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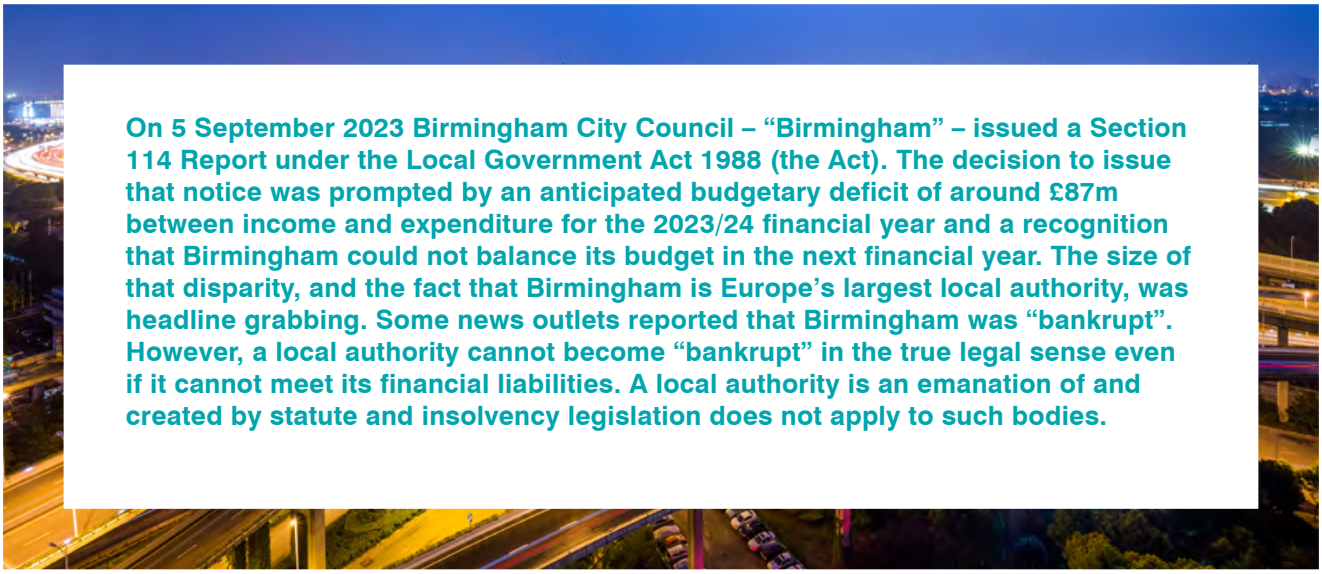
CAN A LOCAL AUTHORITY GO "BANKRUPT" AND WHAT IS A SECTION 114 REPORT?



On 5 September 2023 Birmingham City Council – "Birmingham" – issued a Section 114 Report under the Local Government Act 1988 (the Act). The decision to issue that notice was prompted by an anticipated budgetary deficit of around £87m between income and expenditure for the 2023/24 financial year and a recognition that Birmingham could not balance its budget in the next financial year. The size of that disparity, and the fact that Birmingham is Europe's largest local authority, was headline grabbing. Some news outlets reported that Birmingham was "bankrupt". However, a local authority cannot become "bankrupt" in the true legal sense even if it cannot meet its financial liabilities. A local authority is an emanation of and created by statute and insolvency legislation does not apply to such bodies.

Birmingham has an exposure to equal pay claims for bonuses going back a Supreme Court judgment delivered in 2012 and estimated to be £750m.

Despite its equal pay liability, Birmingham is not the only local authority in financial difficulty and in Section 114 territory. According to a House of Commons publication of 13 September 2023:

- a number of authorities have reported their concerns and may have to issue a Section 114 Report, including Middlesbrough, Coventry, Somerset, and Hastings. In December 2022, Thurrock issued a Section 114 Report and it has a particular financial exposure because of its solar farm investment strategy;;
- in 2018 The National Audit Office estimated that between 2010/11 and 2017/18 local authorities' spending power had fallen by 29%; and
- the Institute for Government estimates a fall in spending power of around 31% between 2009/10 and 2021/22.

Against that background, local authorities are also facing increasing costs pressures from a growing population, demand for local government services, especially adult and children's social care. Also, rises in inflation have added to the strain and The Local Government Association estimates that inflation pressures (including pay demands and rising energy costs) will add £2.4 billion to expenditure forecasts for 2023/24.

Previously, councils in Birmingham's current situation have passed amended budgets to reduce spending in order to produce a balanced budget. This is what occurred in Northamptonshire (2018) and Croydon (2020).

A Section 114 Report does not automatically trigger the Government's powers to intervene in a council's affairs although that has happened following issuing a notice in the cases of Woking, Slough, and Thurrock, Nottingham City Council. The Government has now announced that it will intervene in Birmingham.

If a Section 114 Report is not a step towards insolvency what are its key effects?

- It is an acknowledgement that it appears to a local authority's chief financial officer ("CFO" – who is also the Section 151 officer under The Local Government Act 1972) that the authority's expenditure in the current financial year is likely to exceed the resources available to it (including borrowed funds) to meet that expenditure. That is, its proposed budget means it is facing a budgetary deficit when there is statutory duty to set a balanced budget.

- The CFO does not need Members' or the authority's consent in any form to take this course.

- It is the trigger for an authority to decide on a course of action to consider and resolve the anticipated deficit. That could include cutting proposed expenditure and /or increasing its revenues by increasing Council Tax. Since 2012, the Government has set national increase limits – usually by around 2%-5%. The Autumn Statement in November 2022 fixed the 2023/24 limit to 5% for councils with social care functions. In the light of their particular difficulties Croydon, Slough and Thurrock were respectively allowed 15% and 10% and 10% increases.

