment and this will need to be carefully considered moving forward.

R. (on the application of Wyatt) v Fareham BC

Earlier this year the Court of Appeal in the case of *R. (on the application of Wyatt) v Fareham BC* confirmed the weight to be given to NE's advice, reiterating established case law that a competent planning authority is entitled, and can be expected, to give significant weight to the advice of an *"expert national agency"* such as NE.

The Court also rejected claims that NE's guidance was unlawful. The applicant argued that the advice in place at the time was unlawful because it recommended, as a starting point, that local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling but *"may choose to adopt bespoke calculations"* when assessing how much nitrogen a proposed development would produce.

The appellant contended that a local authority **must** adopt bespoke calculations as the national average occupancy rate would not be permissible unless it was the correct

occupancy rate for the development proposed. As LPAs must use best scientific knowledge when carrying out an appropriate assessment, the appellant argued that NE's advice was unlawful as it was inconsistent with the need for best scientific evidence.

The Court concluded that, as the advice was not a legal instrument nor mandatory or prescriptive in nature, it could not be deemed unlawful and inviting LPAs into error. It provided just one approach that LPAs could take to appropriate assessments and in no way removed the onus on authorities to be sure, beyond all reasonable scientific doubt, that the integrity of a protected site would not be adversely affected.

As such, the position established is that the advice by NE should carry significant weight in the decision-making process deployed by LPAs to whom the guidance applies, but it should not be followed blindly and LPAs retain discretion to depart from the guidance where it is necessary to fulfil the statutory duties set out in the Regulations.

This was demonstrated on the facts of the case. The LPA did not strictly adhere to methodology for demonstrating nutrient-neutrality contained in the 2020 Advice as it had applied a *"precautionary buffer"* of 20% at the end of the calculation for nitrogen output of the scheme as a protective measure, rather than during the calculation itself to account for the inherent uncertainty of the figures.

The Court found this approach acceptable and also noted that the fact that Natural NE had not raised concerns about the proposed development (despite acknowledging that the methodology had not been strictly followed) was in itself good enough reason to justify not following the methodology precisely. However it also stated that *"The true position is that a planning authority ought to follow the methodology contained in the 2020 Advice unless it has good reason not to do so".*

It is therefore clear that a departure from NE's advice will not normally be acceptable save for in situations where a LPA considers a departure necessary to fulfil its statutory duties and in other circumstances, for instance where NE has not taken issue with the particular approach used.

The case upheld a decision by the High Court to refuse permission for judicial review of Fareham Borough Council's decision to grant outline planning consent for the development of eight detached houses on land approximately 5.5km from the Solent & Southampton Water Special Protection Area (a European protected wetland site). The Council had concluded that, given proposed mitigation measures, there would be no adverse effect on the integrity of the protected site.

Therefore, whilst the case may have given support to the significance of NE's advice, it also shows that development near protected sites will still be possible where an LPA properly carries out its statutory functions and is able to evidence neutrality.

The Court also confirmed that whether a plan or project will adversely affect the integrity of a European protected site is a matter of judgment for the competent authority, subject to the *Wednesbury* standard of reasonableness.

Where an LPA has clearly relied on the guidance of NE in carrying out its appropriate assessment, a judge considering any application for judicial review of its decision will not be expected to apply a more stringent test than this when determining if the application should succeed, even where sites are in particularly poor condition, given that the advice already factors in the condition of the protected sites.

NE's March 2022 advice and the government's July 2022 announcement

Since issuing its first advice on nutrient-neutrality, NE has identified a further 20 protected sites that are adversely impacted by nutrient pollution. In March this year, it issued updated advice, which included extending the reach of the advice to a total of 74 LPAs across the country, having originally issued advice to just 32 LPAs mainly in the South-West region. This means that the need to achieve nutrient neutrality is now becoming a national issue, with high numbers of affected authorities in the South and South-West, the North-East, and East Anglia.

The advice issued in 2022 includes updated nutrient neutrality methodology for calculating the scale of nutrient mitigation required, which has a number of changes from its 2020 predecessor.

On 20 July 2022, the government and NE announced measures that should help to resolve (at least to some degree) current issues faced by developers and affected LPAs. An amendment to the Levelling Up and Regeneration Bill will impose a new legal duty on water companies in England to upgrade wastewater treatment works ("WWTWs") by 2030 in *"nutrient neutrality"* areas to the highest achievable technological levels.

This should reduce pollution levels from existing development in sensitive areas, which will affect nutrient-budget calculations and might be expected in due course to lead to changes to NE's current advice. The government's Chief Planner has also said that WWTWs are to be treated as a certainty, such that they can be factored into calculations of nutrient neutrality before the amendment to the bill becomes law.

There will also be a new government-funded Nutrient Mitigation Scheme (NMS) to be established and accredited by NE, which will invest in new and expanded wetlands and woodlands. Developers will be able

to purchase ‘nutrient credits’ from the NMS to discharge their mitigation requirements.

This will make it easier for LPAs to grant planning permission for new developments in areas with nutrient pollution issues, particularly where securing other forms of mitigation is proving difficult. It will also give LPAs greater flexibility to progress applications where determination has been delayed, through the use of planning conditions e.g. requiring that mitigation be provided prior to occupation of a development.

What this means for LPAs, developers and landowners

LPAs and developers will need to consider NE’s updated advice and methodology carefully. The methodology includes, among other things, greater guidance on the use of bespoke calculations when assessing the nitrogen deposition of a site, which was a key issue in the *Fareham* case. It also introduces new variables that must be considered at stages two and three of the methodology. These variables include a site’s operational catchment, soil drainage type, average annual rainfall and whether it is within a Nitrate Vulnerable Zone.

The variables also have a significant impact on so-called ‘nutrient export coefficients’ (kilograms of nitrate and total phosphorous export per hectare of farmland) for both existing and future land use, which will affect nutrient-budget calculations and the level of mitigation required to make the scheme acceptable. Developers and LPAs will need to pay careful attention to applying this methodology correctly.

