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Edition 31

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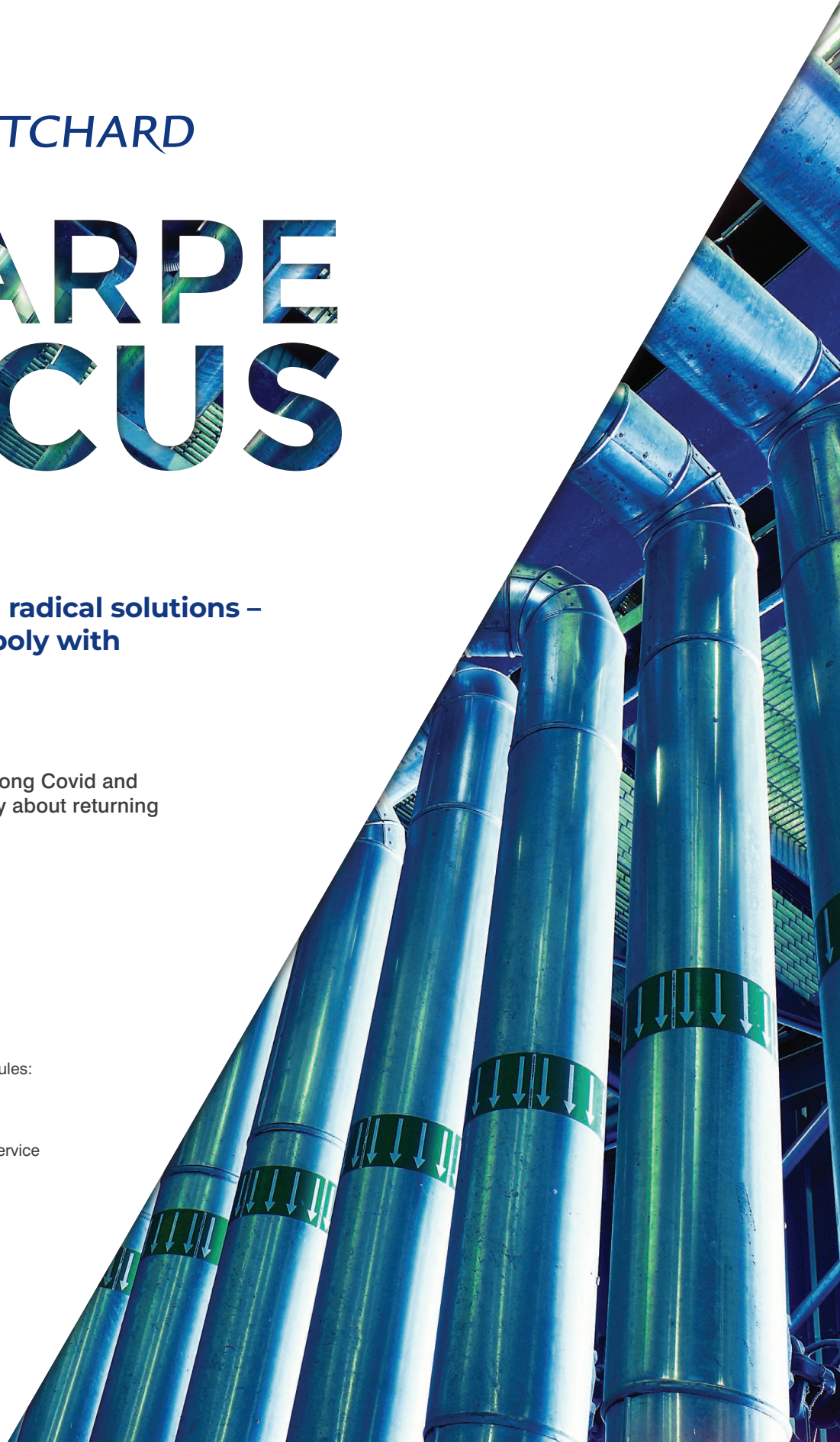

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- JCT Dispute Adjudication Board Rules: a case of “three’s a crowd”?
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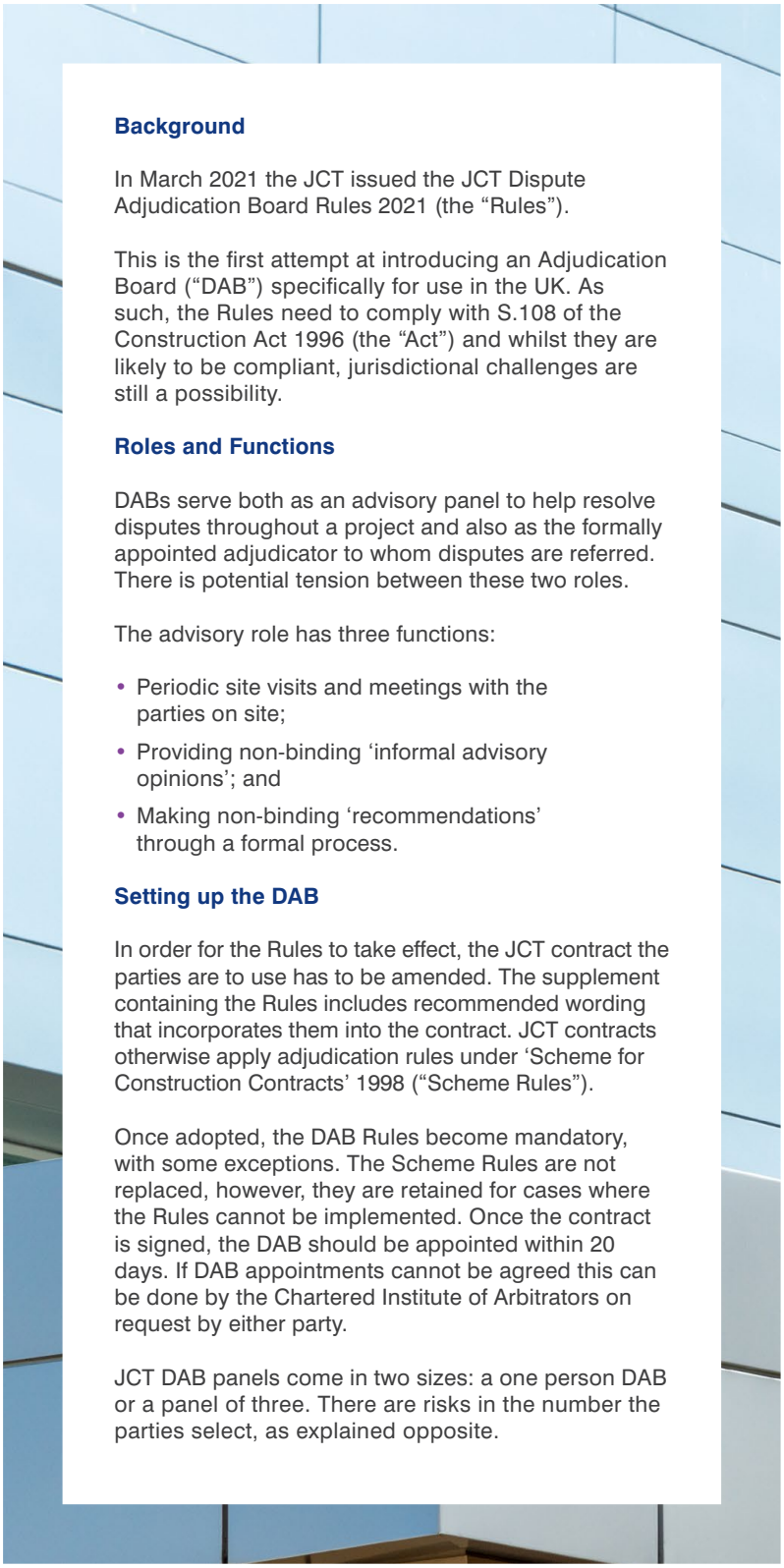
# JCT DISPUTE ADJUDICATION BOARD RULES: A CASE OF "THREE'S A CROWD"?

Legal Director, Peter Jansen who specialises in construction law and dispute resolution, examines the roles and functions of the JCT's Dispute Adjudication Board and highlights some key considerations for parties planning to adopt the Rules in their JCT contracts.



## Background

In March 2021 the JCT issued the JCT Dispute Adjudication Board Rules 2021 (the "Rules").

This is the first attempt at introducing an Adjudication Board ("DAB") specifically for use in the UK. As such, the Rules need to comply with S.108 of the Construction Act 1996 (the "Act") and whilst they are likely to be compliant, jurisdictional challenges are still a possibility.

## Roles and Functions

DABs serve both as an advisory panel to help resolve disputes throughout a project and also as the formally appointed adjudicator to whom disputes are referred. There is potential tension between these two roles.

The advisory role has three functions:

- Periodic site visits and meetings with the parties on site;
- Providing non-binding 'informal advisory opinions'; and
- Making non-binding 'recommendations' through a formal process.

## Setting up the DAB

In order for the Rules to take effect, the JCT contract the parties are to use has to be amended. The supplement containing the Rules includes recommended wording that incorporates them into the contract. JCT contracts otherwise apply adjudication rules under 'Scheme for Construction Contracts' 1998 ("Scheme Rules").

Once adopted, the DAB Rules become mandatory, with some exceptions. The Scheme Rules are not replaced, however, they are retained for cases where the Rules cannot be implemented. Once the contract is signed, the DAB should be appointed within 20 days. If DAB appointments cannot be agreed this can be done by the Chartered Institute of Arbitrators on request by either party.

JCT DAB panels come in two sizes: a one person DAB or a panel of three. There are risks in the number the parties select, as explained opposite.

Another scenario is where a JCT contract is signed with DAB Rules, but the parties then do nothing to appoint the DAB. If a dispute arises, without a DAB having actually been appointed, adjudication can proceed not under the DAB rules but under the Scheme Rules, which become the default in this situation.

There are other exceptions where the Scheme Rules would be applied instead of the DAB Rules. These include DAB failing to reach a decision, cases of extreme urgency or requiring relief outside the powers of the DAB (e.g injunctions).

**Compliance with the Construction Act**

The Scheme Rules in any event apply whenever adjudication provisions do not comply with S108 of the Act, so do the Rules comply? To do so, they must:

- "Enable a party to give notice at any time of his intention to refer a dispute to adjudication."