- The authority is required to meet and consider the Section 114 Report within 21 days of the Report being issued.

- An immediate effect of a Section 114 Report is to impose a kind of moratorium which suspends the incurring of expenditure in relation to new commitments without the prior approval of the CFO until the authority has agreed the course of action to eradicate the deficit. Under the Act this is called the "prohibition period". An unauthorised commitment during the prohibition period is unlawful and could be a nullity for being ultra vires

- Section 114 Report does not, however, release or in any way diminish an authority's existing obligations. The Council is bound to comply with its obligations under any existing contract. Because of that feature, it is unlikely that a Section 114 Report will not have any effect on an existing contract.

Anyone in contract with a Section 114 issuing council could:

- look at what unilateral rights of termination the Council has and what compensation is payable. The s114 Report does not in itself mean the Council will exercise such a right but it might engage the discretion to exercise such a termination right;

- consider if there is scope for the Council to incur a further obligation and whether that is authorised by the CFO in accordance with Section 114 during the prohibition period ;

- In the short term at least one can envisage a pattern of local authority cut-backs on services, higher council tax and sale of assets. Sadly, Birmingham is involved in an asset sale when in other circumstances it probably would not have done so. In sales of interests in land then, for the protection of the public purse (even in strained times), a statutory best reasonably obtainable consideration requirement is in play. See ***'As easy as 123' – Section 123 of the Local Government Act 1972 considered in R (Cilldara) v West Northamptonshire Council [2023] EWHC 1675 (Admin).***

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SMASH AND GRAB ADJUDICATIONS

Last month, Kort Egan presented a paper to the Society of Construction Law on "Smash and Grab" adjudications. These adjudications are common, and so we thought it would be useful to provide a summary of the paper.

What Is a Smash and Grab Adjudication?

A "smash and grab" adjudication is one where payment is sought either under the payment provisions of a contract or the Housing Grants, Construction, and Regeneration Act 1996 (the "Act"). This involves a contractor contending that:

(i) it has submitted a valid payment application; and
(ii) the employer has not provided a pay less notice in response,

which means that the sum claimed in the payment application is required to be paid.

In *S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448*, it was held that the requirement to pay the notified sum in the payment application is an immediate obligation and the employer must pay the sum stated as due, but they would then be entitled to begin a separate adjudication addressing the "true value" of the application.

But if a smash and grab adjudication has been commenced, the employer must comply with that adjudication first before it is entitled to commence or rely on a true value adjudication.

Please note, the presence of a payment application and the lack of a pay less notice does not automatically mean there is a notified sum. There are many factors to consider.

Jurisdiction

If relying on the Act, the parties need to consider if there is a construction contract as defined under the Act, and therefore if there is a right to adjudicate under the Scheme for Construction Contracts (the "Scheme"). If not, the adjudicator will not have the appropriate jurisdiction.

It is no longer the case that multiple payment applications require multiple adjudications. A referring party can now commence one adjudication for these.

What Makes a Valid Payment Application?

Substance, form, intent, and the high threshold

A payment application must be clear that it is a payment application in substance, form and intent, so that the payer has reasonable notice that the payment period has been triggered. It must state the sum considered due by the contractor at the relevant date and it must be free from ambiguity. A contractor must meet this high threshold if they want the sum to become automatically payable if an employer's notice is not served in time.

Timing

Firstly, the parties must closely scrutinise the contract and consider what payment mechanism applies i.e. does the contract comply with the Act, is the Scheme implied and to what extent? Have the parties been using a different payment mechanism to that agreed at the start of the project? The next thing to consider is when can a payment application be served. If the parties wish for applications to be

served a certain number of clear days before a certain date (i.e. the deadline date is not included in the period), or if they wish for it to be served within specific hours, the contract will need to clearly state this. The court will not enforce these requirements if the contract is silent on this.

Another point to consider is when is the contractor entitled to interim payments until, e.g., the court has held that if a schedule has been agreed which provides valuation dates, there is no implied term for subsequent interim payments after the expiry of that schedule.

A further question is whether a payment application can be submitted early. The court has held that where the contract provides for monthly payment applications, early payment applications will not be effective, and the contractor must wait for the next relevant date.

Finally, if an application has not been served by the relevant date, is there a variation/waiver/estoppel argument? If a contractor has previously failed to comply with the payment mechanism, but the employer has nevertheless paid the claimed sum, then the contractor may argue that there has been a variation of the payment mechanism, or that estoppel/waiver operates i.e. that the employer is prevented from asserting a right which contradicts something previously agreed or that they have waived that right. However, the court has held that making a payment on one occasion where an application did not comply with the relevant date does not establish variation/waiver/estoppel for subsequent applications. Similarly, the court has upheld contract terms which expressly exclude one instance of waiver being a waiver of all subsequent non-compliance.

However, if an employer tells the contractor that they will deal with an application which does not comply with the relevant date, and then considers the application (e.g. responds with a valuation and payment notice) without stating or suggesting the application is invalid or seeking to reserve their position, then they will have affirmed the application's validity and are estopped from saying it is invalid.

Payment Notices

The Act requires payment notices to set out the sum the payer considers due at the payment date and the basis on which that sum is calculated. In the recent case of *Downs Road Development LLP v Laxamanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC)*, a payment notice was sent by the employer's agent in time but was for the sum of £1. The covering email said a further payment notice will be issued in due course as it was taking time to assess the application. After the deadline a further payment notice was sent for £657,218.50. The court held that the first payment notice was not valid as it could not be stated that sum was the amount the employer thought due.