Particular attention will also need to be paid to the correct classification of the sites, as each land-use will require a different approach and has different variables from those listed above that need to be considered. Where a site’s land use is classified incorrectly, this is likely to cast doubt on the entire nutrient calculation and will make it difficult for a decision maker to be satisfied that there will be no adverse harm to the integrity of a site.

This was the case in a recent appeal against Ashford Borough Council (APP/E2205/W/21/3284706), where the developer mis-classified land as agricultural. This was considered likely to yield different results from a non-agricultural classification and led the Inspector to conclude that the nutrient calculation carried out by the appellant could not be relied upon and as such the Inspector could not rule out adverse harm.

LPAs may also want to start considering how the guaranteed WWTWs can be factored into their decision-making and how they can lawfully progress planning applications in light of the anticipated NMS.

> **Sharpe Pritchard’s planning team is able to advise developers and LPAs navigating their duties under the Regulations and assist in understanding the impacts of NE’s updated advice.**
>
> **We also have experience in drafting nitrate credit agreements and can advise landowners, developers and LPAs on their use and therefore on the use of the Nutrient Mitigation Scheme as it emerges.**

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FIXED CHARGES, SERVICE CHARGES, AND THE BARONESS

– THE SECOND LEASEHOLD REFORM BILL OF SUMMER 2022

Senior Associate, Lillee Reid-Hunt and Paralegal, Ruth Crout, outline the key aspects of the Leasehold Reform Bill which includes a substantial proposed change in the way long-term renting works in England and Wales.

In July 2022, Baroness Kennedy of Cradley introduced a private Bill: The Leasehold Reform (Reasonableness of Service Charges) Bill ('the Bill'), which at the time of writing is at the second reading stage in the House of Lords.

The Bill proposes to insert provisions into the Landlord and Tenant Act 1985 ('LTA 1985') and the Commonhold and Leasehold Reform Act 2002 ('CLRA 2002') to introduce restraints on how landlords can set and recover service charges from tenants.

Why is the Bill needed?

The Bill deals with two kinds of charges commonly made under tenancy agreements:

1. the fixed service charge – meaning charges that do not vary 'in accordance with the costs making up the charge' (although note that they may vary by index (e.g. RPI or CPI) or by a set percentage, or both); and
2. the variable administration charge – meaning charges that vary according to the service or good provided (e.g. one-off charges made for installations etc.).[1]

There is currently no 'reasonableness' threshold applicable to fixed service charges under the LTA 1985, which means that tenants can be charged disproportionately to the services supplied (see Anchor Trust v. Waby (2018) UKUT 370 (LC)).[2]

Similarly, under the CLRA 2002, landlords can charge variable administration charges that do not reflect the actual costs incurred by them resulting in significantly higher costs being recovered from tenants. There are additional issues when it comes to disputing these costs in court: the burden is on the tenant to demonstrate that the charge is more than the maximum that could be charged to a third party, and a landlord can rebut the claim simply by demonstrating that the charge is between the minimum and the maximum.

Baroness Kennedy's explanatory notes that accompany the Bill purport that leaseholders are genuinely disadvantaged by the current lack of regulation of service charges. She notes that leaseholders are charged the highest rates in the market for in-house surveyors, and the charges levied by landlords for 'run of the mill' consents or simple information requests can amount to several hundred pounds.

These points are impactful alongside recent case law that highlights the lack of protections for leaseholders when it comes to service charges. The Deputy President in Anchor Trust v Waby referred to Arnold v Britten [2015] UKSC 36 as a 'particularly striking example of the non-availability of statutory protection where a charge varies by reference to a factor other than the amount of the relevant costs'.[3]

What does the Bill propose – at a glance?

The Bill introduces a 'reasonableness' threshold to section 19 of the LTA 1985 and paragraph 2 of Schedule 11 of the CLRA 2002, followed by a reversal of the existing burden of proof so that it is the landlord who must demonstrate that the charge is reasonable and/or in line with what they have actually spent.[4] The intended result is that landlords will not be able to charge tenants unless they can demonstrate that the charge reflects actually incurred costs.

These provisions will likely face amendments and edits through the course of the Bill's passage through the Lords, Commons, and committee stages, but it is worth noting that as the Bill currently reads there may be unintended effects.

For example, the provisions reversing the evidentiary burden under the LTA 1985 and the CLRA 2002 differ for fixed service charges and administration charges respectively. Landlords will only need to provide evidence if they intend to retain the fixed service charge under the amended LTA 1985, implying that the provisions will not take effect unless a tenant demands repayment of the charge by the landlord.[5]

In contrast, the equivalent clause for administration charges under the amended CLRA 2002 is triggered at the point that the landlord seeks to enforce the charges.[6] If the Bill receives Royal Assent in its current form then landlords may get away with imposing unreasonable fixed service charges and gamble that their tenants are unaware of their rights and will not request the payment back.

Additionally, there are discrepancies in the proposed provisions applicable to each statute around landlord's agent's costs. While the amended ss.19(6) of the LTA 1985 (relating to fixed charges) refers to 'an out-of-pocket cost incurred by the landlord (or an associate of the landlord)', the amended ss.19(8) (relating to variable charges) defines 'out-of-pocket' more strictly as 'the direct cost to the landlord of providing the thing or service in question' (emphasis added).[7]

There is a similar discrepancy between the new paragraphs 2(2) and 2(4) inserted by clause 2 of the Bill into CLRA 2002 Schedule 11.[8] This inconsistency could limit the costs agents can recover from leaseholders, should it become law as currently drafted.

It is unclear whether these 'discrepancies' are intentional or not.

Final Thoughts

This Bill, along with the Leasehold Reform (Ground Rent) Act 2022, marks a substantial change in the way long-term renting works in England and Wales. However, the Bill has a long road ahead of it before it becomes an Act, and it would be presumptuous to speculate on what amendments might come between then and now.