The Rules do this. Whilst they offer alternatives, adjudication is commenced by a party notifying its intention to refer a dispute to the DAB and is mandatory for obtaining a decision.

- "Provide a timetable to secure the appointment of the adjudicator and referral of the dispute to him within seven days of the notice of intention to refer."

In appointing the DAB parties chose between the options of a one-member or three-member DAB. The Rules can only clearly comply with the seven day timetable requirement if the single-member option has been selected in the contract.

A three-member DAB is problematic because S108 makes no provision for a "plural" adjudicator. It has been argued that the word 'adjudicator' used in S108 doesn't require the adjudicator to be a single or 'natural' person.

Nevertheless, the position is unclear. S108(2)(b) refers to the 'appointment of the adjudicator and referral of the dispute to him within seven days of such notice'.

The same pronoun appears in S108(2)(c), with "his" and "him" used consistently throughout, pointing to a requirement for a single adjudicator. Paragraph 4 of the Scheme also provides: 'any person requested or selected to act as an adjudicator in accordance with paragraphs 2, 5 or 6 shall be a natural person acting in his personal capacity', which suggests (although does not mandate) a single adjudicator.

Arguably if the intention had been for the "adjudicator" to be either singular or plural a neutral expression such as "the tribunal" as in the Arbitration Act 1996 would have been used. Whilst a panel of three is not expressly precluded, it is safer to choose a single adjudicator.

- "Require the adjudicator to reach a decision within 28 days of referral to him or such longer period as is agreed by the parties after the dispute has been referred".

This time limit provides a further good reason for a single adjudicator requirement in the legislation. Ordinarily, it can be met by a single adjudicator. Imposing this commitment on three independent adjudicators is likely to involve a greater burden.

That will be increased because the 3 member DAB must always try to reach a unanimous decision. The DAB is likely to have less than 28 days to reach a decision because time must be allowed for trying to achieve unanimity.

As written, the Rules do reflect this precise requirement of S108. However, doubt remains about whether the requirement for a three-member DAB to reach a unanimous decision within 28 days from receipt of the referral is realistic or achievable.

The Rules comply with other S108 requirements and are consistent with them.

### Decisions

The referring party notifies the responding party and simultaneously the DAB of its intention to refer a dispute to adjudication. Within seven days from that notice the referring party serves its referral on the DAB and the responding party. At that point 28 days for reaching a decision commences. The DAB can establish its own procedures in the adjudication.

### Experts

The Scheme empowers the adjudicator to arrange independent tests / experiments, e.g., on defective materials. By contrast the Rules empower the DAB to "make use of its own specialist knowledge" e.g., meaning that one member of a three-member DAB panel could give expert advice to the DAB as a whole. The position of a single member DAB is unclear.

Under the Scheme, the adjudicator may by agreement appoint his own experts, assessors or legal advisers. In disputes about instructions to open up the works for inspection, JCT contracts require the adjudicator either to have his own relevant expertise or to appoint an independent expert with suitable expertise. The DAB Rules if applicable cancel these requirements.

The focus on a DAB's own specialist knowledge could involve the opinion of another member, perhaps a member not previously involved in the dispute. In that situation rules of natural justice should be observed.

These can require the DAB to share with both parties any technical opinion (including from another member of the DAB) upon which a decision might be based. In RSL (South West) Ltd v Stansell[1] Ltd the TCC refused to enforce an adjudicator's decision which relied upon the final report of an expert that had not been shared with both parties.

The Scheme requires adjudicators to make available all information taken into account in reaching his decision, including all the information that it receives from third parties such as experts. The equivalent Rules, however, only cover information received from parties to the dispute.

Decisions are binding pending final determination of the dispute by a court or arbitrator. Unlike a scheme adjudication, the DAB adjudication is mandatory: disputes cannot be referred to arbitration or court proceedings unless first determined by the DAB. Even if a final determination is sought, the adjudicator's decision must be complied with without delay. Summary relief is available from the court to secure compliance until the dispute is finally determined.

### Recommendations

As an alternative to an adjudication decision the Rule allow the referring party instead to ask the DAB to make a "Recommendation".

Although procedural rules for arriving at a Recommendation are the same for reaching a decision, a Recommendation is not adjudication under the Act. Therefore, many of the legal principles around adjudication would not apply to a non-binding Recommendation.

Although non-binding, a "Recommendation" is nevertheless admissible in later legal/arbitral proceedings: neither party is bound by the Recommendation, but the

court could assess its evidential weight. However, parties should be cautious: unlike some forms of "evaluation" given by mediators, a "Recommendation" is not a "without prejudice" communication.

A favourable Recommendation cannot be used to support a subsequent referral for an adjudication decision on the same dispute.

### Informal Advisory Opinion

The DAB can be asked to give an informal advisory opinion on a potential dispute. The opinion may be provided during a conversation with the parties (e.g., a conference call), at a meeting on site with the parties or during a site visit, or in a written note requested by the parties.

In any subsequent Recommendation or decision, the DAB is not bound by any "advisory opinion" it has previously given to the parties including any statements made during a site visit.

The intent is to capture anything said by the DAB in the nature of "advice". The broad description covers much of what is stated, whether recorded or not and irrespective of the DAB's intention.

### Site Visits and Meetings

Informal advisory opinions are an extension of the DAB's site visiting role. After an initial meeting, the frequency of the DAB's site visits is agreed, with a default frequency of 2 months. During site meetings the DAB can take information from "informal conversations" with attendees about the performance of the contract and pending claims. Visits may also be combined with hearings of any disputes which have been referred for a decision.

The DAB will prepare a report of each site visit.

The DAB may not communicate, orally or in writing, with any one party in the absence of the other. Communications from one party to the DAB must also be copied to the other.

Without prejudice correspondence is not to be copied to the adjudicator[2].

The dual role of the DAB can mean that the risk of apparent bias from its presence at discussions on site will be inevitable.

### Costs and Fees

Unless otherwise directed the parties are jointly and severally responsible for DAB members' fees for ongoing site visits.

The DAB is empowered to decide how its fees for acting as adjudicator on any disputes will be apportioned. Ordinarily the losing party is ordered to pay these but not necessarily so. The parties must meet their own legal costs.

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[1] [2003] EWHC 1390

[2] *See Ellis Building Contractors -v- Vincent Goldstein [2011] EWHC 269 (TCC)* in which it was said that parties should be strongly discouraged from deploying without prejudice communications in adjudication because of the risk of apparent bias and a legitimate fear that the adjudicator might not have been impartial in reaching the decision.

# THE PUBLIC PROCUREMENT REVIEW SERVICE REPORT: PROCUREMENT PITFALLS AND HOW TO AVOID THEM

Legal Director, Juli Lau and Paralegal, Beth Edwards, examine some of the most common procurement pitfalls and provide a checklist of points for local authorities to bear in mind in order to avoid costly errors.

The Public Procurement Review Service ("**PPRS**"), a body set up by the Cabinet Office to investigate concerns from suppliers in relation to procurement practices, recently published its **2020/2021 Progress Report.** The report provides insights into the cases investigated by the PPRS in the 2020-2021 financial year and outlines the main trends and issues raised by suppliers.

The top five areas for complaints were as follows:

- **Payment** – 30 of the cases referred to the PPRS concerned non-payment of valid and undisputed invoices. Regulation 113 of the Public Contracts Regulations 2015 ("PCR 2015") implies into all contracts the requirement to pay valid and undisputed invoices within 30 days. The PPRS upheld all of these complaints, leading to the payment of £602.9k to suppliers.

- **Evaluation** – 12 cases related to the evaluation process of the procurement, with specific concerns including the criteria used and conflicts of interest within the evaluation panel.

- **Use of Frameworks** – Concerns raised included the use of the direct award procedure, as well as the rationale of suppliers in choosing the most appropriate agreement in the circumstances. The majority of the ten cases related to Crown Commercial Service Frameworks, in particular the Digital Marketplace.

- **Feedback** – Seven cases concerned a lack of detailed feedback or no feedback at all being provided to bidders when their submissions had been rejected. This meant that suppliers were not able to understand why their bids had failed. The PPRS argues that detailed feedback allows suppliers learn for future bids, and can help to improve the quality of bids in general.

- **Advertisement** – The majority of the six cases concerned timeframes, the process contracting authorities used to advertise, and a perception that advertisements were written in favour of the incumbent.

While some of the cases referenced above were dismissed by the PPRS, they are helpful in understanding the main concerns of suppliers and issues for contracting authorities to be aware of.

To avoid the pitfalls highlighted by the PPRS report, the following is a checklist of points for contracting authorities to remember, at each stage of the lifecycle of a procurement:

### Pre-Procurement

- If intending to use a framework agreement, contracting authorities should carefully consider the following factors:

- **Class** – Is the contracting authority sufficiently identified as being entitled to use the framework?
- **Scope** – Does the project satisfy the required technical and essential specific standards to use the framework? Does the framework scope meet the project needs?
- **Term** – Does the framework permit call-off contracts of the length needed to complete the project?
- **Value** – Will the total value permitted by the framework be exceeded?
- **Process** – Have the rules laid down by the framework been followed? In particular, if making a direct award, have the criteria for doing so been met?

### Advertisement

- Contracting authorities must be aware of their responsibilities under the procurement law regime to advertise contract opportunities. These responsibilities include complying with relevant time limits and opportunities on particular platforms (including the **Find a Tender Service** or Contracts Finder, as appropriate). **Procurement Policy Note 07/21** outlines these transparency requirements, and we have explained this in further detail in an **article on our website**.
- The advertisement must contain sufficient detail to ensure a fair competition.

### Evaluation

- The evaluation criteria must determine the most economically advantageous tender (Regulation 67 PCR 2015), and it must actually form the basis of the decision.
- Published evaluation criteria must be transparent; clear guidance should be provided to bidders as to how their answers will be evaluated.
- For each project, relevant parties should complete conflict of interest checks. A record of any actual, potential and perceived conflicts should be kept and regularly updated if circumstances change. Assistance on managing conflicts of interest can be found in **PPN 04/21**, and its **accompanying guidance**, which includes conflict of interest declaration templates which are provided and updated by the Cabinet Office.