Conversely, many contracts contain clauses that the payment application sum is the amount the contractor believes is due to them at the relevant date. Considering the *Downs* case, it may be possible for an employer to argue that a payment application is invalid because the contractor cannot have actually considered the sum claimed to be due as it is exaggerated or not the true value. The courts used to give this argument short shrift, but it remains to be seen if the position has now changed.

Pay Less Notices

The Act provides that a payer may give the payee a pay less notice which specifies the sum the payer considers due and the basis on which that sum is calculated.

The court has held that a pay less notice must be in substance, form and intent a pay less notice in respect of a specific payment application and must be referable to the payment notice in which the notified sum is identified.

The Level of Specificity Required

Where contract terms or the Act require an application or notice to set out the basis on which a sum is calculated, arguments can arise on whether the application or notice does this.

It will depend on the facts of a case if a failure to break down an element of an account into line-by-line detail is a failure of substantiation that may render the application invalid.

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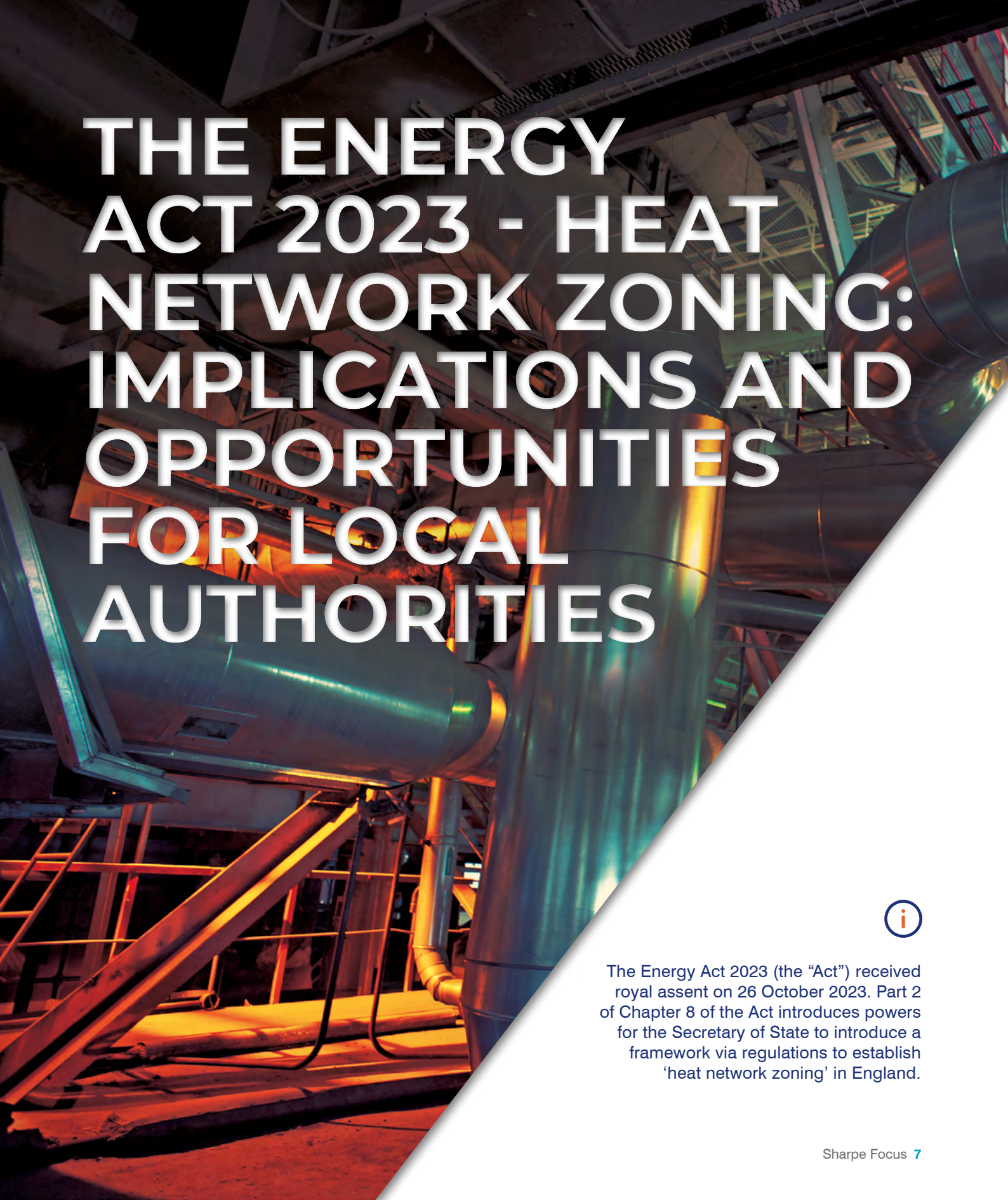

THE ENERGY ACT 2023 - HEAT NETWORK ZONING: IMPLICATIONS AND OPPORTUNITIES FOR LOCAL AUTHORITIES

The Energy Act 2023 (the "Act") received royal assent on 26 October 2023. Part 2 of Chapter 8 of the Act introduces powers for the Secretary of State to introduce a framework via regulations to establish 'heat network zoning' in England.

The Department for Energy Security and Net Zero ("DESNZ") describes heat network zoning as a 'key policy solution' that is needed to meet net zero targets and has stated that it would support local authorities to designate new heat network zones no later than 2025.1 Given the short timeframe, it is crucial that local authorities are aware of their potential powers and responsibilities conferred upon them by the Act.

What is heat network zoning?

Heat network zoning is a methodology by which certain areas are identified and designated as those where district heat networks are the lowest cost solution for decarbonising heat. Factors that might be considered to identify such areas might include:

- heat demand intensity;
- building density; and
- availability of low carbon heat sources

How do local authorities play a part?