It is enough to remark that tenancy law remains a high priority for the government and for Parliament, and the savvy landlord would do well to keep an eye on developments, ensure leases are up-to-date and 'futureproof' as much as possible, and implement effective record-keeping to ensure that charges can be evidenced if and when necessary.

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[1] Ibid.
[2] Anchor Trust v. Waby (2018) UKUT 370 (LC).
[3] Anchor Trust v. Waby (2018) UKUT 370 (LC) para 46.
[4] Leasehold Reform (Reasonableness of Service Charges) Bill, s.1 and s.2
[5] Leasehold Reform (Reasonableness of Service Charges) Bill, s.1(3).
[6] Leasehold Reform (Reasonableness of Service Charges) Bill, s.2(2).
[7] Leasehold Reform (Reasonableness of Service Charges) Bill, s.1(3).
[8] Leasehold Reform (Reasonableness of Service Charges) Bill, s.2(2).

GUIDELINES UPDATED FOR PUBLIC SECTOR AUTHORITIES REGARDING RUSSIAN AND BELARUSIAN SUPPLIERS

Following Russia's invasion of Ukraine, the UK Cabinet Office has updated its procurement policy relating to contracts with suppliers from Russia and Belarus.

Here, our Legal Director, Juli Lau and Associate, Gonzalo Puertas, examine the latest procurement guidelines.

The Cabinet Office updated the Procurement Policy Note 01/22[1] – Contracts with suppliers from Russia and Belarus, alongside a list of frequently asked questions ("PPN") to reflect modifications relating to the Local Government (Exclusion of Non-commercial Considerations) (England) Order 2022 No. 741[2] ("Order").

The Order amended the constraints of section 17 of the Local Government Act 1988 ("LGA 1988") such that local authorities described in the LGA 1988 can effectively review public contracts with companies linked to the Russian and Belarusian state regimes following the invasion of Ukraine by Russia, and potentially terminate such contracts and decline bids from those prospective suppliers.

Background, scope, and timing

The PPN, first issued by the Cabinet Office on 28 March 2022, concerns the termination of such contracts by all central government departments and suggests that other public sector contracting authorities *"should consider applying"* its approach.

However, the PPN noted that contracting authorities subject to section 17 LGA 1988 are prohibited from considering non-commercial reasons in their procurement decisions, or for terminating contracts, and indicated that secondary legislation was being considered to address the issue.

As of 1 July 2022, when the Order came into effect, the geographical origin of supplies or contractors cease to be non-commercial reasons that contracting authorities are prohibited from considering in their procurement decisions. The Order applies to local authorities, fire and rescue authorities, waste disposal authorities, integrated transport authorities, combined authorities, among others designated in section 1 LGA 1999 *("local authorities")*.

On 10 August, the Cabinet Office updated the PPN to local authorities in its scope and now includes local government specific guidance and additional frequently asked questions which are relevant for such authorities. As updated, the PPN's guidelines and recommendations are now in general the same for both central government and local authorities.

The PPN's guidance can be summarised as follows:

- Authorities are allowed to consider the Russian/Belarussian origin of prospective suppliers and contractors (including subcontractors, associated bodies, and customers) to exclude them from new procurements or terminate the relevant contracts, as applicable
- Authorities should not automatically exclude from new procurements suppliers linked to Russia or Belarus but registered in the UK or those having significant business operations in the UK (or a country to which the UK has a relevant international agreement)
- A decision to terminate a contract should be made on a case-by-case basis by observing legal and contractual obligations, alongside risk assessments, and ensuring there is an audit-trail to support such decision
- The decision to exclude suppliers and terminate contracts rests with the relevant authority.

The PPN approach to central government scope of action differs to that of local authorities mainly as follows:

- Recommendations on whether or not to terminate relevant contracts should be made to the most senior commercial/procurement professional in the local authority and to the Chief Financial Officer or equivalent appointed under section 151 LGA 1972 (not to the Accounting Officer or equivalent as in central government)
- While central government is allowed to take action under the PPN in line with value for money, local authorities need to consider their duty under section 3 LGA 1999 to secure continuous improvement in the exercise of their functions, having regard to economy, efficiency, and effectiveness (e.g., where incurring significant termination charges)

Key takeaway

The PPN updates the national guidelines for both central government and local authorities to mobilise a policy objective following the invasion of Ukraine by Russia.

Public sector authorities can rely on the PPN as a starting point to consider the specific circumstances, conduct appropriate and proportionate due diligence, and pursue legal routes of cancelling their contracts with Russian/ Belarusian suppliers.

However, the overarching recommendation of the PPN is that public sector organisations seek legal advice on more nuanced issues, most notably around contractual termination provisions and their implications, complying with public procurement obligations.