### Feedback

- The PPRS suggests that feedback should be provided to successful and unsuccessful bidders by contracting authorities after both shortlisting and evaluation.
- It is recommended by the PPRS that detailed feedback should be provided to all suppliers, not just those who request it, and that feedback should be comprehensive and allow bidders to understand why their bid was accepted or rejected.
- In any case, contracting authorities should be mindful of their duties to give feedback and notification of decisions, as set out in Regulations 55 and 86 PCR 2015.

### Payment

- Contracting authorities should bear in mind the requirements implied into contracts under Regulation 113 PCR 2015 that all valid and undisputed invoices must be paid to contractors within 30 days of the invoice becoming due, and that sub-contracts and sub-sub-contracts must contain similar prompt payment provisions.

It is worth noting that the "**Transforming Public Procurement**" Green Paper published last year proposes the replacement of the PPRS with a new oversight body which is to carry out an increased level of monitoring.

Furthermore, unlike the PPRS, this new unit would have the ability to issue enforcement notices to individual contracting authorities, with further possible action including spending controls. With these proposals pending, it is even more important that contracting authorities take heed of the types of complaints which are being brought to the PPRS' attention, and ensure that they have sufficient processes in place to avoid the common pitfalls.

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# PROCUREMENT REFORM – AN UPDATE

Senior Associate, Radhika Devesher and Trainee Solicitor, Natasha Barlow, provide a summary of the proposed and enacted changes to the UK procurement regime post-Brexit.

In the wake of Brexit, the UK Government has been considering an overhaul of the public procurement regime. The aim is to encourage flexibility in procuring goods, services and works by introducing adaptable processes that are less rigid than those required by EU law.

The proposed overhaul of the procurement regime commenced with the Green Paper and will become the Procurement Bill at its next stage (see **Sharpe Pritchard's summary of the Green Paper**).

In the meantime, the Government has introduced legislation to amend the Public Contracts Regulations 2015 (PCR 2015) in light of new trade deals. It has also published the **National Procurement Policy Statement.**

As a summary, we have set out these proposed and enacted changes in the form of a timeline on the following page.

| | |
|---|---|
| **DECEMBER 2020**<br>Green Paper published and consultation commenced | **Cabinet Office issued consultation on the Green Paper: Transforming Public Procurement**. Seeking to legislate for a more flexible and less bureaucratic procurement regime in light of Brexit and the UK no longer being tied to EU law. |
| **MARCH 2021**<br>Green Paper consultation deadline | **Green paper consultation closed on 10 March 2021**. Subject to widespread comment and the Cabinet Office will consider responses before preparing the Procurement Bill. |
| **MAY 2021**<br>Queen's Speech | **Procurement Bill announced**. Main aim is to reform government procurement in the UK and create a single Act to cover all existing procurement legislation. |
| **3 JUNE 2021**<br>PPN 05/21 issued | **National Procurement Policy Statement issued**. Sets out the requirements for all contracting authorities to have regard to national strategic priorities for public procurement. |
| **11 JUNE 2021**<br>GPA amendments to PCR 2015 | **Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 came into force**. Amends PCR 2015 to include the UK's membership of the Government Procurement Agreement (GPA), created by the World Trade Organization (WTO). |
| **2 JULY 2021**<br>International trade amendments to PCR 2015 | **Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 came into force**. Amends PCR 2015 to require contracting authorities to treat suppliers from countries where a trade deal is in place no less favourably than UK-based suppliers. |
| **EXPECTED SEPTEMBER 2021**<br>Cabinet Office issue Procurement Bill | **Provided there are no new considerations raised as part of the consultation, the government has indicated that the Procurement Bill will be issued in September 2021**. Draft Bill will confirm the proposed changes to the procurement regime and the responses to the consultation. |
| **EXPECTED LATE 2021/ EARLY 2022**<br>Parliament consideration of Procurement Bill | **The Procurement Bill will be placed before Parliament**. It will be subject to discussion before gaining Royal Assent and becoming enshrined in law. |
| **EXPECTED 2022**<br>Enactment of the Procurement Bill | **Commentators anticipate that the UK will have a new procurement regime coming into force in 2022**. Until then, application of PCR 2015, CCR 2016 and UCR 2016 continue and it is "business as usual" for the public sector. |


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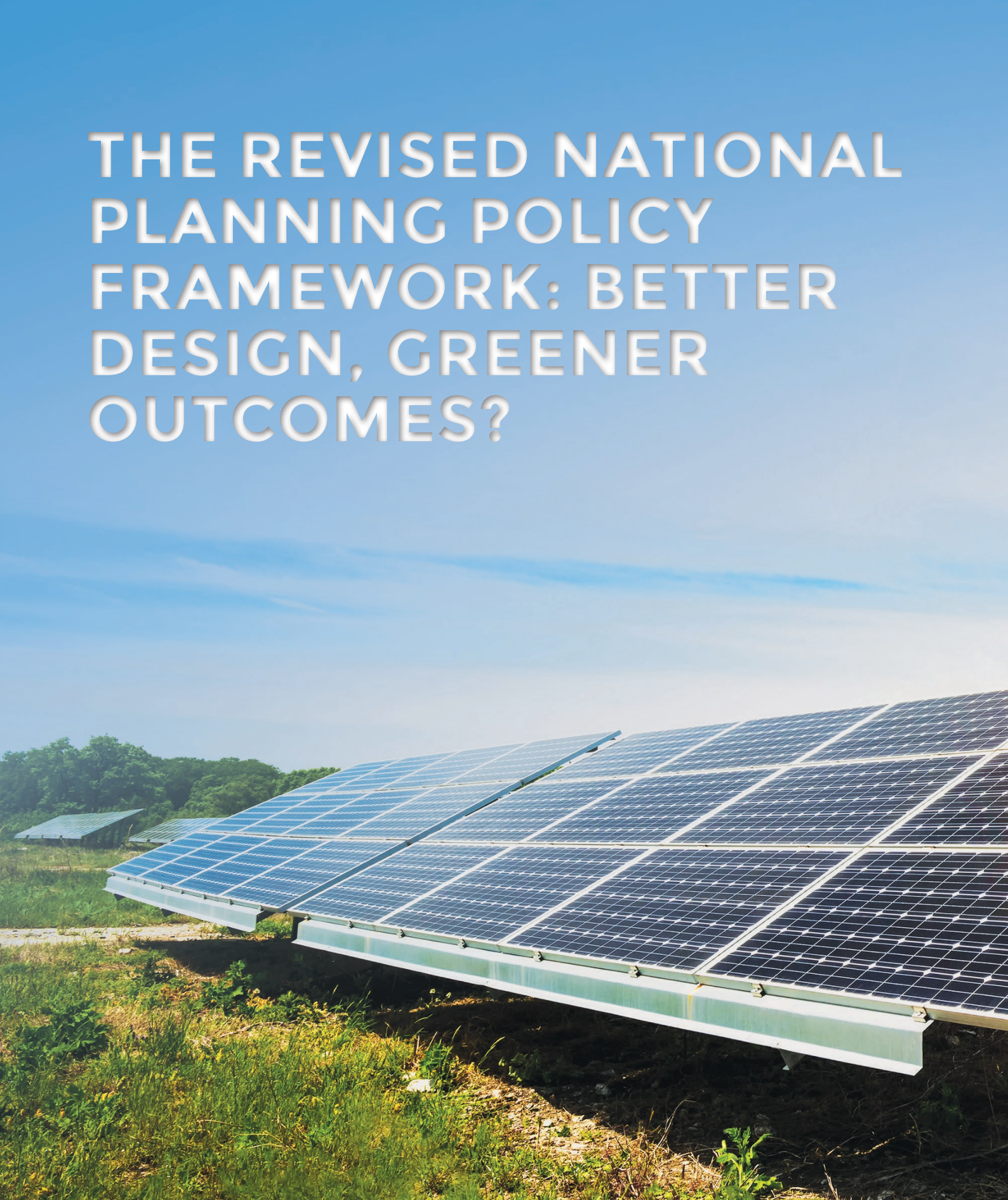
# THE REVISED NATIONAL PLANNING POLICY FRAMEWORK: BETTER DESIGN, GREENER OUTCOMES?



Partner and Parliamentary Agent, Alastair Lewis, and Trainee Solicitor, Sarah Wertheim outline the latest National Planning Policy Framework changes and explain how future developments will be impacted by the new rules.

Just like buses, major planning reforms seem to be coming along in threes in 2021, which is shaping up to be a year of significant change in the planning world. We have already had significant changes to the permitted development regime and there is still potential for a major shake-up in the Planning Bill promised in the Queen's Speech, though recent press reports suggest this could be watered down significantly due to the strength of opposition. Sandwiched in between the two are recently made revisions to the National Planning Policy Framework (NPPF).

The revisions to the NPPF came into force on 20 July 2021, replacing the 2019 version of the NPPF. This is something of a big deal, because since the first version of the NPPF was published in May 2012 it has only been changed twice since.

To accompany the changes, MHCLG has also published the National Model Design Code.

Here is a summary of the main NPPF changes:

1. Measures to improve design quality, including a new requirement for Councils to produce local design codes or guides;
2. Emphasis on using trees in new developments;
3. Adjusting the presumption in favour of sustainable development for plan-makers;
4. New limits on the use of Article 4 directions to restrict Permitted Development ('PD') rights;
5. Councils should 'retain and explain' statues rather than remove them; and
6. Encouraging faster delivery of public infrastructure, like further education colleges, hospitals and prisons.

## The details:

### Chapter 2: Achieving Sustainable Development

Paragraph 11 stipulates that all plans should *"promote a sustainable pattern of development that seeks to…align growth and infrastructure; improve the environment; mitigate climate change (including by making effective use of land in urban areas) and adapt to its effects.'.*

Paragraph 7 refers to the purpose of the planning system making a *'contribution to the achievement of sustainable development'*. The revised version makes additional reference to the 17 Global Goals of Sustainable Development (agreed by the UN in "Transforming our World: the 2030 Agenda for Sustainable Development"). Those goals address social progress, economic well-being and environmental protection.