Heat network zoning is not a new methodology. Denmark has employed a form of heat network zoning since 1979 where municipalities identified zones where district heating would be optimised. This has resulted in, to date, around 64% of all private Danish households being connected to district heating systems and is a large part of the reason that Denmark is widely recognised as one of the most energy-efficient countries in the world.

In November 2021, DESNZ consulted on heat network zoning and identified that local authorities, amongst other key stakeholders, would be involved in implementing heat network zoning. In 2022, the government published its response to the 2021 consultation and confirmed that it intended for a zoning coordinator to be established by local government with responsibility for a particular locality. Local government was perceived to be most suited to the role as a zoning coordinator due to their pre-existing responsibilities, knowledge and contacts with relevant stakeholders in the local area. Heat network zoning will therefore provide local authorities with an opportunity to adopt a central role to facilitate an increase in the heat network market and help further the nation's goal to achieving its net zero objectives.

The Energy Act 2023: powers and responsibilities of zone coordinators under the heat network zone provisions

The Heat Network Zoning provisions of the Act are separated into headings which are considered below. The below summary is not intended to capture all the provisions of the Act, but instead provide a snapshot of the provisions that are relevant to local authorities in their potential capacity as zone coordinators.

Zones Regulations

The Secretary of State may make regulations about heat network zones ('zones regulations'). A heat network zone is an area that is designated as appropriate for the construction and operation of district heat networks.

Heat Network Zones Authority and zone coordinators

Such zones regulations may:

- designate a person as the Heat Network Zones Authority (the "Authority");
- provide that a local authority (or local authorities) may designate a person, and may also designate itself, as a 'zone coordinator';
- make provisions about a zone coordinator's funding and governance; and
- provide that the Authority performs a zone coordinator's functions in certain circumstances.

Identification, designation and review of zones

Under s.225 of the Bill, zones regulations may provide:

- that the Authority and a zone coordinator identify and designate areas that are appropriate for the construction and operation of district heat network(s) as heat network zones and keep such designation under review; and
- procedure concerning the designation of heat network zones.

Under s.226 of the Act, zones regulations provide that a 'zoning methodology' must be used for any identification of a potential heat network zone. Under s.226(3) of the Act, zones regulations may provide that the Authority issues guidance in relating to the zoning methodology. Such zoning methodology may include, amongst other things:

- the criteria for determining an appropriate area;
- provision about the use of maps and how areas are identified; and
- the roles of the Authority and zone coordinators.

S.227 of the Act provides that regulations may grant the Authority and zone coordinators certain powers to request information from specified persons in order to carry out their functions under s.225 and s.226 of the Act.

Heat networks within Zones

Zones regulations may:

- require specified persons of a description of securing that specified buildings are connected to a district heat network within a heat networking zone in certain circumstances;
- provide that zone coordinators give notice of requirements imposed by regulations to those specified persons;
- provide that zone coordinators may request information from a person about a source of thermal energy on their premises;
- provide that zone coordinators may install equipment on a specified person's premises to enable a source of thermal energy to supply a district heat network within a heat network zone; and
- provide that zone coordinators decide what district heat networks may be constructed and operated and by whom within a heat network zone.

Enforcement

Zones regulations may provide for a zone coordinator to issue notices requiring compliance with heat network zone requirements and impose penalties on a person for the contravention of a heat network zone requirement.

Records, information and reporting

Zones regulations may provide for zone coordinators to acquire, maintain, and provide to other zone coordinators or the Authority, information relevant to identification of appropriate areas for district heat networks.

Commentary

Currently, the form that the heat network regulations will take is unknown. Until further information and consultations are made by government concerning the regulations and relevant guidance is provided by the Heat Networks Authority, the extent of a zone coordinator's involvement in heat network zoning is still unclear. What is clear, is that local authorities may designate themselves as zone coordinators under the Act and that central government intended for local authorities to play a role in the process.

The Act also provides that a Heat Networks Zones Authority will be established as an overseeing public body responsible for establishing the methodology for identifying heat network zones and oversight of zone coordinators. Zone coordinators will act in their capacity as localised experts to acquire both geographical and technical information in order to establish areas which can be designated as heat network zones. Such designation will provide certainty for private investment and will result in zone coordinators working both closely with key stakeholders and making key decisions on the construction and operation of new heat networks:

Further, zone coordinators will be responsible for overseeing compliance with:

- connection of specified buildings in heat network zones to district heat networks; and
- requirements under the regulations to access and utilise sources of thermal energy.

Local authorities should therefore consider:

1. the importance of growing the heat network market within the areas they are responsible for;
2. the likelihood/suitability of any areas within their control as being designated as heat network zones;
3. what resources are available to carry out the zone coordinator role and what resources need to be acquired; and
4. to initiate communications with external stakeholders in both the public and private sector who will be affected by the implementation of any regulations.

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1 As published in the *"Energy white paper: Powering our net zero future"* by the Department for Business Energy & Industrial Strategy on 14 December 2020

DATA PROTECTION AND DIGITAL INFORMATION BILL

Earlier this year, the Government introduced its next version of The Data Protection and Digital Information Bill (No.2). It retains the Government's commitment to refine and update data protection legislation.

As stated in the Government's press release in March this year introducing the Bill, the Bill aims to provide a framework integrating the *"best elements of GDPR to provide businesses with more flexibility about complying with the new data laws"*. The press release sets out the Government's expectation that data reforms to the UK GDPR could save the economy up to £4.7bn over the next decade, whilst increasing business confidence in AI and automated decision-making. Furthermore, the Bill aims to strengthen data protection and privacy and retain the UK/EU data adequacy agreement.