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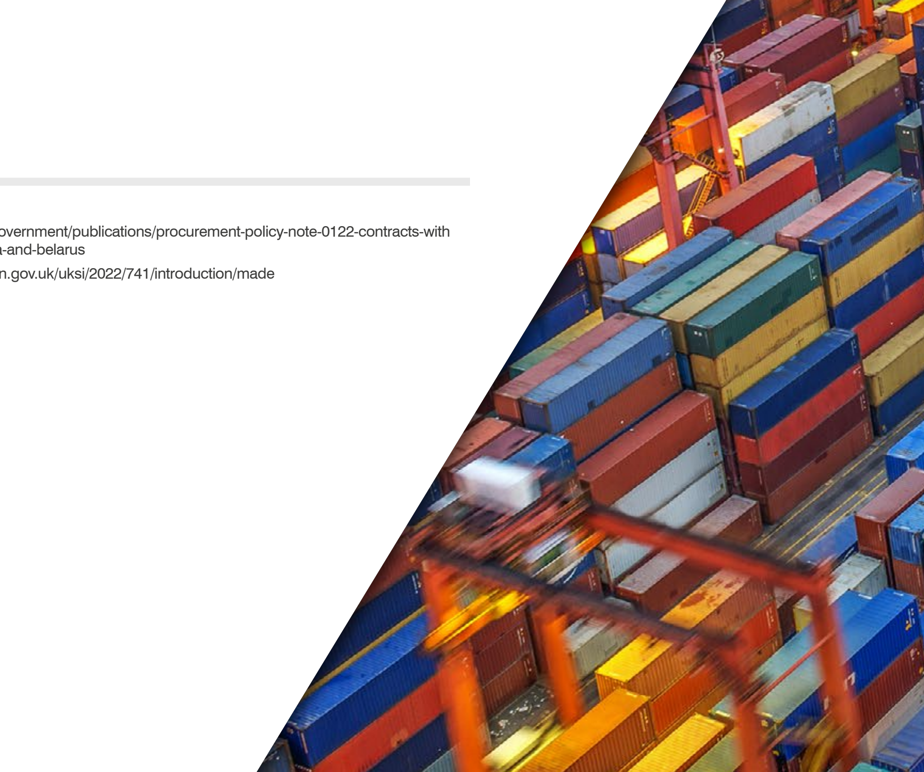
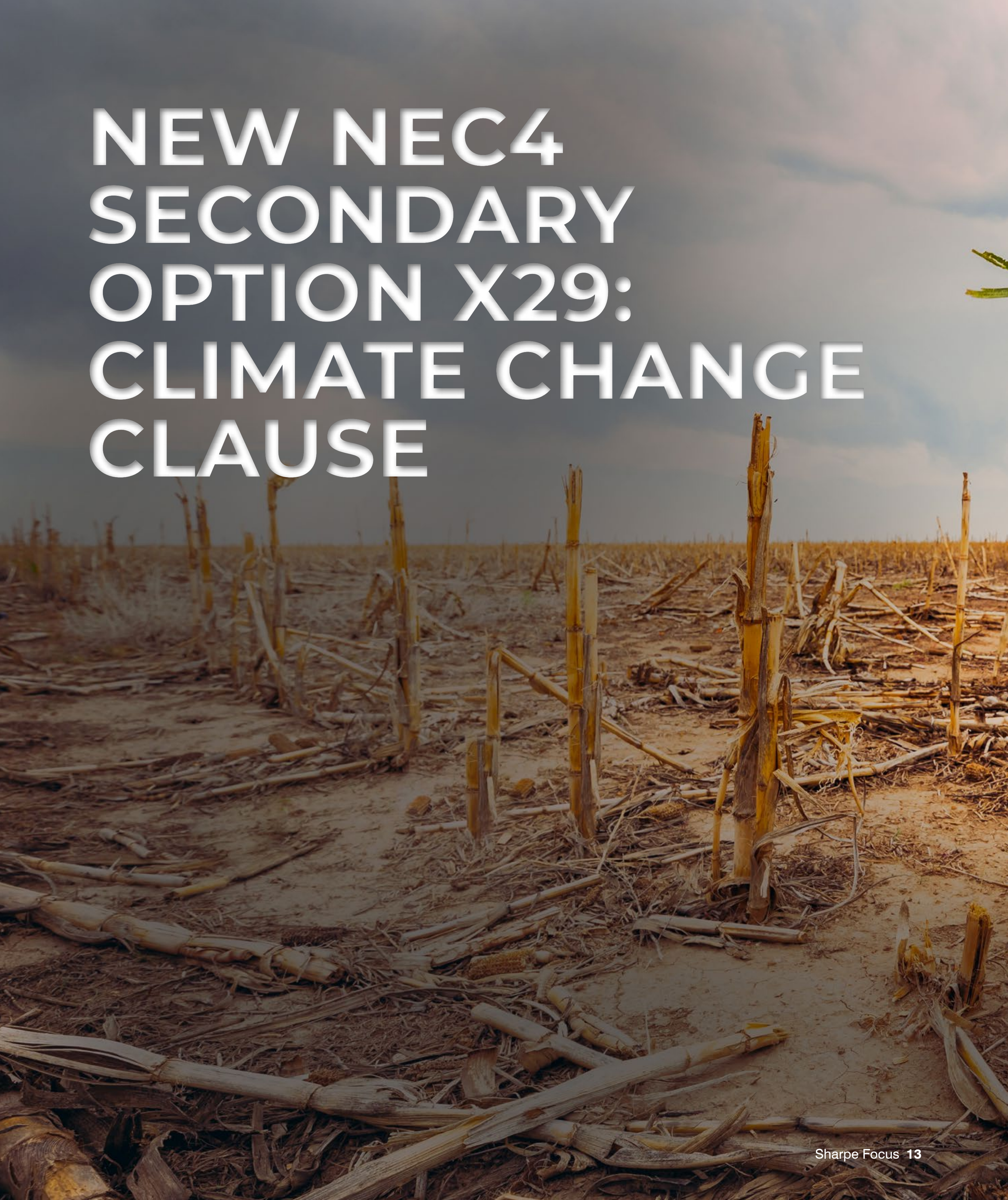


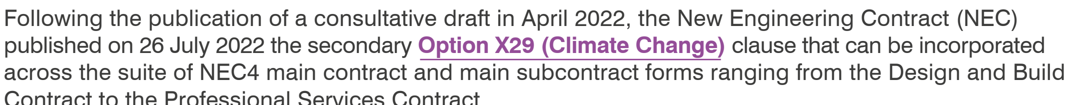
[1] https://www.gov.uk/government/publications/procurement-policy-note-0122-contracts-with-suppliers-from-russia-and-belarus

[2] https://www.legislation.gov.uk/uksi/2022/741/introduction/made



NEW NEC4 SECONDARY OPTION X29: CLIMATE CHANGE CLAUSE

Roseanne Serrelli, our Partner and Head of Strategic Projects and Innovation, together with Associate, Gonzalo Puertas, examine the implications of NEC4 which now requires contractors to collaborate with other Climate Change Partners.



Following the publication of a consultative draft in April 2022, the New Engineering Contract (NEC) published on 26 July 2022 the secondary **Option X29 (Climate Change)** clause that can be incorporated across the suite of NEC4 main contract and main subcontract forms ranging from the Design and Build Contract to the Professional Services Contract.

