

Harold Macmillan, when asked about his greatest challenges as Prime Minister, is alleged to have said, "Events, dear boy, events". And what a lot of events there have been since our May newsletter! Internationally, the US presidential elections enthral, whilst the terror attacks in France and Germany horrify. Nationally, Brexit and the Conservative and Labour party leadership contests occupy the column inches. Here in Norfolk, devolution dominates the local news.

In this edition, our Practice Director, Victoria McNeill, writes about her experience of advising on the devolution proposals for East Anglia, whilst our Assistant Practice Director, Chris Skinner, ponders the effect Brexit may have on employment prospects for local authority lawyers. We also report on: the changes to IR35 that will require local authorities to determine how workers who are engaged through an intermediary are taxed; the transparency provisions of the Companies Act 2006 which require details of a local authority to be placed on the PSC register of companies over which they have significant control; and the requirement under the Bribery Act 2010 to implement adequate procedures to prevent bribery by persons associated with a local authority.

### **"The Eastern Powerhouse"**

No, not the new name for nplaw but the proposal to create a Mayoral Combined Authority for East Anglia. In the March 2016 budget, the Chancellor proposed a devolution deal for East Anglia, involving 23 local authorities in Norfolk, Suffolk, Cambridgeshire and Peterborough. I have had the lead on governance since the start of negotiations and have been working full time on devolution for several months now.

The Government specified a tight deadline for accepting the initial proposals and weeks of hard negotiating followed. If you had been around Norfolk County Hall on Monday 16<sup>th</sup> May 2016, you would have seen the (then) Secretary of State for Communities and Local Government, Greg Clark, and the (then) Paymaster General, Matt Hancock. Ministerial visits are rare in Norfolk, so it's an indication of the importance the Government was placing on the deal being done. The negotiations were further complicated by a change of Norfolk County Council leadership at the Council's AGM on 9<sup>th</sup> May 2016. George Nobbs, the leader of a rainbow alliance (Labour, UKIP, Liberal Democrat and Green) lost out to Cliff Jordan (Conservative) in a leadership contest, after the Green Party decided that it would not support the proposed devolution deal for East Anglia.

In accordance with the statutory process for the creation of a Mayoral Combined Authority, we conducted a Governance Review which concluded that the most effective way to improve statutory functions across East Anglia was through the creation of two Mayoral Combined Authorities. On 17<sup>th</sup> June 2016, two separate devolution deals were published: one for Norfolk and Suffolk, and one for Cambridgeshire and Peterborough. In each case, the proposals involve Westminster transferring some decision-making powers relating to transport, infrastructure and jobs to a combined authority chaired by a directly elected mayor, with additional money being made available to build affordable homes, new roads and transport links and to deliver other community services.

Each of the sixteen Norfolk and Suffolk authorities met in June 2016 to decide whether to consult the public on the proposals. Twelve of the sixteen, including both County Councils, decided to go out to consultation on the Scheme of Governance. Four Norfolk councils voted against accepting the proposals.

The next stage of the legal process will be feeding back the consultation responses to the Secretary of State for Communities and Local Government, Sajid Javid. He must then decide whether to lay an Order

in parliament for the creation of a combined authority, although before he does so, he must obtain the agreement of the twelve participating councils to the laying of the Order. So my time over the next couple of months will be spent negotiating a draft Order with the Department of Communities and Local Government and Treasury officials, drafting a Constitution and framing options for the operational set up and running of the combined authority. The draft Order could be laid before Parliament before the end of the year, and new Mayoral Combined Authorities could be in place by May 2017.

If the deals are accepted, the combined authorities will be the first non-metropolitan, two tier (county and district) devolution deals of any scale. The relevant legislation was not really designed with two tier areas in mind, but working closely with colleagues in the DCLG and Treasury we are finding our way through it and would be happy to share the learning with any others embarking on this process.

It's a fascinating piece of work for governance geeks like me. Don't say I don't know how to live!

Victoria McNeill

### **Brexit - What will it mean for employment prospects for local authority lawyers?**

Over the past few weeks, I have heard stories of property deals being cancelled or postponed, funding being withdrawn from development projects, and business orders for equipment being cancelled. If you are a lawyer in private practice dealing with residential or commercial conveyancing, you might expect that a slack period to be coming up. It is harder to know how the referendum decision will affect those of us in local government. My guess is that there might be a slowdown in property transactions, and maybe a reduction in some planning work, as development decisions are delayed. Child protection lawyers and litigators, however, are unlikely to be affected at all. Of course, if things really go badly with the economy, we may see local authority infrastructure and regeneration projects given the green light, which will keep us all busy. I wonder how we will view things in 12 months' time.