This article reviews what additional clarifications have been made in the Bill's current version and how the UK GDPR may be changed. It should be noted that the proposals are subject to amendment by Parliament.

If the Bill comes into force, it s**hall not replace UK GDPR and the Data Protection Act 2018**, but rather supplement it and be used to amend provisions in the UK GDPR and the Data Protection Act 2018. Additionally, under the current draft of the Bill, if an organisation already complies with UK GDPR they shall not be required to make any additional changes.

How the Bill is changing the GDPR:

- The definition of "personal data" will be amended to clarify when an individual is identifiable. Additionally the Bill adds, information obtained without the appropriate technical or organisational measures to mitigate the risk of information being unintentionally distributed, constitutes the definition of personal data. This may help organisations wanting to anonymise personal data, because it currently can be difficult in some circumstances to truly say that data is anonymous and that the UK GDPR does not apply.
- Removal of the requirement to maintain a Record of Processing Activities (ROPA). This provides organisations with more flexibility in recording their data appropriately and catering to SMEs over 250 people who do not process high risk data.
- The requirement for Data Protection Impact Assessments is replaced by Assessments of High Risk Processing. Whilst the UK GDPR does not specifically state what is high risk, the Bill adds that where an 'assessment of high risk processing' occurs, the organisation will need to provide examples of processing that demonstrate data subjects' fundamental freedoms being impinged.

This new process would provide more flexibility as to when and how such assessments are carried out. Organisations though may continue to use the DPIA processes they have become familiar with.

- The introduction of the Senior Responsible Individual (SRI) role to replace the role of the Data Protection Officer. This will be required for public bodies and those that undertake high-risk processing. The SRI must be an individual within an organisation's senior management. (The role can be held by more than 1 person if individuals job-share.) The tasks the SRI would be responsible for though are very similar to those of a DPO.

- The definition of processing information for research purposes is not expressly defined in the UK GDPR. The clarification set out in the Bill provides greater clarity around what these terms stipulate. There are also changes around whether or not you need to contact individuals to re-use their information for research purposes.

- Subject access requests can be refused on the basis of being vexatious. Currently, subject access requests can be refused for being manifestly unfounded but, being able to refuse on the grounds of a request being vexatious or excessive is likely to be welcomed by controllers.

- Changes to website cookies so they can be done on an opt-out basis, rather than opt-in. This may mean that organisations need to update their websites and, as consumers, we may start to see fewer cookies pop-ups when browsing online.

- In relation to international data transfers, the proposals aim to make this area less complicated and burdensome, however, it is questionable whether this change will jeopardise the UK-EU Adequacy Agreement.

- Changes to the role and structure of the Information Commissioner's Office are also detailed. However, we will continue to have a body in the UK to regulate data protection and fines may still be imposed for breaches. It is proposed that Parliament will approve the ICO's Strategic Objectives; this has led to some concern about the role of Parliament in the future direction of the protection of information rights.

- The Bill widens the definition of a call, to nuisance calls and texts, increasing fines to either up to 4% of global turnover or £17.5 million.

When will the Bill become law:

The Bill is predicted to receive assent around **March 2024**.

However, the timing is subject to the Ping-Pong procedure and the Bill is still progressing through Parliament, currently awaiting its report stage in the House of Commons.

The Government will also need to bear in mind that the reforms will be significantly limited if the UK adequacy decision granted by the EU is not renewed on 27 June 2025. The adequacy decision means that personal data can flow freely from the EU to the UK without additional safeguards. When the EU considers whether the adequacy decision is to be renewed, they will consider the data protection laws of the UK and how much they have departed from the EU's GDPR.

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COULD ADR HELP IN YOUR TRIBUNAL CLAIM?

On 7 July 2023, Judge Barry Clarke (President of the England and Wales Employment Tribunals) released guidance on the use of Alternative Dispute Resolution ("ADR") in Employment Tribunal claims. The guidance was written for Tribunals; however, it may be of interest to parties who are seeking early resolution to claims and wish to avoid going to a final hearing.

Tribunal claims always carry a cost, whether this be an early settlement offer, legal or just the cost of diverting staff from their day job to prepare and attend the Hearing. Costs orders are only rarely made in Tribunal claims so there is no guarantee of recouping your legal costs, even when defending against weak claims.

Alongside the financial and emotional costs, no Tribunal is without risk, which multiplies when dealing with complex matters such as discrimination and whistleblowing claims.

Employment Judge Clarke's guidance on the use of ADR has been produced as a way to resolve claims earlier and thereby reduce costs to all involved is a welcome contribution to this arena.

So what ADR options are available to parties?

The Four ADR options

We are all now familiar with the first two, ACAS Conciliation and Judicial Mediation. The final two options; Judicial Assessment and/or Dispute Resolution Appointment are less understood, and we feel are underutilised by parties and the Tribunal.

ACAS

Early conciliation has now been a statutory requirement for nearly 10 years (May 2014) before a claim can be lodged at the Tribunal. In addition, the use of ACAS does not end with the issuing of a claim and their assistance can be instrumental in settling a claim at any point during a case.

Pros:
ACAS are independent to all parties and the Tribunal, and they can assist with claimants who are not represented.

An ACAS officer can provide appropriate information to a litigant in person to assist them in understanding the benefit of settlement.

ACAS have a simple legally binding agreements (COT3), which brings claims to a quick end.

Cons:
ACAS must remain impartial so cannot easily advise either party on strengths or weaknesses of their claims. Further, the same conciliators are not always available due to their work loads, and this can lead to delays in progressing matters quickly.

Judicial Mediation

Mediation is consensual, confidential, and facilitative which means.

Consensual: both parties have to agree to the process.