NEC have also published corresponding **Guidance Notes** for each of the X29 secondary options setting out in detail how the provisions can be utilised.

Purpose

According to NEC, the X29 clause will be used to *"tangibly demonstrate carbon reduction initiatives on future builds across the construction sector"*. The new clause aims to reduce the impact of emissions arising through the lifecycle of an asset i.e., the emissions created in the construction works themselves, in the production of materials and in the operation and maintenance (and, eventually, demolition) of the resulting asset.

> Instead of traditionally adhering to one of the party's climate change policies as appended in the contract documents, the X29 clause has been developed to address the issue in the project scope of works or services and to engage clients and all key members of the supply chain.

How it works

Depending on the NEC4 contract form, the key elements introduced by the X29 clause are:

- Climate Change Requirements to be complied with by the contractor as specified in the project scope e.g., levels of recycling, the use of renewable power on-site, the use of electric vehicles, reducing waste generation, designing out waste, and reducing carbon emissions through design. This means that if the contractor fails to comply and the failure relates to the contract works, it will be a defect and must be remedied. It is worth noting that, as part of the project scope, Climate Change Requirements can be changed unilaterally by the project manager
- A Climate Change Plan i.e., the contractor's strategy setting out the stakeholders, roles, timescales, key milestones, tools, and tasks for achieving the Climate Change Requirements. The plan is a statement of intent of how the contractor proposes to achieve the Climate Change Requirements, thus it is not subject to direct contractual sanctions if the contractor fails to comply with it
- A non-mandatory Performance Table setting out performance targets and incentives to encourage the contractor to achieve stated performance targets. Incentives may be financial (positive or negative), or even not financial and instead be used only to measure and record the performance achieved. The contractor is required to report its performance against the Performance Table targets at regular intervals. As the table is not part of the project scope, it cannot be changed unilaterally by the project manager and failure to achieve these targets will not result in a defect that has to be corrected

- Contractor's proposals of changes to the project scope of works or services to reduce the impact of emissions on climate change during the lifecycle of the asset. If the change results in the contractor bettering the targets set out in the Performance Table, then it will be rewarded as provided for in the Performance Table

Heads up

The X29 clause follows the NEC approach to a collaborative contractual relationship and so requires the contractor to collaborate with other Climate Change Partners identified in the Climate Change Requirements, and to give early warnings for events which may impact the achievement of the Climate Change Requirements.

The Guidance Notes emphasise that careful consideration must be given as to the content of the Climate Change Requirements to make sure they are achievable and do not place undue risk upon the contractor. If the Climate Change Requirements are unduly onerous this may lead to bidders refusing to bid for the work or including substantial risk allowances within their bids.

Also, the Guidance Notes indicate that the X29 clause is in some ways a combination of secondary Options X17 (Low performance damages) and X20 (Key Performance Indicators), and it is recommended that it is not used with these options.

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PROCUREMENT REFORMS

– implications for procurement challenges and remedies

Here, Partner, Colin Ricciardello, considers the implications for procurement challenges and remedies arising out of the government's procurement reforms.

Chapter 7 of the Green Paper (December 2020) on *"Transforming Public Procurement"* was concerned with *"Fair and Fast Challenges to Procurement Decisions"*. It mooted some radical changes to the applications to Court regime in Chapter 6 of the Public Contracts Regulations 2015 ("PCR"). They included an expedited process/review system, an independent contracting authority review, a tribunal to handle low value claims and capping damages to two and a half times tender costs.

Following the Green Paper consultation, the government response (December 2021) indicated that it was not going to pursue many of the possible reforms. We now have seen the Procurement Bill (introduced in May 2022) and that confirms that many of the Green Paper proposals have been dropped and reveals that the proposed new Part 9 *("Remedies for Breach of Statutory Duty")* looks similar to the existing regime in Chapter 6 of the PCR.

The government response also indicated a commitment to concentrate on working with the Civil Procedure Rules Committee and re-working the Technology & Construction Court's (TCC) procurement challenges guidance – the objective being to create a quicker and more accessible challenge process through:

- Fast track expedited trial procedures
- Usage of written only pleading cases
- Clarity on early disclosure processes
- More use of TCC district registries
- Agreeing timetables at the beginning of a claim

The basics of bringing a claim under the Bill

In the Bill's Part 9, Clause 89 expresses a contracting authority's duty to comply with specified Parts and that is enforceable in civil proceedings under Part 9 brought in the High Court. That follows the structure of PCR Reg. 91.

Such claims can now though only be brought by *"UK supplier"* or *"treaty state supplier"* (the relevant international treaties are set out in Schedule 9 of the Bill) whereas under the PCR the duties were owed EU law based and owed to an *"economic operator"* under Regs. 88 and 89.

Under clause 89 (b) a supplier can only bring a claim if it has suffered or is at the risk of suffering loss or damage as a consequence of a breach of duty. That is very similar to PCR Reg. 91, so having to cross the threshold of causation of loss before a breach becomes actionable has been retained.

Automatic suspension

At clause 90, the Bill retains what (subject to conditions) is an automatic injunction preventing a contracting authority from entering into the contract which is the subject of a challenged award decision. In the PCR this provision appears in PCR Reg. 95.

In Reg 95(1)(a) where a claim form has been issued in respect of a contracting authority's *"decision to award the contract"*[1]; and the authority has become aware that a claim form has been issued – so the requirement to trigger the suspension operating is knowledge of issue not service of the claim form – and the contract has not been entered into, then the authority is required to refrain from entering into the contract.

In the Bill, the trigger for the suspension operating is still notice that proceedings have been commenced. The major changes are that:

- In sub-section 90(1) (a) the basis of the issued proceedings appears to have been widened and not restricted to a decision to award the contract but now extends to *"proceedings commenced in relation to the contract"* and
- Clause 90 also expressly extends to modification of a contract and not just the award of new contract
- The most radical change though comes in sub-section 90(3) in that the automatic suspension will only apply if notification that proceedings have been started is given **before** the end of any applicable standstill period. Under the PCR the suspension applies whenever notice of commencement of proceedings was given (so including after the standstill period had expired) providing at the time of the notice the contracting authority had not entered into the contract.