### Chapter 3: Plan Making: Long term vision for large scale developments

Paragraph 22 is about long-term vision in strategic plan making. It has been revised so that it now says that *'where larger scale developments such as new settlements or significant extensions to existing villages and towns form part of the strategy for the area'* policies should be set within a vision of at least 30 years (i.e. further ahead than the usual 15 years) to take into account the likely timescale of delivery. It's important for planning authorities to note that this change does not affect local plans already published or submitted for examination before 21 July 2021, however, it is acknowledged that it is something that planning inspectors will need to take into account when examining plans published or submitted for examination after 21 July 2021.

### Chapter 4: Decision Making: Article 4 directions and PD rights

Article 4 Directions are used by Planning Authorities where they want to remove Permitted Development (PD) rights in a specific area, for example PD rights which allow for residential conversions. Paragraph 53 imposes new limits on the use of Article 4 Directions. Where they relate to changes from non-residential use to residential use, they must be limited to situations where the Direction is necessary to avoid wholly unacceptable adverse impacts, for example the loss of the essential core of a primary shopping area, where that would seriously undermine its vitality and viability. It says that all Article 4 Directions must be based on robust evidence and apply to the smallest area possible. Planning authorities should note that the changes set a higher bar when making Article 4 Directions. The Government has said that existing Article 4 Directions will remain in force during a one year grace period which ends on 31 July 2021 but after that, Planning Authorities must reapply if they wish to secure exemption from the new limitations.

### Chapter 8: Promoting Health and Safe Communities: Speeding up delivery of public infrastructure

Paragraph 96 is new. It says that to ensure faster delivery of public service infrastructure such as further education colleges, hospitals, criminal justice accommodation, Planning authorities should work proactively and positively with promoters, delivery partners and statutory bodies to enable key planning issues to be resolved before applications are submitted thereby creating much needed faster delivery.

### Chapter 12: Achieving Well-Designed Places: the National Design Guide and Model Design Code and Trees

In paragraphs 127, 128 and 129, reference is now made to neighbourhood planning groups, emphasising that they can play an important role in identifying the special qualities of an area and in explaining how these should be reflected in development *'both through their own plans and by engaging in the production of design policy, guidance and codes by local planning authorities and developers.'*

There is also reference to new responsibilities on local planning authorities to prepare Design Guides and Codes which align with the principles set out in the National Design Guide and National Model Design Code, and which reflect local character and design preferences. Authorities should ensure implementation of these guides and codes. Paragraph 129 provides further information about how these guides and codes can be prepared, whether that be at an area-wide, neighbourhood or site-specific scale.

Paragraph 131 is new. It is about securing tree planting to help mitigate and adapt to climate change. It says that new streets should be tree lined and that opportunities should be taken to incorporate trees elsewhere in developments such as in parks and community orchards.

It also says that appropriate measures should be put in place to secure the long-term maintenance of newly planted trees and that existing trees are retained wherever possible. It says that developers and the Planning Authority should work with highways officers and tree officers to ensure that the right trees are planted in the right places, and solutions are found that are compatible with highways standards and the needs of different users.

Paragraph 134 has been amended to say that development should be refused if it is not well designed, especially where the development fails to reflect local design policies and government guidance on design. It also now highlights that significant weight should be given to development which reflects local design policies and outstanding or innovative designs which promote sustainability.

### Chapter 14: Meeting the Challenge of Climate Change: Flood Risk

Both paragraphs 161 and 162 now specifically say that 'all sources' of flooding, as well as current and future impacts of climate change, should be taken into account when applying the sequential test.

Previously, the wording only specified *'flood risk to people and property'*. It should also be noted that paragraph 161 says that plans should now not only use opportunities provided by new development to reduce the causes and impacts of flooding but also use *'improvements in green and other infrastructure'* as well as *'making as much use as possible of natural flood management techniques as part of an integrated approach to flood risk management.'*

There is a change to the tests that must be met under Paragraph 167, in cases where development is proposed in areas at risk of flooding. In the light of any site-specific flood risk assessment and any sequential and exception tests, as applicable), among other things, it must be demonstrated that the development must now be appropriately flood resistance and resilient *'such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment.'*

Annex 3 is new. It is introduced by paragraph 163, which says that if it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification, which is set out in the new Annex 3. It sets out five different heads of flood risk vulnerability for different types of development: Essential Infrastructure, Highly Vulnerable, More Vulnerable, Less Vulnerable and Water-Compatible Development.

### Chapter 15: Conserving and Enhancing the Natural Environment: National Parks and AONBs

Paragraph 176 relates to development within National Parks, the Broads and Areas of Outstanding Natural Beauty. It creates a new obligation for development within their setting to be *'sensitively located and designed to avoid or minimise adverse impacts on the designated areas'*. The NPPF continues to say (now in Paragraph 177) that permission *'should be refused for major development'* other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest.

### Chapter 16: Conserving and Enhancing the Historic Environment: Statues

Paragraph 198 is new and is probably the item that has caught the public eye more than any of the proposed changes, given recent stories about the proposed removal of various statues of people associated with the slave trade. The paragraph covers applications for the removal or alteration of historic statues, plaques, memorials and monuments (whether listed or not). It says that in considering those applications, Planning Authorities should have regard to the importance of the retention of the statue in situ and of explaining their historic and social context rather than removal.

### Chapter 17: Facilitating the Sustainable Use of Minerals

Changes to paragraph 215 show a move away from encouraging certain types of carbon-based fuel exploration and production. It no longer provides that minerals planning authorities should *'recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy and put in place policies to facilitate their exploration and extraction'* and instead provides that they should *'when planning for on-shore oil and gas development, clearly distinguish between and plan positively for the three phases of development (exploration, appraisal and production), whilst ensuring appropriate monitoring and site restoration is provided for.'*

## Summary

So in summary, the number of changes that have been made may not be particularly high, but some of them are of some significance, for example those relating to good design. It will be interesting to see how the revised NPPF will interact with the Planning Bill – once we know what it says, particularly in the light of press reports that the proposals for zoning may not be going ahead after all.

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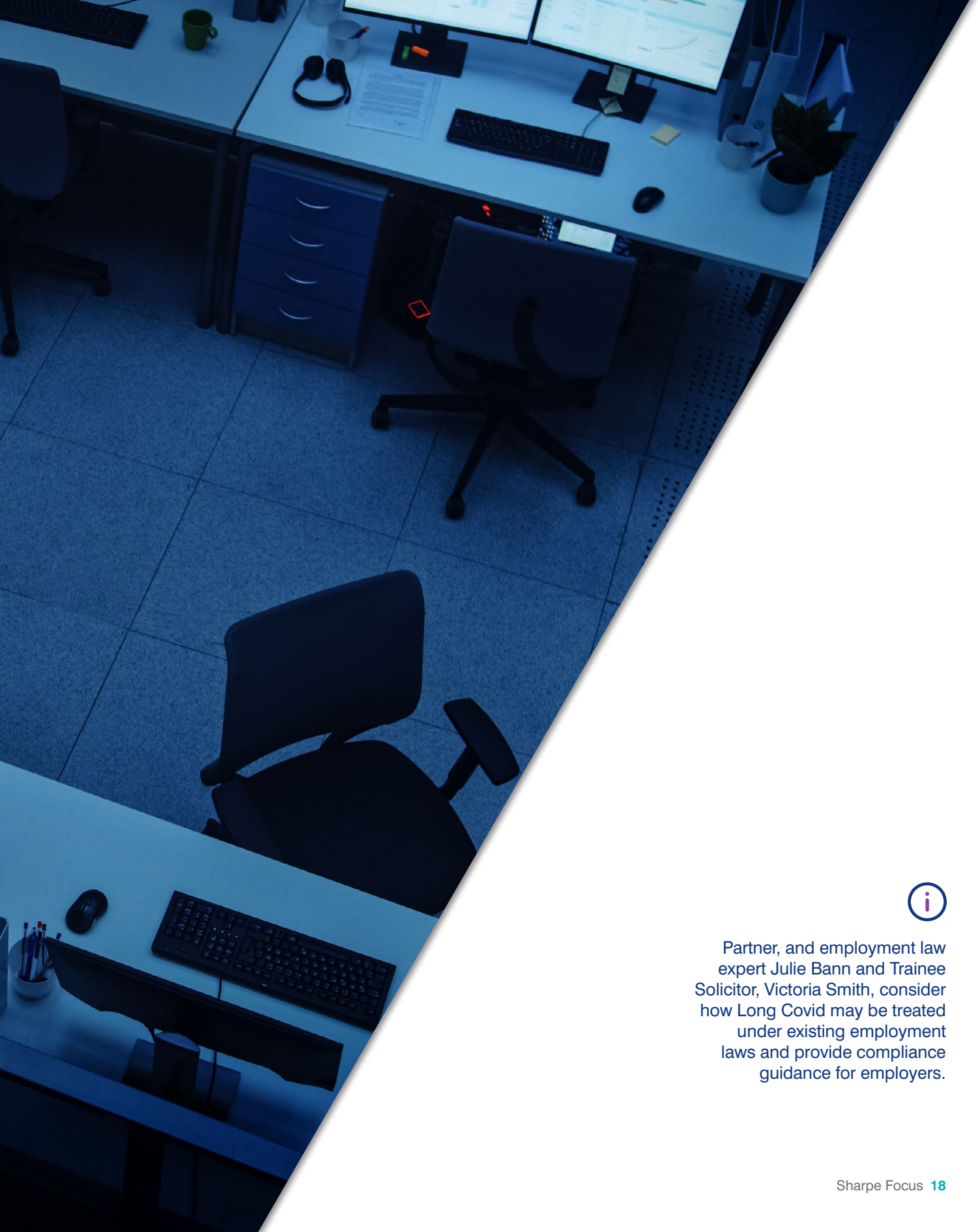
# MANAGING EMPLOYEES WITH LONG COVID AND EMPLOYEES WHO HAVE ANXIETY ABOUT RETURNING TO THE OFFICE



Partner, and employment law expert Julie Bann and Trainee Solicitor, Victoria Smith, consider how Long Covid may be treated under existing employment laws and provide compliance guidance for employers.

## Does Long Covid qualify as a disability under the Equality Act 2010?

Whilst we are all somewhat returning to the old normal that existed before the "new normal" over the last 18 months, with masks now optional and social distancing requirements removed, the medical impact of COVID-19 continues to have a lasting impact on a number of people.