Confidential: parties can speak freely "without prejudice" and any comments or concessions made will not be used at a final hearing.

Facilitative: the Judge conducting the hearing will not generally give indication on merits or prospects of success.

Many respondents will be aware of Judicial Mediation as this has been used in Tribunals for a number of years. Judicial Mediation is becoming more and more common with Tribunals normally considering it in cases where the final hearing is likely to be three days or more. Normally it is considered in cases involving discrimination or whistleblowing. It should be noted that settlement can only be reached via a COT3, and ACAS needs to be aware that mediation is taking place.

Pros:
Judicial Mediation is aimed to be held before parties incur significant costs and therefore assists in maximising savings to parties.

It can help bring both sides to the table. It gives Claimant's an opportunity to explain their case to a Judge and consider the response to those claims.

It is possible to offer non-financial options to settle, which would not be open to a Tribunal, which have included in our experience, as an agreed reference, an apology and an agreed consideration of an ill health retirement process Judicial Mediations can also be held remotely or in person depending on the necessity of the parties.

Even if it is unsuccessful both parties often get a better understanding of the other part is position so are better able to prepare for the Hearing. Or future settlement discussions

Cons:
Many Tribunals will only consider listing for a judicial mediation if a claim is likely to be over five days. Where Judicial Mediation can be useful for more straightforward cases as well.

If the parties are not able to achieve a settlement outside of a judicial mediation, the prospects of achieving one during that mediation are lessened, especially if either party has unrealistic expectations of the value of the claim.

Further, due to the 'without prejudice' nature of the discussions, if mediation fails any information learnt must be ignored.

Judicial Assessment

Judicial Assessment is another Judge led but rarely used process. This differs from Mediation in that the judge will review the case and outline considerations on the strength and weaknesses of each parties case. It can be used on any type of case. The process is consensual, confidential, and evaluative.

Evaluative: the Judge will use their experience and skills to review the pleadings and any other documents to give an impartial indication on the merits or weaknesses of parties positions.

Pros:
Judicial Assessment can take place at any time; be it a preliminary hearing, case management hearing, or during a specific listed hearing. It is useful in bringing unreasonable parties to the negotiating table if their cases are shown to be weak and can be used to limit weak claims. Where parties agree, it could also assist having an indication as to the weakness of the other party's position to concentrate on.

Cons:
Judicial Assessment works both ways in that it can highlight weaknesses in your own claims, which in turn may make negotiating more difficult for you when trying to reach a settlement with a party in a stronger position.

Dispute Resolution Appointment

This a new scheme, currently being piloted in the West Midlands Tribunals where it has shown to have a positive outcome.

It is intended to be used in the most complex of cases; mainly discrimination and whistleblowing claims.

In this appointment, an Employment Judge will use their skills and experience to give parties an evaluation of their prospects of success and possible outcomes in terms of remedy, while remaining impartial. They will do this using the information available at the time to them. To ensure that the evaluation is as helpful to the parties as possible, the Dispute Resolution Appointment will be held after witness statements have been exchanged. These statements will be available for the Employment Judge to read (along with key documents of relevance).

The need for this sort of assessment has been due to the high backlog of cases the Tribunals are currently facing, with parties not being interested in the other mediation routes. Such reluctance to use other mediation routes is mainly due to, either one party not being professionally represented or an unrealistic expectation, on either party of the merits and therefore value of the claim.

Pros:
It can bring an unrepresented party to a realisation about their case and the merits and weaknesses of it. It can also help resolve cases faster before they become prolonged and increasingly combative.

Cons:
Time and expense involved in bringing/defending the claim will have already been spent. This is because it is usually only considered after witness statements have been produced and when the parties are preparing for final hearings. In many cases, where the parties and entrenched in their positions, it will make more sense financially to just proceed with the Hearing.

Our Opinion

ADR has its place within the Employment Tribunal system and the experience in the West Midlands has shown that it is resolving cases and freeing up judicial resources. We hope that it is offered across all regions not only as an alternative but is actively considered and used by the Tribunals. We however believe that judicial assessment should be automatically considered in every Preliminary Hearing. In our experience, once the ET1 and the ET3 are considered, an Employment Judge will be able to assess the legal claims and defence and highlight strengths and weaknesses. This will not be as comprehensive as an assessment when all the preparation has been completed but would be a better tool to reduce financial costs of defending claims. We would also like to see this process go hand in hand with a clear warning that if the case has clear and significant weaknesses, the Claimant may face a legitimate application for costs if they proceed. This would not impede a future judge from reaching their own decision on the basis of all the evidence but would potentially weed out hopeless cases/ defences.

If you wish to discuss any of these options on any of your current cases or just wish to speak about these processes in greater detail, please do get in contact with a member of our **team**, who will be happy to assist you

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INTERMEDIATE TRACK AND FIXED COSTS – A BRAVE NEW WORLD?

Introduction

The new rules came into effect on 1 October 2023, which included the establishment of an intermediate track for claims ranging from £25,000 to £100,000. Prior to the new rules coming into effect, such cases would have been allocated to the multi-track.

The new rules have been introduced under The Civil Procedure (Amendment No.2) Rules 2023 and the accompanying update of Practice Directions (the 156th update since the CPR came into existence!). The new regime applies to where proceedings are issued after 1 October 2023, save for personal injury cases, where the new rules only apply where the cause of action accrued after 1 October 2023.

The procedure for the intermediate track is a hybrid of those for the fast track and the multi-track, involving more active case management by the courts, but with directions still likely to follow a standard pattern. A crucial part of the change is that the new fixed recoverable costs regime is being put in place to cover cases allocated to the fast track and the intermediate track.