Standstill Period

As for the standstill period under the Bill, (like PCR Reg. 87(1)) clause 49 states that a contracting authority may not enter into a public contract before the end of the mandatory standstill period or at the end of a later one which may be provided for in an award notice published under clause 48. The "*mandatory standstill period"* is eight working days beginning with the day on which a contract award notice is published. This period is different to PCR Reg. 87(3). Also, unlike PCR Reg. 86(1)(d), the precise standstill statement is not required under clause 48 but that requirement may appear later in regulations to be published under clause 86.

A voluntary standstill period on modification of contracts may be held and, if so, a modification may not be made before the end of that voluntary period as published in a mandatory contract change notice published under clause 70. (Under PCR Reg 72(3), notice of modification only has to be published in two cases of modification whereas the new regime requires the publication of a notice in all cases of modification).

The advantage in holding a voluntary standstill period is that the set aside remedy in clause 94(1)(e) does not apply if the contract change notice provided for a standstill period and the modification was not made before the end of that standstill period (clause 94(3)). This is like the scheme in PCR Reg 99(1) where the first ground of ineffectiveness can be disapplied by the prior publication of a voluntary transparency notice and holding the required standstill period. The ability to agree to extend the standstill period was not provided for in the PCR but such extensions were commonplace and indeed the TCC's Guide encourages the parties to be sensible about agreeing to extend. There is no apparent reason in the Bill why this practice should not continue,

and it actually assumes a greater importance given that the contract-making suspension only takes effect if notice of issue is given before the standstill period expires.

Interim Remedies – Ending the Contract-Making Restriction

Under the PCR and the Bill, procurement challenges create a unique position in that once proceedings are commenced, and the Defendant is informed of that and it has not entered into the contract, then an automatic injunction is obtained preventing entry into the contract or framework agreement with the winning tenderer. Under the PCR that feature though was balanced by being subject to the court ending or modifying that restriction (PCR Reg 96) and that power also appears in clause 91 of the Bill.

Under the PCR a test for ending the contract-making restriction was developed by the Court in many judgments by adopting the common law *American Cyanamid*[2] principles governing when an interim injunction should be granted. The test to be applied now appears in clause 91(2) of the Bill and it does have similarities with the way the *American Cyanamid* test has been applied in the many reported judgments on applications to end the suspension. However: (i) the initial test in *American Cyanamid* of whether there is a serious issue to be tried; and (ii) the question of whether damages are an adequate remedy being determinative of whether the suspension should be ended, have both disappeared.

When considering whether to end the suspension the Court must now have regard to:

- The public interest in, among other things:

  - Upholding the principle that contracts should be awarded/modified in accordance with the law
  - Avoiding delay in performance of the contract

- Interest of suppliers, including whether damages are an adequate remedy for the claimant
- Any other matters the Court considers appropriate

The Court's power to impose undertakings or conditions in PCR Reg. 96(3) in cases where it decides not to end the suspension is retained in clause 91(4) but that power appears to be wider as it applies to any order made under clause 91(1) – not just to the 91(b) power to *"…extend the restriction or imposing a similar restriction".*

The chances are that the Court will approach the retention of the contract-making suspension as if it were granting an injunction and so it will turn to the starting point of requiring the Claimant to provide a cross-undertaking in damages in return for hanging onto the suspension.

The other counterpoint in the PCR to what is an automatic injunction was the requirement to serve proceedings within seven days after the date of issue. That allowed a contracting authority to move quickly in applying to end the suspension.

There is no equivalent provision in the Bill so the position could arise that the suspension is engaged by informing those proceedings had been issued (clause 90 (1)) but there is no obligation to serve other than the requirement under the Civil Procedure Rules ("CPR") to serve within four months after issuing (Rule 7.5(1)).

To end that potential four months of potential *"paralysis"* a contracting authority could serve a notice under CPR 7.7 requiring the Claimant to serve the claim form or discontinue. That is all going to take time and delay can be crucial when there is an urgency to enter into a contract or the Claimant has an interest in delaying.

(1) Pre-Contractual and (2) Post-Contractual Remedies With Set Aside Power

Like the PCR (Regs. 97 and 98) the Court's power to award remedies in the Bill (clauses 92 and 93) depends upon whether the contract that is the subject of the issued proceedings has or has not been entered into.

The ineffectiveness regime in PCR Reg. 99 (which gave the court power to declare concluded contracts ineffective) is no more under the Bill, but a power to set aside such a concluded contract appears in clause 94 if the Court is satisfied that a claimant was denied a proper opportunity to obtain a pre-contractual remedy because a specified set-aside condition is met. The conditions appear at clause 94(1)(a) to (f) and are as follows:

a A required contract award notice (akin to the contract award decision notice under the PCR, Reg 86) was not published

b The contract was entered into or modified before the end of a standstill period or whilst suspension in force

c The contract was entered into or modified whilst the automatic suspension was in force or in breach of an order extending or imposing a similar restriction

d In the case of contracts which are exceptions to holding the mandatory standstill period (described in clause 49(3)) the breach only became apparent on publication of the contract award notice

e In the case of modifications, the breach becomes apparent on publication of a contract change notice

f The breach became apparent only after contract entered into or modified

Time Limits on Commencing Claims

Time limits appear in clause 95 of the Bill and are very similar to the equivalent provisions in PCR Reg. 92 and 93. So, the 30-day time limit for starting a claim running from the date of actual knowledge or constructive knowledge of the basis for bringing the claim; the power to extend that time limit if there is a good reason to do so; the power to extend is limited to three months from the date of knowledge, have all been retained.