"Long Covid" is a term whose meaning is ever developing as scientists learn more about the effect of having caught COVID-19. It is thought currently that around 20% of people who contract the virus go on to suffer with Long Covid. According to the Imperial College London-led REACT-2 study, this means that more than 2 million people are still suffering with symptoms after 12 weeks.

## What is Long Covid?

As with the symptoms of COVID-19, the symptoms of Long Covid vary between individuals. Generally, people suffering from Long Covid have suffered memory problems, tiredness, dizziness, pins and needles in limbs, difficulty breathing and heart palpitations, all of which often go on to cause depression and anxiety. Evidence shows that there is no 'one size fits all' approach to symptoms and new symptoms are being experienced as we learn more about the disease.

If an individual is suffering with symptoms 12 weeks after they first contracted the virus, they are then classified as suffering with 'Long Covid'.

It has been found that certain demographics are more susceptible to suffering with the lasting effects of Covid after 12 weeks. Current research indicates that women, people who smoke, people who are overweight, people from deprived areas, and those in hospital are the most vulnerable. Equally, for every 10 years of age, the chance of developing Long Covid increases by 3.5%.

## Will it qualify as a disability?

For a medical condition or illness to qualify as a disability it must be:

- A physical or mental impairment; and
- Have a substantial and long-term adverse effect on the individual's ability to carry out normal day-to-day activities.

Both requirements must be met for the individual to gain protection under the Equality Act 2010.

Addressing these points in turn, tribunals tend to be more focused on the effect of an "impairment" rather than the medical label given to it. So, regardless of what symptoms are added or removed from Long Covid, the important point to assess is the *effect* that is has on the individual.

There has been extensive case law as judges deliberate over the meaning of "substantial adverse effect," but they have set the bar quite low to meet this threshold. The effect must be more than merely trivial for it to qualify. It is likely that most, if not all, of the symptoms listed above would be considered more than trivial.

The long-term requirement of the definition is the potentially the most divisive. What makes Long Covid so unique is that the symptoms may come and go, causing someone to deteriorate and then improve fairly frequently.

According to case law, "long term" usually means having lasted for more than 12 months. Long Covid is a relatively new medical diagnosis and so there are few people who will have suffered with it for more than 12 months at present.

It is important to note that an individual does not have to wait 12 months whilst they have a condition for it to qualify under the Act. The Tribunals will assess whether, at the point in time they are deciding the case, whether it is *likely* to last 12 months.

## Risks of dismissing someone who has Long Covid

Employers should always proceed with caution before taking the decision to dismiss an employee who may potentially have a disability, and in any event may only contemplate doing so after following a thorough absence management procedure.

Accordingly, to prepare for managing the long-term or erratic sickness absence of employees with Long Covid, employers should ensure that their absence management policies are up to date and are "pandemic" fit for purpose.

Specifically, they need to be alive to the idiosyncrasies that COVID-19 has caused. HR should also work with managers to ensure that communication with employees suffering from Long Covid is kept up to ensure that employees remain engaged, and HR are informed of and understand the reason for, duration, and pattern of the sickness absence and what support may be required.

When dealing with any employee with repeated absence or long-term sickness, one of the first steps employers should take is to refer them to occupational health to understand more about their condition, the likelihood and timing of recovery and the adjustments that could be made to a facilitate a return work or more frequent attendance.

A potential difficulty for employers managing an employee who is suffering from Long Covid is whether Occupational Health will have sufficient expertise to make

informative assessments given the newness of the condition. It will certainly be an extra factor to consider when evaluating how to proceed.

Where there is doubt, there may be a need to obtain a medical report from a more specialist doctor.

As stated above, a unique feature of Long Covid is that symptoms come and go, meaning that sufferers are likely to be able to attend work some days, but not all days. This could potentially be very disruptive to the workforce, but whether that would be enough to legally justify a dismissal is another question.

If dismissal is a potential outcome being contemplated, it is essential that employers follow a full and thorough capability process to the letter, supported by accurate and up to date medical evidence, including occupational health assessments.

It is also essential for employers to ensure, prior to any dismissal, that all potential reasonable adjustments are considered and, where reasonable, implemented, potentially including redeployment and even a trial of redeployment before a decision to dismiss is taken.

This is a complex area of law, and what will be fair and reasonable in each given situation is fact specific. Accordingly, focused professional advice should be sought at the relevant time.

## How do you manage employees' anxiety about returning to the workplace?

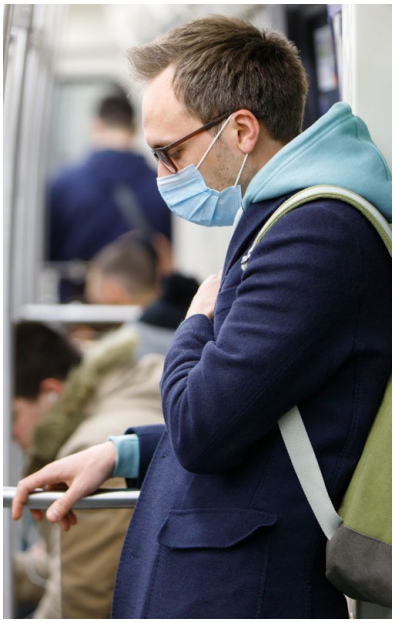
Further to the removal of lockdown restrictions on 19 July 2021, most employers are expecting their employees to return to the office for some, if not all, of their contractual working hours. But what should an employer do if employees have concerns about working from the office?

### 1 Comply with the statutory and common law duty to provide a safe place of working and government guidance, "Working safely during the Coronavirus (COVID-19)."

After almost 18 months of the Government mantra "hands, face, space," it won't come as surprise to anyone that employers need to provide a COVID-19 secure place of work; which essentially means conducting thorough risk assessments and doing everything practically possible to minimise the risk of COVID-19 being transmitted in the office environment.

The key actions to take are set out below:

- Complete a COVID-19 specific risk assessment or assessments, with consideration of further measures that need to be taken in relation to employees who require additional measures to protect them. Risk assessments should always be in writing, but businesses with more than 50 employees should publish the risk assessment on their website;
- Ensure the office space is well ventilated;
- Ensure the office space is thoroughly cleaned regularly, with particular care being taken towards touch points;
- Give employees the discretion to wear masks if they wish whilst at their desks and recommend mask wearing in communal areas, particularly those that may become crowded;
- Encourage staff to take lateral flow tests before coming into the office;
- Require staff who have COVID-19 symptoms to work from home and send home anyone who becomes unwell at work with COVID-19 symptoms; and
- Recommend that staff are vaccinated.



### 2 Phase a return to the office

For many employees a return to the office, with possibly a long commute thrown in, may itself be a shock to the system before they have even turned their mind to anxieties regarding COVID-19. Recognising this and proposing a phased return to the workplace, with a gradual build-up of hours worked in the office is likely to ease any anxiety (or general disgruntlement about a return to the old normal) and pay dividends in the long run.

### 3 Consult and engage with your workforce.

The importance of listening to and talking to your staff must not be underestimated. Good communication is the golden ticket to a happy workplace. Subject to specific circumstances, employers should consult either directly with staff, employee representatives or a health and safety representative selected by a union about the health and safety aspects of returning to the office following the easing of restrictions.

Furthermore, employers also need to understand the employees' overall feelings/apprehensions about returning to work and consider what additional support can be put in place to help staff manage specific anxieties.

For some workers this might be further adjustments such as allowing them to avoid key commuter times, offering additional parking to minimise the use of public transport, additional weekly supervision to just talk, access to counselling via an Employee Assistance Programme or allowing some employees (particularly if they were identified as extremely clinically vulnerable) to continue to work from home.

### What can an employer do if an employee still refuses to return to the office?

Employees have a right to refuse to attend work if they have a reasonable belief that attending work would put them in serious and imminent danger. Where employers take the steps above, it is unlikely an employee would be able to demonstrate that any fear of serious and imminent danger was reasonable.

Normally, where an employee fails to follow a reasonable instruction (i.e., to attend work) an employer may follow a disciplinary procedure to address such conduct. However, where employees are anxious (and particularly because of the uniqueness of the pandemic situation), we would always recommend talking to employees again and exhausting all other potential ways of resolving concerns before addressing the refusal to return to the office in a formal disciplinary procedure.

Additionally, a refusal to work or a grievance raised about the working environment could, subject to the specific facts, amount to a whistle-blowing concern and accordingly, it is crucial that employers take further expert advice due to the potential for a disciplinary sanction or dismissal to be viewed as being subjected to a detriment.