The Intention Behind the Changes

The reforms aim to ensure greater certainty and proportionality in legal costs across a broader range of civil claims. They seek to enhance access to justice and facilitate informed decision-making throughout the litigation process, with a particular focus on cost reduction.

What Does It Apply To?

Intermediate track cases will encompass civil cases that meet the following criteria:

- The claim is valued between £25,000 and £100,000.
- The trial is expected to last no more than three days.
- The use of oral expert evidence is likely to be limited to two experts per party.

Cases of greater complexity will be directed to the multi-track regime, where the extended fixed costs scheme will not be applicable. Additionally, the new intermediate track will introduce new standard directions.

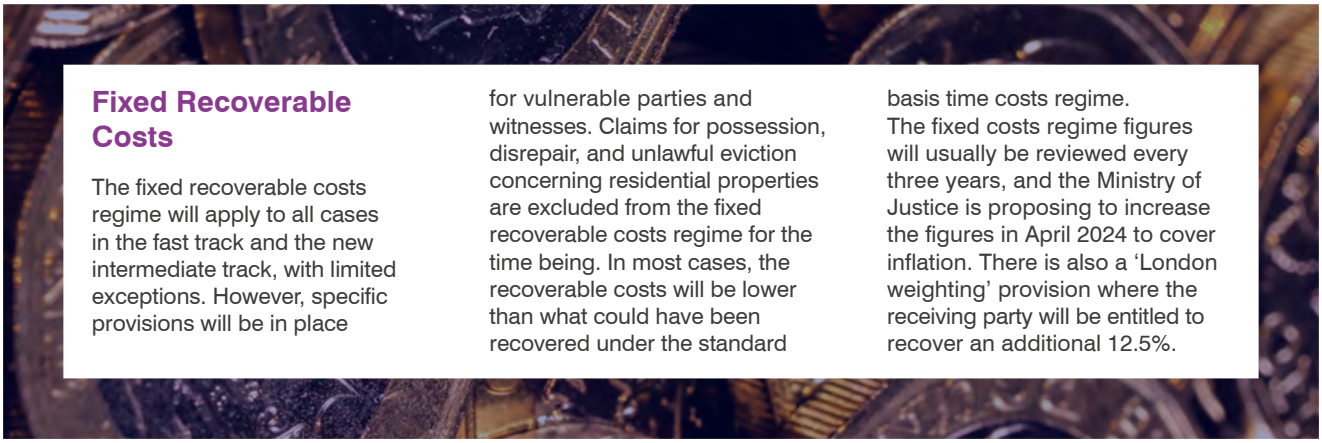
The intermediate track will sit between fast track and multi-track cases, applying to claims for both monetary relief, non-monetary relief, and mixed claims. However, a claim containing a non-monetary relief component will only be allocated to the intermediate track if the court deems it to be in the interests of justice.

Exclusions

The following cases are excluded from the intermediate track:

- Claims for mesothelioma or other asbestos lung diseases.
- Claims for clinical negligence, unless both breach of duty and causation have been admitted.
- Claims for damages related to harm, abuse, or neglect of or by children or vulnerable adults.
- Claims that the court could order to be tried by a jury.
- Claims against the police involving an intentional or reckless tort or relief or remedy related to the Human Rights Act 1998.

Note that this exclusion does not apply to road accident claims, employer's liability claims, or accidental falls on police premises.



Fixed Recoverable Costs

The fixed recoverable costs regime will apply to all cases in the fast track and the new intermediate track, with limited exceptions. However, specific provisions will be in place for vulnerable parties and witnesses. Claims for possession, disrepair, and unlawful eviction concerning residential properties are excluded from the fixed recoverable costs regime for the time being. In most cases, the recoverable costs will be lower than what could have been recovered under the standard basis time costs regime. The fixed costs regime figures will usually be reviewed every three years, and the Ministry of Justice is proposing to increase the figures in April 2024 to cover inflation. There is also a 'London weighting' provision where the receiving party will be entitled to recover an additional 12.5%.

Complexity Bands

Both the fast track and intermediate track will consist of four complexity bands (with some exceptions), and each case must be assigned to both a track and a complexity band. While the parties may agree on a complexity band, the court retains discretion to assign a case to the band it deems appropriate. In addition to allocation hearings, a claim may also require an assignment hearing to determine the relevant complexity band. The complexity bands are defined in a way that is not overly prescriptive, allowing room for disagreement. The assigned complexity band and the stage the claim has reached will determine the level of fixed recoverable costs allowed. The more complex the claim, the higher the fixed costs, starting with band 1.

Complexity Bands and Fixed Costs in the Intermediate Track

Complexity Band 1

This band covers any claim where only one issue is in dispute, and the trial is not expected to last longer than one day. It includes:

- Personal injury claims where liability or quantum is in dispute.
- Non-personal injury road traffic claims.
- Defended debt claims.

The fixed costs in complexity band 1 are the lowest available under the new fixed costs regime. For example, in band 1 the cost for the attendance of a trial advocate on the first day of trial is £3,200.

Similarly, the costs recoverable from pre-issue up to and including the date of service of the defence is just £1,600+ an amount equivalent to 3% of the damages.

Complexity Band 2

This band encompasses less complex claims where more than one issue is in dispute, including personal injury accident claims where both liability and quantum are in dispute.

In band 2 the fixed cost for the attendance of a trial advocate on the first day of trial rises to £3,500.

The fixed cost from pre-issue up to and including the date of service of the defence is £5,000+ an amount equivalent to 6% of the damages.

Complexity Band 3

This band comprises more complex claims with multiple disputed issues, unsuitable for assignment to complexity band 2. It includes noise-induced hearing loss and other employer's liability disease claims.