There is a special time limit in clause 95(4) for set-aside claims or where a contract detail notice under clause 51 (similar to the contract award notice in PCR Reg 86) was not published. That time limit can run up to six months from the date the contract was entered into (clause 95(4) (a) and (b)). That appears to mirror the six-month "longstop" time limit for bringing an ineffectiveness claim in PCR Reg. 93(2) (b).

Time limits and what constitutes knowledge to start the 30 days running have featured greatly in UK procurement challenge decisions. Given the similarity in the wording, the chances are that the PCR case law will continue to be relevant and cited even though that body of case law may have roots in EU Directives and EU case law.

The Green Paper aimed to make procurement challenges more accessible, quicker and perhaps less expensive. Given the similar provisions and similarity of wording between Chapter 6 of the PCR and Part 9 of the Bill, it would appear that the essential landscape of procurement challenges is unlikely to be transformed.

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[1] Arguably a decision to reject a tender is not a decision to award the contract and so proceedings in respect of that decision would not be subject to the automatic suspension.

[2] 1975 A C 396

ADJUDICATION: TIMESCALES, THE SLIP RULE AND REASONS

Here, our Partner, David Owens, and Associate, Melanie Blake consider the adjudicator's decision, examining extensions, reasons, and the slip rule.

Timescales

Adjudications are designed to save time and money by preventing proceedings from being dragged out through litigation in court. As such, the timescales for decisions are tight. The adjudicator is required to reach their decision within 28 days of service of the referral notice.

This period can be extended by a further 14 days if the referring party agrees and can be extended further if both parties agree. Complete stays in the adjudication process are contrary to its original aims and are therefore very rare, only being granted in very limited circumstances[1] or if agreed between the parties. Parties should therefore not rely on the possibility of a stay to buy themselves more time.

The adjudicator's decision is binding and will be final providing it is not challenged by subsequent arbitration or litigation. Even if the parties wish to pursue court or arbitration proceedings, they must, in the meantime, comply with the adjudicator's decision.

In the majority of disputes, the parties will accept the adjudicator's decision, but if they choose to pursue subsequent proceedings the dispute will be heard afresh – not as an 'appeal' of the adjudicator's findings.

It should be noted that once an adjudicator has decided on a particular issue, that same issue cannot be referred to a second adjudication; it must instead go to arbitration or litigation. Parties would therefore be wise to take a decision at face value and comply with its directions, even if they wish to challenge it later. The phrase 'pay now, argue later' is often used in reference to adjudication decisions.

Completion and Communication

As outlined above, the adjudicator must normally reach a decision within 28 days of service of the referral notice. Additionally to this, Paragraph 19(3) of the ***Scheme for Construction Contracts*** 1998 provides that the adjudicator should deliver the decision to the parties to the contract *"as soon as possible"*[2] after it has been reached.

If the decision is delivered late, it may make it unenforceable. This decision needs to be communicated to the parties in writing[3], and every party to the contract must be provided with a copy.

Reasons

However, just because a copy of the decision is given to all parties, it does not necessarily mean it must explain how it has been reached. Adjudicators are not required to give reasons for their decision, perhaps because of the emphasis on a speedy resolution and the added time such writing would require.

However, in practice, most parties do ask for a reasoned decision and are more likely to accept a negative result if there is an explanation. It is important to note that if one party asks for reasons, reasons must be given. However, the reasons don't have to be given in detail. The court has found that if a reasoned decision is required, a brief statement will suffice[4].

The threshold for a decision being overturned due to flaws within its reasoning is very high, reasons need to be 'absent or unintelligible and have caused the complainant substantial prejudice'[5] before a court will refuse to enforce a decision.

Parties may therefore ask for reasons, which may perhaps serve them well for future disputes, but it will very rarely give them a route to challenge that particular decision.

Adjudication Slip Rule

When you consider the short timescale that adjudicators have to make their decisions and the large volume of material they often have to consider, it is not surprising that errors sometimes make their way into the decision. The *"slip rule"* applies in court, arbitration and adjudication proceedings and allows for the correction of accidental mistakes or errors in the outcome of such proceedings.

Prior to 2011, the Housing Grants Regeneration and Construction Act 1996 ("Construction Act") did not expressly provide for the slip rule. Instead, adjudicators had to rely on an implied term, described as providing the adjudicator with a power to "*correct an error arising from an accidental error or omission or to clarify or remove any ambiguity in the decision which he has reached.*"[6]

When the amendments to the Construction Act came into force on 1 October 2011, new section 108(3A) formally introduced the following slip rule for adjudication: *"The contract shall include provision in writing permitting the adjudicator to correct his decision so as to remove a clerical or typographical error arising by accident or omission."*

In the absence of such a written provision, any contractual adjudication mechanism falls away and is replaced in its entirety by the Scheme for Construction Contracts 1998, which provides that the adjudicator may correct the decision to remove a clerical or typographical error arising by accident or omission, either on the adjudicator's own initiative or at the request of one of the parties.

Under the Scheme, the adjudicator must make any correction under the slip rule within five days of the date when the decision was delivered to the parties (paragraph 22A(2)) and (in England and Wales only) deliver the corrected decision to the parties as soon as possible (paragraph 22A(3)).

Section 108(3A) of the Construction Act does not set a time limit for slip rule corrections (unlike the Scheme). This gives parties the freedom to agree a period in their contract.

The slip rule is useful in that it prevents the parties from having to go to court to correct the decision, thus saving both time and money.

However, it is not designed to be used to challenge the reasoning or fundamentals of a decision, and it is important to remember that it is intended to correct what in reality often amount to typographic errors.

Parties should therefore not see the slip rule as something to be used if they disagree with the reasoning of a decision.