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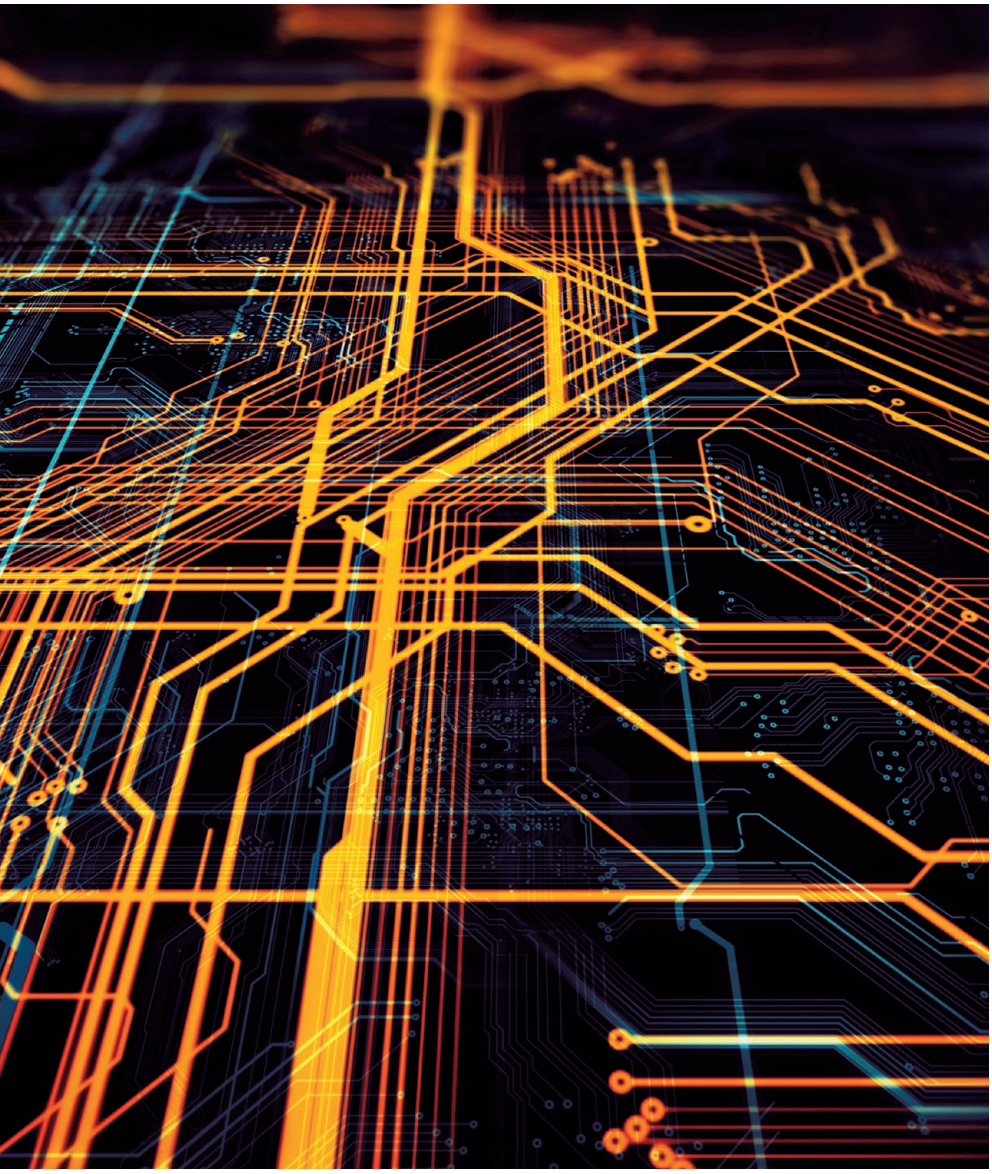
*With thanks to Heather Love for her contribution*

# ADEQUACY DECISION GRANTED TO THE UK

Associate Solicitor, Charlotte Smith, who specialises in ICT and Data law, considers two recent adequacy decisions and explains how this affects existing data practices.



After six months of waiting, it was confirmed on 28 June 2021 that the European Union has granted the UK an adequacy decision for data protection. In fact, there have been two adequacy decisions – one under the GDPR, and another in relation to processing under the Law Enforcement Directive.

**What does this mean?**

Under the EU GDPR, personal data cannot be transferred to a country outside of the European Economic Area without an appropriate safeguard being put in place (e.g. standard contractual clauses and binding corporate rules under the GDPR), unless that personal data was being transferred to a country with an adequacy decision.

When the UK left the EU and the Brexit deal was finalised an adequacy decision had not yet been determined. Instead a six month bridging period was agreed which allowed personal data to continue to flow freely whilst the EU determined if an adequacy decision would be granted. That adequacy decision is now in place.

This means that personal data can still flow from the EU to the UK without the need for appropriate safeguards or relying on an exception under Article 49 of the EU GDPR. As the UK also does not require appropriate safeguards for transfers of personal data to the EU then this adequacy decision means

that personal data can more easily flow between the UK and EU. This is a decision that will be welcomed by organisations operating in both the UK and EU who were likely becoming concerned that they may need to quickly put standard contractual clauses in place and amend their data practices, if they had not already done so.

### What do the adequacy decisions say?

It is time limited. Unlike adequacy decisions granted by the EU to other countries, the adequacy decisions granted to the UK are for 4 years and are not indefinite. The EU acknowledges that, for now, the UK's data protection legislation is very closely aligned to the EU; post-Brexit the UK brought the GDPR into UK and the EU's Law Enforcement Directive is incorporated into UK law through the Data Protection Act 2018.

After those four years the adequacy decision can be renewed if the EU considers that the UK continues to provide an adequate standard of protection for the personal data of individuals in the EU.

It will be interesting to see if the time limited nature of the adequacy decision will impact on any updates to data protection legislation that the Government may be considering. The recent report by the Taskforce on Innovation, Growth and Regulatory Reform suggested replacing the GDPR in the UK and we wait to see if the Government decides to adopt those recommendations. The EU Commission is likely to be following those developments carefully when considering whether to extend the adequacy decision in the future.

Organisations relying on these adequacy decisions for long term transfers of personal data should bear this in mind. It may be worth considering if contracts should include explicit provisions for the data protection provisions to be revisited in future to address the transfer of personal data from the EU.

The GDPR adequacy decision also does not cover transfers of personal data for the purposes of UK immigration control. This is because of the Court of Appeal's recent judgement in *R (Open Rights Group and the3million) v Secretary of State for the Home Department and Others [2021] EWCA Civ 800.*

The Court of Appeal held that the immigration exemption set out in Schedule 2 of the Data Protection Act 2018 was not compliant with the GDPR. The EU Commission has indicated that it will reassess whether this immigration exclusion is needed once the UK has addressed the findings of the Court of Appeal.

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# BIG PROBLEMS NEED RADICAL SOLUTIONS – TIME TO PLAY MONOPOLY WITH DISTRICT HEATING?

Steve Gummer, a Partner in our Infrastructure team, together with Partner, Alastair Lewis, Solicitor, Anna Sidebottom and Paralegal, Oliver Slater, examine the effects of global climate change and investigate the various approaches being taken by local authorities, including how and whether heat networks are an effective solution.

## Climate Emergency

***"We are in a climate emergency".***

While true, this is a very fashionable phrase at present amongst legal and political professionals. It is so often used that there is a risk that it begins to lose all meaning. A few facts worth reciting to remind us all just how real the climate emergency we face is:

- **We will see rising temperatures** – Even with only a modest increase in temperatures of 2°C the impacts could be huge. In the UK there could be a 30% decrease in river flows during 'dry' periods, a 5-20% increase in river flows during 'wet' periods, and between 700 and 1,000 more heat-related deaths per year in South-East England compared to today[1]. Ofwat has stated that in England, it's estimated that there is a 25% chance of the worst drought in recorded history within the next 30 years[2].

- **Sea levels will rise** – As polar ice sheets and glaciers melt and the warming oceans expand. Even small increases of tens of centimetres could put thousands of lives and settlements at risk from coastal flooding during stormy weather[3].

- **Food and Global Trade will be disrupted** – Malnutrition could become more widespread as crop yields are affected by increased drought conditions in some regions, leading to reduced food production.

- **Diseases may become more prevalent** – In London and other major cities there is an understandable inquisition in to the air people are being asked to breathe. Warmer temperatures could increase the range over which disease-carrying insects are able to survive and thrive. Vulnerable people will be at risk of increased heat exposure and the number of deaths due to temperature extremes is expected to increase in the future, although in the long term there will likely be fewer health problems related to cold temperatures[4].

None of this is new. It's just helpful to put the words "climate emergency" in to context. Some of the ideas proposed in this paper are radical. However the challenge society faces in terms of climate change and our commitment to cut emissions of greenhouse gasses is immense. The consequence of failure is catastrophic.

## Heating

At present the majority of heating in the UK is provided by gas. Gas-fired space heating accounts for around 720 terawatt hours (TWh) of energy consumption each year in the UK. Of the 25 million homes in the UK, over 23 million have a gas supply for heating[5]. Heating contributes approximately 30% of the UK's total greenhouse emissions[6]. Heating is a huge part of our national climate change discussion. This has a huge environmental impact.

## Heat Networks

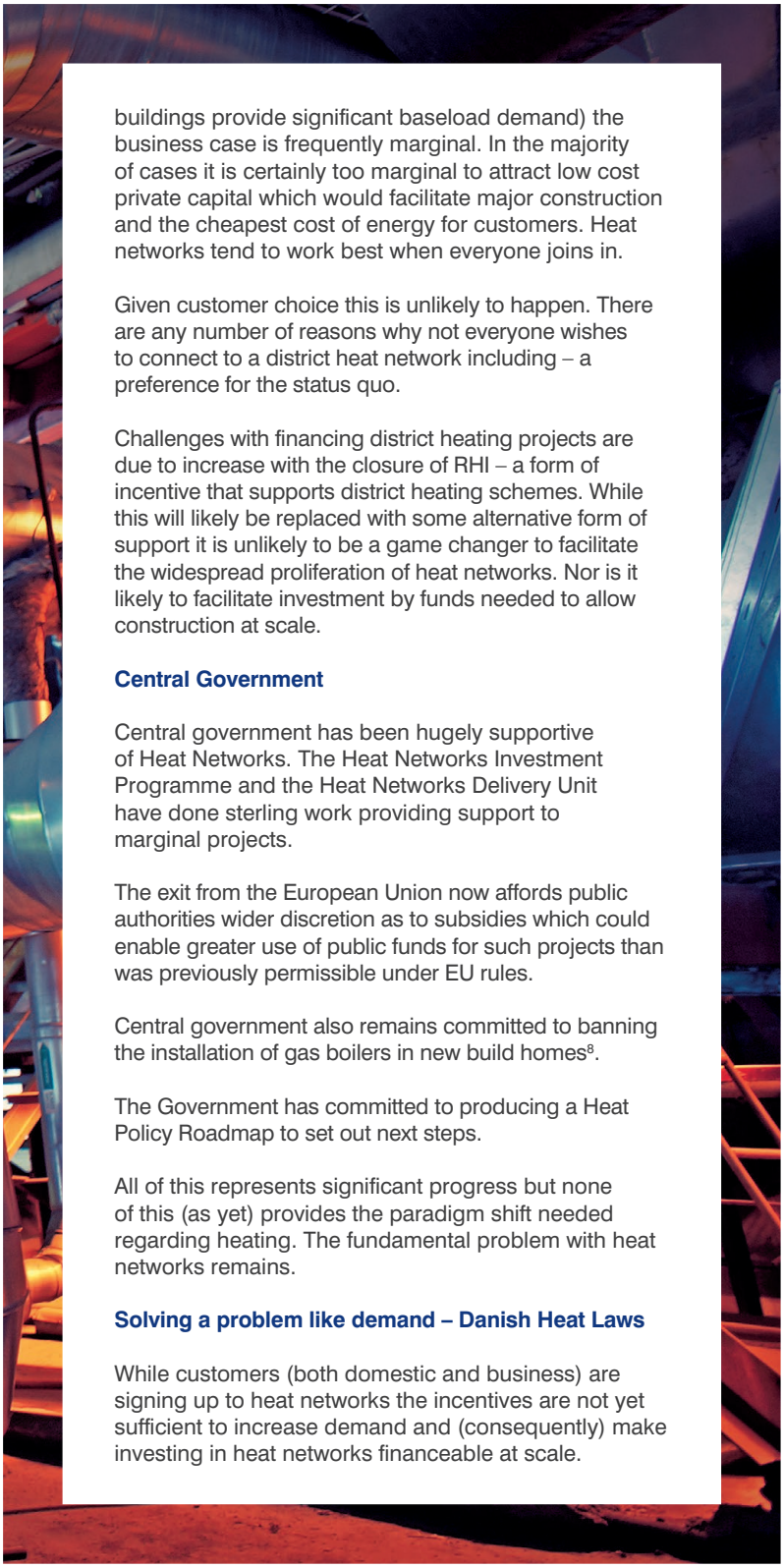
Heat networks are a series of pipes that transport heat from a central source and deliver it to a variety of different customers including businesses and homes.