In band 3 the cost for the attendance of a trial advocate on the first day of trial is £4,000.

The fixed cost from pre-issue up to and including the date of service of the defence is £6,400+ an amount equivalent to 6% of the damages.

Complexity Band 4

This band includes any claim that would typically be allocated to the intermediate track but is unsuitable for assignment to complexity bands 1 to 3, such as any personal injury claim with serious issues of fact or law.

In band 4, the fixed costs are the highest available under the new fixed costs regime.

The cost for the attendance of a trial advocate on the first day of trial is £5,800.

The fixed cost from pre-issue up to and including the date of service of the defence is £9,300+ an amount equivalent to 8% of the damages.

Satellite Litigation

Fixed costs can vary greatly depending on the complexity band that you are placed in by the Court. This could well lead to disputes between the parties as the financial implications of the allocation decisions are significant.

There is going to be uncertainty for parties during litigation as to what the recoverable costs will look like, as under Part 26 allocation will be at the discretion of the Court. The difference is significant, a multi-track case is not covered by the new fixed costs regime whereas an intermediate track case is. A Claimant may therefore "over-egg the pudding" and seek to inflate the value of their claim in order to fall into the multi-track and avoid fixed costs.

This uncertainty raises the prospect of satellite litigation, with parties disputing track allocation and complexity bands within the intermediary track.

Conclusion

It has been stated that the introduction of the intermediate track aims to strike a balance between efficient case management and standard procedures, with a focus on providing greater cost certainty and proportionality to improve access to justice. However, the implementation of these changes and the potential ambiguity surrounding track allocation and complexity bands, in particular, may well have the opposite effect and lead to an increase in costs for the parties (which may well not be recovered) because of disputes and an increase in satellite litigation.

This article is for general awareness only and does not constitute legal or professional advice. The law may have changed since this page was first published. If you would like further advice and assistance in relation to any of the issues raised in this article, please contact us today by telephone or email **enquiries@sharpepritchard.co.uk**.

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NOT THAT BLACK AND WHITE:

THE USE OF LANDOWNER RIGHTS BY PLANNING AUTHORITIES - ENTERPRISE HANGARS LTD V FAREHAM BOROUGH COUNCIL [2023] EWHC 2060

The decision in Enterprise Hangars Ltd v Fareham Borough Council [2023], has reaffirmed that planning authorities should not invoke their rights as private landowners to stifle planning applications.

The judgement by the High Court emphasised that planning decisions should be made purely based on planning considerations. Considerations of the defendant local authority as landowner should not have been a material factor in the planning decision-making process.

Background:

Fareham Borough Council ('FBC') owned land at Solent Airport, which was earmarked for commercial development in the local plan. In March 2022, the claimant, Enterprise Hangars Ltd ('Enterprise'), submitted a planning application to FBC as the local planning authority, to obtain permission to develop part of the land as live/work hangar buildings.

As part of the application, Enterprise requested access to the FBC site to conduct a survey for the presence of badgers. FBC refused the request and made it clear that, in its capacity as landowner, it would not sell the land to Enterprise as Enterprise's plans for residential development of the land did not accord with FBC's commercial vision for the site.

In further discussions between the two parties, Enterprise repeated the "well-established principle that issues of land ownership are not relevant to the planning process". However, FBC argued that access could legitimately be refused as this was a matter concerning "*land ownership and not planning*". Eventually, Enterprise proceeded to bring a judicial review claim challenging the legality of FBC's decision. Shortly after, Enterprise's planning application was refused; one of the reasons given for refusal was lack of a badger survey.

Judgement:

Enterprise succeeded on all three grounds of challenge. Mr Justice Lane decided that:

1. **FBC "fettered its discretion as planning authority" by acting purely as a landowner.**

FBC was incorrect in its assumption that it could utilise its rights as a private landowner and should have made its decision solely based on planning considerations. By doing so, it limited the scope of Enterprise's appeal to the inspector as Enterprise was no longer allowed to benefit from the presumption in favour of sustainable development in the NPPF, because of the absence of the badger survey.

2. **FBC's actions caused a procedural irregularity.**

The key question was whether Enterprise had been given a "fair crack of the whip". It transpired that FBC had conducted its own survey to discover indications of badger presence. However, FBC had rejected Enterprise's planning application partly due to a lack of a badger survey, which FBC had prevented Enterprise from undertaking. It was decided that FBC "used its position as landowner to put the Claimant at a material disadvantage" and had not acted according to the requirements of procedural fairness.

3. **The actions of FBC were irrational.**

The justifications given for refusing Enterprise access to conduct a badger survey were described as having "no basis in law" and being "entirely spurious".

FBC's reasons for refusal included:

- the survey would disrupt airport business. However, the Airport Manager raised no such concerns and FBC had conducted its own survey.
- to sell the land on a plot-by-plot basis would be disadvantageous. However, this is exactly what FBC originally envisaged.

Ultimately, Lane J quashed the planning decision and said he would consider a mandatory order regarding access for the survey.

Analysis:

It is a well-established rule that local authorities must ensure a proper separation in the exercise of their statutory powers and must not permit one role to influence decisions taken pursuant to a different role. However, in this case the Court held that it was immaterial that if the site had been owned by a private individual they could have legitimately refused consent for the defendant to enter the site to conduct the survey. Lane J stated that local authorities had to act in accordance with the requirements of public law:-

"the defendant cannot exercise the rights that it would otherwise have as a landowner, if and to the extent that this would inhibit its ability to decide applications for planning permission according to law."

The judgement makes it clear that when planning authorities make decisions on planning applications, these decisions must be made based solely on planning considerations. If a planning authority wishes to oppose a development on its land as the landowner, this must not be done as part of the planning decision -making process.

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