Chris Skinner

### **Reform of IR35 will affect public sector bodies from April 2017**

The Government announced in its 2016 Budget that it intends to reform the rules governing payments to public sector workers who operate through an intermediary. The proposed changes will take effect from April 2017.

The intermediaries legislation (more commonly known as IR35) was introduced by the Finance Act 2000 to prevent circumvention of tax and National Insurance rules by individuals who provide their services through a company but whose employment situation, apart from the method of their payment, is substantially the same as that of an employee taxed under PAYE. Intermediary relationships include engagements via employment agencies, outsourcing companies and consultancy firms, all of which are widely used in the public sector.

#### **Why is the Government doing this?**

The Government believes that there is widespread non-compliance with IR35 with the result that significant amounts of tax are not being paid. It estimates that the lost tax is currently in the region of £440 million a year, and notes that there is evidence of employment agencies and public bodies insisting that workers are only engaged if their services are provided through a personal service company.

#### **What change is planned and how will it impact on public sector bodies?**

Public sector bodies will be obliged to analyse every engagement and determine whether the personal service company should be taxed as an employee. Currently this task must be performed by the person who runs the personal service company. The assessment will involve analysing whether the individual has to provide personal services, the degree of control that they have over how the job is done, whether they supply their own equipment and whether holiday or sick pay is paid.

## New on-line tool

HMRC will provide a new on-line interactive tool to assess whether (in its view) the intermediaries legislation applies to a particular engagement.

## Consultation

The Government is presently consulting on the exact parameters of the changes. The closing date for comments is 18<sup>th</sup> August 2016. See <https://www.gov.uk/government/consultations/off-payroll-working-in-the-public-sector-reform-of-the-intermediaries-legislation>

## Conclusion and next steps

Public bodies will need to review all personal service company contracts in readiness for April 2017. They will need to determine who in Finance, HR or another relevant department will make the decision as to whether or not a personal service company should be taxed as an employee and how decisions will be reached. They also need to bear in mind that the tax consequences of making the wrong assessment could be significant.

## When is a local authority an individual?

We all know that a local authority is a legal person, but an individual? Well, for the purposes of the transparency provisions of the Companies Act 2006, a local authority is indeed an individual.

## The transparency provisions of the Companies Act 2006

Part 21A of the Companies Act 2006 ("CA"), which sets out the transparency provisions, was inserted by the Small Business, Enterprise and Employment Act 2015. It provides that all companies (subject to certain exceptions) must keep a PSC register. (PSC stands for "persons with significant control"). With effect from 6<sup>th</sup> April 2016, details of every individual who has significant control over the company must be entered in its PSC register, and from 30<sup>th</sup> June 2016 information on the PSC register must be filed with Companies House as part of the company's confirmation statement (which supersedes the annual return). The circumstances in which an individual is deemed to have significant control over a company are set out in Schedule 1A CA and include holding, directly or indirectly:

- 25 per cent or more of the shares or voting rights in the company;
- the right to appoint or remove a majority of the company's board of directors;
- the right to exercise significant influence or control over the company;

as well as actually exercising significant influence or control over the company.

Section 790C(12) CA provides that Part 1A is to be read and have effect as if each of the following were an individual, even if it is a legal person under the laws by which it is governed:

- a corporation sole;
- a government or government department of a country or territory or a part of a country or territory;
- an international organisation whose members include two or more countries or territories (or their governments);
- a local authority or local government body in the United Kingdom or elsewhere.

Where a local authority has significant control over a company, the following details must be entered in the company's PSC register:

- the local authority's name and principal office;
- the local authority's legal form and the law by which it is governed;

- the date on which the local authority became a registrable person in relation to the company; and
- the nature of the local authority's control over the company.

Local authorities should take care that their subsidiaries include these details on their PSC registers and submit them to Companies House with their confirmation statements.

### ... and when is a local authority a commercial organisation?

It is not immediately obvious that local authorities are caught by the provisions of the Bribery Act 2010 which make it an offence for commercial organisations to fail to prevent bribery, however, these provisions have important implications for public sector bodies and for charities (except those that are unincorporated). As ever, the devil is in the detail.