Heat networks provide a unique opportunity to move away from gas and to utilise low-cost renewable and recovered heat sources at scale. Heat networks currently supply around 1% of buildings heat demand[7].

## The Fundamental Problem with Heat Networks

Many local authorities and others across the UK are setting up district heating networks. However the initial start-up costs and capital investment is significant. This is particularly the case when projects face huge demand risk and uncertainty.

We have worked with many local authorities on district heating schemes and (even where public sector



buildings provide significant baseload demand) the business case is frequently marginal. In the majority of cases it is certainly too marginal to attract low cost private capital which would facilitate major construction and the cheapest cost of energy for customers. Heat networks tend to work best when everyone joins in.

Given customer choice this is unlikely to happen. There are any number of reasons why not everyone wishes to connect to a district heat network including – a preference for the status quo.

Challenges with financing district heating projects are due to increase with the closure of RHI – a form of incentive that supports district heating schemes. While this will likely be replaced with some alternative form of support it is unlikely to be a game changer to facilitate the widespread proliferation of heat networks. Nor is it likely to facilitate investment by funds needed to allow construction at scale.

### Central Government

Central government has been hugely supportive of Heat Networks. The Heat Networks Investment Programme and the Heat Networks Delivery Unit have done sterling work providing support to marginal projects.

The exit from the European Union now affords public authorities wider discretion as to subsidies which could enable greater use of public funds for such projects than was previously permissible under EU rules.

Central government also remains committed to banning the installation of gas boilers in new build homes[8].

The Government has committed to producing a Heat Policy Roadmap to set out next steps.

All of this represents significant progress but none of this (as yet) provides the paradigm shift needed regarding heating. The fundamental problem with heat networks remains.

### Solving a problem like demand – Danish Heat Laws

While customers (both domestic and business) are signing up to heat networks the incentives are not yet sufficient to increase demand and (consequently) make investing in heat networks financeable at scale.

While it may run counter to years of free market considerations in the heating sector, restricting customer choice as to whether or not to join a heat network may hold the answer.

The more customers that sign up to a heat network, the more quickly initial capital expenditure can be offset and the greater savings can be passed through to consumers in the form of lower bills.

As of 2015, 63% of Danish dwellings were connected to a district heating network. The reason for such comparatively-high consumer uptake – at least compared to the UK where, in 2018, only c.450,000 domestic customers were connected to district heating networks – can be found in Danish Law.

Firstly, Danish law, gives Danish municipalities the option of requiring new and existing buildings to connect and stay connected to a district heating network. Secondly, national bans on electric heating in new and existing buildings (where connection to district or gas heating is available) were introduced in the '80s and '90s[9].

As a result of these two policies that inhibit choice of heating method, Danish energy companies have an assured income in respect of their district heating schemes and renewable heating projects have expanded and become investable with a low cost of energy for consumers.

There is no equivalent of this law on the statute books in England (although – as noted above the gas boiler ban is a good start). While district heating schemes for tenanted new build blocks may have some level of certainty of demand, there are very limited means by which to mandate retrofit district heating. As older homes tend to be the least energy efficient and powered by gas the climate challenge remains.

## Local Authorities to Lead the Way

Local authorities have done huge amounts of work developing local heat networks for residents and businesses alike. We have advised many local authorities in respect of such projects. As such we are aware that local authorities have also wrestled with the challenges of uncertain demand and the difficulties of attracting low cost private capital to unlock investments.

What we set out below are seven options/approaches that local authorities do or may consider to limit demand risk and compel use of local district heating schemes (in turn making schemes more investable and cheaper for customers). Some of the approaches are commonplace. Others are more radical ideas.

While some of the proposed solutions may seem unattractive it is important to go back to the context established right at the start of this article. The scale of the climate challenge is immense and radical solutions should not be ruled out.

## Mainstream Ideas

### Idea 1 – Be your Own Best Customer – Public Sector Baseload

- **Approach:** Putting in place supply contracts with other public sector entities to ensure a minimum baseload supply for the Project.
- **Use:** This approach is already widespread and is usually a critical part of getting existing local authority heat networks off the ground.
- **Challenges:** Procurement issues (Public Contracts Regulations 2015) need to be considered when public sector entities issue long-term supply arrangements as do matters of subsidy control. These issues are usually surmountable by setting up and establishing an appropriate competition process.
- **Ability to solve the demand challenges of Heat Networks:** This approach will assist heat networks in dense urban areas which have a large amount of government offices, swimming pools and schools. If all of these buildings sign up it can provide a significant, long-term and secure revenue stream from which to meet capital commitments and attract other customers at value. However its efficacy and usefulness is conditional upon accidents of geography (namely proximity of public sector demand to the source of supply). This approach would not support the development of heat networks in rural settings nor does it guarantee any take up beyond the public sector.

### Idea 2 – Embrace the New – Use Businesses and New Build Developments as Baseload

- **Approach:** Putting in place long-term supply contracts with businesses and with new build tenanted blocks can create long-term committed revenue streams. Unlike heat supply agreements with domestic customers, long-term heat supply agreements with businesses and developers of tenanted blocks can include break clauses with termination payments to recoup lost revenue and wasted expenditure – this means that revenue streams are secure even if these customers elect to leave.
- **Use:** This approach is already widespread and is usually a critical part of getting existing local authority heat networks off the ground.
- **Challenges:** Terms and conditions will need to be compliant with law including the Unfair Contract Terms Act 1977. Any agreements with consumers (as opposed to businesses) will need to be compliant with the Consumer Rights Act 2015. This means equivalent break clauses are not achievable with non-business customers. A core challenge will be getting businesses to sign up to long-term – perhaps 15-20 year agreements. This may be a commitment many businesses and residential blocks are reluctant to make – and particularly so unless pricing guarantees and environmental guarantees can be made.
- **Ability to solve the demand challenges of Heat Networks:** This approach provides some long-term secure supply but does not address the critical issue – namely retrofitting standalone homes that are fitted out with gas boilers.

### Idea 3 – The Status Quo – Delivering Through the Planning System

- **Approach:** Updating local development plan policies to ensure that buildings are required to sign up to local authority district heating schemes is quite a common approach.

Local authorities are already required to write policies which address the need to reduce carbon emissions. The NPPF states that local plans should *"take a proactive approach to mitigating and adapting to climate change"* and *"identify opportunities for development to draw its energy supply from decentralised, renewable or low carbon energy supply systems and for co-locating potential heat customers and supplies"*.

- **Use:** This approach is already widespread (particularly where heat networks already exist). By way of example one London Borough requires (as part of its local plan) that:
  - All major developments to connect to, and where appropriate, extend existing decentralised heating;
  - Minor new-build developments should be designed to be able to connect;
  - Where networks do not currently exist, developments should make provision to connect to any future planned decentralised energy network in the vicinity; and
  - Where major developments cannot immediately connect to a heat network, feasibility study to be undertaken.

Typically, planning authorities implement their local plans via s.106 agreements

- **Challenges:** Compliance with planning rules. This would not necessarily affect the millions of existing dwellings with high carbon fossil fuel heating systems.
- **Ability to solve the demand challenges of Heat Networks:** While this approach is helpful its scope is limited in nature. Again this approach relates primarily to new build developments.

It may be possible to update local plans in advance of the existence of a heat network. Whilst it may seem counter-intuitive to adopt such an approach in areas where there is no existing heat network, using the planning system to make properties "heat network ready" is a good way of safeguarding a window of opportunity to connect as many properties as possible when a heat network becomes available

## Less Mainstream Ideas

### Idea 4 – The Partial Solution – Property Restrictions

- **Approach:** Putting in place restrictions in leases and other property documents. Local authorities tend to be significant landowners and it may be appropriate for local authorities to begin to add to their leases requirements to sign up the district heat network.
- **Use:** Outside of tenanted blocks we are not aware this approach is widely used. This may simply be because local authority energy and property teams tend to be staffed by different personnel with different priorities.
- **Challenges:** Ensuring compliance with relevant contract fairness rules as above. Also local authorities will be keen to ensure changes they make to property documents do not diminish the value of the relevant property or render it unmarketable.
- **Ability to solve the demand challenges of Heat Networks:** While this approach is helpful its scope is limited in nature. Reliance in this instance is on land being owned by local authorities so this does not address the fundamental issue of residential sign up.

### Idea 5 – Local Legislation – Private Bill

- **Approach:** A local authority could seek to obtain a specific private Act in Parliament in respect of a specific heat network(s). This may (for example) designate a relevant area as a heat network area and require (as with Danish Law) that all properties in the area be connected to a local heat network within a certain period of time.

Private bills are typically promoted by organisations, like local authorities or companies, to give themselves powers beyond, or in conflict with, the general law. Private Bills only change the law as it applies to specific individuals or organisations (like local authorities), rather than the general public.