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1 Wimbledon Construction Co 2000 Ltd v Vago [2005] EWHC 1086 (TCC)

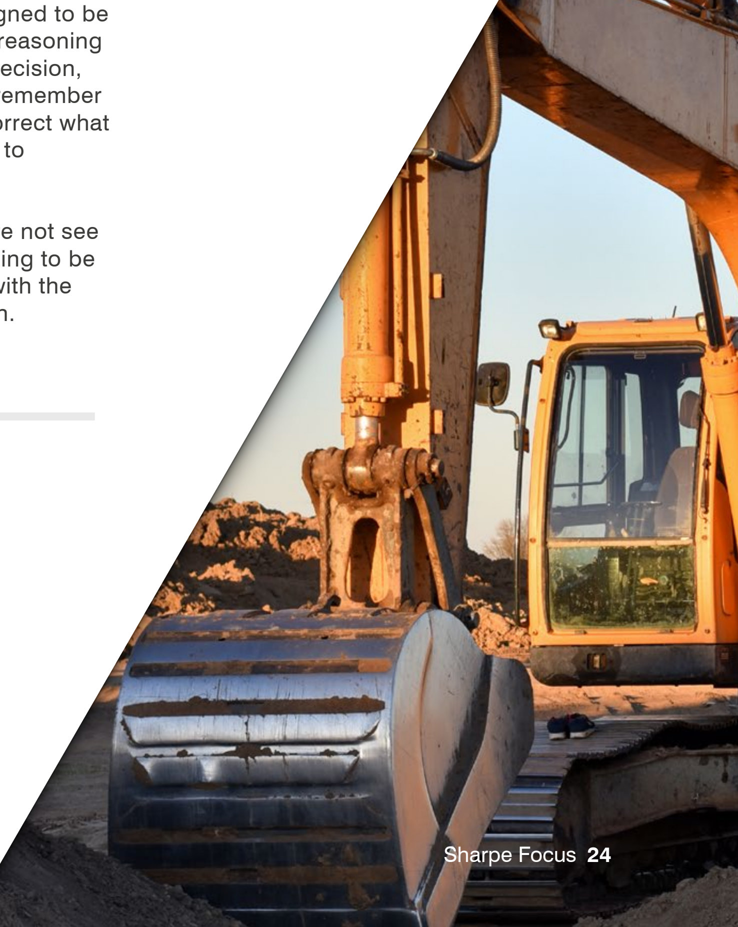
2 The Scheme for Construction Contracts (England and Wales) Regulations 1998, 19 (3)

3 The Scheme for Construction Contracts (England and Wales) Regulations 1998, 19(3)

4 Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358

5 Gillies Ramsay Diamond v PJW Enterprises Ltd [2002] ScotSC CSOH 340

6 Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd



THE RISE OF GREEN BONDS TO FUND LOCAL AUTHORITY CAPITAL PROJECTS

Peter Collins, Partner and head of the corporate team considers the steady increase in popularity of green bonds as a means to fund net zero and other community projects

Local authorities have for some time been looking for new ways to fund capital projects. The reduction in funding settlements over the last decade has been a major driver and has seen local authorities look to raise money through mechanisms that would have previously been considered overly risky.

An example is the approach taken by several councils to invest in commercial property, often in areas well beyond their administrative area. Councils were able to do this due to the relatively low interest rates obtainable from the Public Works Loan Board.

This type of activity is now very much in the spotlight and the UK Debt Management Office has now closed a number of loopholes such that this type of funding is no longer available for investments where income is a key driver.

The public works loan board is still available for capital projects, but several authorities have now started to look at more innovative funding options, particularly where the funding is to fund carbon net zero or other environmental or community-based projects.

Community municipal (or 'green') bonds are one such form of alternative lending based on the idea that members of the community invest in bonds with a fixed coupon.

Put another way, the general public lend money to the council for a guaranteed return taking advantage of most councils' strong covenant strength.

Not only can it be seen by investors as a relatively secure way to achieve a return on funds over and above (at the time of writing) what savings accounts are currently offering, it also allows the community to invest in projects of local significance, which will often have an environmental objective.

These bonds are typically administered by an intermediary to create a lending structure linking the local authority to individual members of the public.

How do green bonds work?

A local authority looking to implement a green bond will need to appoint an intermediary regulated by the Financial Conduct Authority that specialises in administering this type of financial product.

The contract between the council and the intermediary sets out the basis on which it will do this, payment for which will usually be in the form of a percentage-linked management and administration fee.

The intermediary will also provide an online platform that members of the public will be able to access to make their investments. Importantly, the intermediary will

be the regulated body and will need to be given the arrangement will be a financial promotion for the purposes of section 21 of the Financial Services and Markets Act 2000.

The council will be legally linked to the bondholders in that bondholders will have rights against the council for non-payment of interest and principal amounts advanced by them, but all the administrative functions will be undertaken by the intermediary.

Are these arrangements lawful?

Section 1 Localism Act 2011 provides a general power of competence for local authorities. It gives local authorities the same power to act that an individual generally has and provides that the power may be used in innovative ways, that is, in doing things that are unlike anything that a local authority – or any other public body – has done before or may currently do.

Entry into such arrangements similar or the same to this community municipal lending arrangement is not unique and has been undertaken by a number of other local authorities.

Moreover, section 1 of the Local Government Act 2003 gives the power to local authorities to borrow money for any purpose relevant to its functions under any enactment for the purposes of the prudent management of its financial affairs. The general power is very wide, subject only to two limits (s.2 LGA 2003).

The first of these contained in s.3 LGA 2003 is how much money an authority determines it can afford to borrow ("the affordable borrowing limit"). In this respect the system is self-regulatory in that, provided an authority remains within its affordable borrowing limit, no government consent is required for that borrowing. The second limit to the general power is contained in s.4 LGA 2003.

The Secretary of State has reserve power to impose limits on borrowing by authorities, by regulations, if the national economic situation requires. Neither of these two limits is likely to impact an authority looking to pursue a particular green bond.

Takeaways

Green bonds offer local authorities an innovate means to raise funds for green projects that have wide community buy-in.

It follows that they will be most successful where residents' priorities meet with a council's green agenda and, of course, in areas where residents are more likely to have the disposable income to allow investing money in this way.

While it will not work for all projects, it is certainly an option worth considering where ordinary sources of finance are deemed unsuitable or are otherwise unavailable.

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