Historically they were used to authorise railways, canals, harbour installations etc., but there is also a long history of local authorities promoting their own private bills to give them general powers exercisable in their areas.

For example, the London Boroughs have promoted 13 "general powers" bills since 1990, which have included provisions about environmental protection, traffic and highways and licensing, among others.

Perhaps one appealing aspect of private bills is that there is a history that where a local authority proposes a progressive and innovative private bill it may (in time) be more widely adopted by the Government – this, for example, was the case in respect of Liverpool City Council – who introduced a private bill on banning smoking in public places before it was overtaken by national legislation.

It's also worth noting that the Clean Air Acts came about after a number of local authorities had secured their own local provisions in private Acts.

- **Use:** This approach has not yet been used.
- **Challenges:** We are industry leading experts in this field, having advised numerous local authorities (including the London Boroughs) on promoting private bills. There is no guarantee of success. Parliament may find that legislation which does something that would normally be a matter for government, unacceptable and reject it early on public policy grounds. And those affected (but not individual residents) can object to the Bill by petitioning. As such the process is high risk and can be costly for local authorities – albeit the prize for innovation is significant.
- **Ability to solve the demand challenges of Heat Networks:** This is the first of our solutions which offers a more global solution – namely a requirement to sign up to a heat network akin to that in Denmark. Obviously any such private bill would have narrow geographical confines. However it nonetheless could be a precursor (whether or not the promotion was ultimately successful) to national legislation.

### Idea 6 – Very Local Legislation – Byelaws

- **Approach:** A local authority could attempt to make, and obtain confirmation of byelaws mandating sign up to the relevant local heat network.

Local authority byelaws are laws made by local authorities requiring something to be done, or not done, in a specified area. In other words, local laws to deal with local issues.

Four elements are essential to the validity of a byelaw:

- it must be within the powers of the local authority making it;
- it must not be repugnant to English law;
- it must be certain and positive in its terms; and
- it must be reasonable.

In this case what is contemplated is the introduction of a Byelaw akin to a Danish Heat law requiring sign up to the district heat network.

- **Use:** This approach has not yet been used. However it is worth noting that local authorities have proposed somewhat controversial Byelaws in the past.

In 2010, the councils in Greater Manchester agreed a draft byelaw to impose a minimum price on alcohol sales in the city[10]. In the end, the plans were shelved as the Government decided to legislate on a national scale, but this is an interesting example of local authorities thinking outside the box when it comes to byelaws.

Similarly Liverpool City Council contemplated a byelaw to ban plastic toys in McDonald's Happy Meals[11].

- **Challenges:** This approach may be challenging to get off the ground. The Secretary of State's permission or confirmation is usually required, and one of the things he or she would consider is whether there is a clear enabling power. At present there is not a clear power that would enable this approach (although central government may wish to consider introducing legislation to enable it – which may be akin to the Danish approach described above, or indeed similar to the powers that local authorities have to make smoke control orders (not byelaws) under the Clean Air Act 1993).

There is a general power for local authorities to make byelaws in s235 of the Local Government Act 1972: to *"make byelaws for the **good rule and government** of the whole or any part of the district or borough… and for the **prevention and suppression of nuisances** therein."*

There are two types of common law nuisance: public nuisance and private nuisance. Public nuisance is defined as follows[12]:

*"A person is guilty of a public nuisance, who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."*

However, despite this definition, public nuisances have been committed where the nuisance is not itself an illegal act. In *AG v PYA Quarries* [1957], for instance, quarrying – which is not an unlawful act – was found to be a public nuisance on the specific facts of the case.

In particular it was noted that a public nuisance could be one which materially affected the reasonable comfort or convenience of a class of Her Majesty's subjects. In an era of unclean and polluted air, one could suggest a resident who refuses to change to an environmentally friendly district heating network endangers the health of the public, due to the environmental damage caused by gas boilers and that this should be deemed to constitute a nuisance.

It should be noted this would be a significant stretch of current law and (while we consider the bye law idea is a nice one) we do think it would have a very low chance of success in the event of a challenge (for a start there is something perverse about describing use of a gas boiler as a nuisance only in circumstances where a heat network operates – typically a nuisance either exists or it does not).

However it might well be worth local authorities lobbying the Government to enact primary legislation to enable local authorities to make local orders akin to smoke control orders to better enable district heating.

It is also worth noting that breach of a byelaw is a criminal offence and local authorities may not consider it appropriate to criminalise not signing up to a local heat network or retention of a gas boiler.

- **Ability to solve the demand challenges of Heat Networks:** Again this approach would (if successful) offer a more global solution – namely a requirement to sign up to a heat network akin to that in Denmark. Obviously any such byelaw would have narrow geographical confines. However it nonetheless could begin a process of passing heat law type rules. Such a byelaw would be certain to be challenged on legality grounds and it is very unlikely it would survive the challenge.

**Idea 7 – Enforcement – Environmental Enforcement**

- **Approach:** Local authorities could take a revised interpretation to s.79 of the Environmental Protection Act 1990. This states that certain "fumes or gases emitted from premises so as to be prejudicial to health" constitute a statutory nuisance. Where a local authority determines that a statutory nuisance exists it must either issue an abatement notice which can mandate works to be undertaken or take such other steps as it thinks appropriate for the purpose of persuading the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence (in this case, arguably, either could require connection to the local heat network).
- **Use:** We are not aware this approach has been used.
- **Challenges:** Describing the use of a gas boiler as a statutory nuisance would be (to say the least) challenging. The majority of homes in the UK have gas boilers. Further not all areas have heat networks and there is something perverse about saying use of a gas boiler is a nuisance only if you have a local heat network – a nuisance is either a nuisance or it is not. However given the scale of the climate emergency faced (and issues of air pollution) perhaps there is a slim argument that where local people refuse to sign up to a cost competitive heat network and retain their gas boiler they may arguably be committing this statutory nuisance. Perhaps an analogy could be drawn to coal fires. Coal fires could be said to have been the equivalent of gas boilers of their day: everybody had one, and before the Clean Air Acts and EPA, it would no doubt have been considered outrageous to suggest that use of a coal fire constituted a public nuisance. But now, there is no doubt that under s.79 it could be.

However for the time being any local authority that took this approach regarding a gas boiler would be taking a significant departure from current practice and success is far from certain and any challenge would be likely to be successful.

- **Ability to solve the demand challenges of Heat Networks:** Again this approach would (if successful) offer a more global solution – namely a requirement to sign up to a heat network (if there was one) akin to that in Denmark. Obviously any such approach would have to have narrow geographical confines and only apply when a heat network was an option. However it nonetheless could begin a process of passing heat law type rules. Such an approach to enforcement would be certain to be challenged on legality grounds and there would be a high risk that such an approach would not be successful.

## All Stick and No Carrot?

Some of what is proposed above is radical (and likely not politically attractive). Depriving customers of choice runs contrary to free market principles that have governed the heating sector for generations. Further there is a question as to whether (in some cases) going so far as to criminalise a failure to sign up to a heat network is appropriate.

There is without question a place for positive incentives such as tax/business rates breaks for joining the local heat network. However the Danish case study shows that some restriction of choice (in favour of renewables) is needed.

Local authorities are already taking decisions to stray further in to inhibiting personal freedoms than ever before in the valid name of public policy. Licensing of landlords renting their property serves as a fetter on use of homes but provides certainty as to high standards of housing for tenants.

Planning restrictions on new build properties preventing residents from obtaining parking permits is an encroachment on the right to own a car but is justifiable in the pursuit of clean air. Given the scale of the global climate crisis it seems reasonable to reach for radical solutions.

## Quid Pro Quo – Competition and Consumer Protection

Mandating heat networks needs to come with consumer protections. It is often stated that heat networks are not regulated in England and Wales. That is not true – the Consumer Rights Act 2015 protects non-business customers and many schemes are signing up to voluntary regulation with the Heat Trust. However, where local authorities are to take some of the more extreme steps above greater protections will be needed.

By restricting customer choice an effective monopoly is being established. Ofgem is currently exploring how best to regulate heat networks but absent any further developments it is not impossible to imagine local authorities can also play a role as standard bearers ensuring customer protection.

Where running of a heat network is outsourced via concession local authorities can establish themselves as quasi-regulatory bodies policing price and efficiency in a manner akin to Ofwat and Ofgem with other natural monopolies. Periodic reviews and price controls would be remarkably effective on a local level and may result in greater customer engagement.

## Conclusions

It seems inescapable that the climate crisis is real and demands action in respect of heating.

In order to make district heating truly viable at scale and in a cost efficient way demand (and certainty thereof) is required. Heat networks work best when everyone joins up and it is not clear in the light of the risks faced by global climate change that opting out should be acceptable.

Local authorities have done huge amounts already in terms of establishing heat networks but we think more can be done to mandate heat networks and (in so doing) create a roadmap for long lasting change to the heating industry.

Central government may well look to implement heat law type arrangements but at the moment this does not seem to be the intention. With this in mind there is gap for activist Councils to try to push the agenda. Albeit some of the more radical options set out in this paper come with significant challenge risk.

Case studies from Denmark show that nothing but compulsion will drive up usage of heat networks to the levels we need to make a meaningful environmental impact.

Heat networks only work well where everyone joins up and there is a legitimate case to be made that in a time of global climate emergency (provided there are proper consumer price and quality protections) sign up to renewable heating should not be an option. While it is disconcerting to create an effective monopoly – the risks of abuse can be mitigated by effective regulation.

The more pressing risk is the climate change risk we all face and which requires urgent progress. In this regard and in terms of heat network sign up it is difficult not to draw the parallel between those advocating for heat networks and parents trying to teach their young children to act in their own best interests and eat their vegetables.

Sure they might figure it out on their own. But wouldn't it be easier if there was nothing else on the menu[13].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[2] Ofwat – PR24 and beyond: Creating tomorrow, together
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[11] https://www.dailymail.co.uk/news/article-517955/Liverpool-set-ban-McDonalds-Happy-Meals-bid-cut-childhood-obesity.html
[12] Archbold: Criminal Pleading, Evidence and Practice (2015), para 31-4.
[13] Paraphrased from the West Wing – Manchester Part II.

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