#### The Bribery Act 2010

The term "relevant commercial organisation" is defined at section 7.5 of the Bribery Act 2010 ("BA") and includes a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere). Government guidance issued by the Ministry of Justice (available at <https://www.gov.uk/government/publications/bribery-act-2010-guidance>) states that,

*"The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase. ... As regards bodies incorporated in the UK, despite the fact that there are many ways in which a body corporate can pursue business objectives, the Government expects that whether such a body can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), **it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.**"*

Section 7 BA provides that a relevant commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for that organisation. Under section 8 BA, a person is associated with a commercial organisation if they perform services on its behalf. The definition therefore includes employees, agents and subsidiaries.

Critically, a commercial organisation will not be liable if it can prove that it had in place adequate procedures designed to prevent bribery by persons associated with it. The government guidance sets out six principles which should inform procedures put in place by a commercial organisation wishing to prevent bribery being committed on its behalf.

**Principle 1:** A commercial organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They should also be clear, practical, accessible, effectively implemented and enforced.

**Principle 2:** The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) must be committed to preventing bribery by persons associated with it. They should foster a culture within the organisation in which bribery is never acceptable.

**Principle 3:** The commercial organisation should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.

**Principle 4:** The commercial organisation should apply due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the

organisation, in order to mitigate identified bribery risks.

**Principle 5:** The commercial organisation should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces. With regard to training, the government guidance says:

- Training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk;
- Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed;
- General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.
- It may be appropriate to require associated persons, particularly high risk associated persons to undergo training. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.
- Whatever the format (traditional classroom or seminar, e-learning or other web-based tools), the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

**Principle 6:** The commercial organisation should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.

The government's view is clearly that a local authority or incorporated charity which engages in commercial activities with a view to making profits is caught by the BA. As the guidance itself says, the government's view is not decisive: the courts will be the final arbiter, but it would be a high risk strategy for a public sector body or incorporated charity to take an opposite view and ignore the guidance. Risk assessment, due diligence and training should all therefore be in place.

## Training

nplaw offers training on all areas of local government law. In addition to advertised seminars such as those described below, we frequently provide bespoke training to both clients and non-clients. Examples of recent bespoke training include: CPO training for the shared legal service of Wokingham Borough Council and the Royal Borough of Windsor and Maidenhead; training on CPOs and enforced sales (with particular emphasis on empty properties) for Mid Devon District Council; and forthcoming CPO training for Hastings Borough Council.

### Seminar on Planning and Housing

Members of our Planning and Environmental Law team recently held a seminar on key developments in planning and housing, at which they presented an overview of the Housing and Planning Act 2016. They then discussed in more detail those areas of the Act of most interest to our clients, such as development and neighbourhood plans, starter homes and custom self-build, permissions in principle, registers of land of particular types, reports on land in public ownership, planning obligation disputes, and enforceability of affordable housing obligations. The seminar ended with a discussion of the key points raised in the *Richborough* and *West Berkshire* cases. (*Richborough Estates Partnership LLP v Cheshire East Borough Council and Secretary of State for Communities and Local Government (C1/2015/0894)* and

and *R (West Berkshire District Council and Reading Borough Council) v. Secretary of State for Communities and Local Government [2016] EWCA Civ 441.*)

The feedback from the 38 delegates from Norfolk, Suffolk and Essex who attended the seminar was overwhelmingly positive. One said, “*all planners need to come to these!*”, whilst another wrote, “*It was extremely well organised and very informative, in fact one of the best training sessions I have attended for many years.*”

We will be running further training sessions on the Housing and Planning Act as regulations are published.

### **Seminars on Compulsory Purchase**

We have been overwhelmed with applications for places at the CPO Seminar that we are holding in London on 23 September 2016. This date is now fully booked, but we have arranged to repeat the seminar on 11th November 2016 Full details can be found on on the news & events page of our website at <http://www.nplaw.co.uk/news-events/>.

For details of all the training we can offer, please contact Fiona Anthony at [fiona.anthony@norfolk.gov.uk](mailto:fiona.anthony@norfolk.gov.uk) or on 01603 222943.

### **Our next newsletter**

We hope that you found this edition of our newsletter useful. The next edition of our newsletter is due out in September 2016. If you are a new reader and wish to subscribe to future newsletters, just enter your email address in the box on the news & events page of our website at <http://www.nplaw.co.uk/news-events/>

**If you have any queries relating to this newsletter or wish to seek advice, please contact:**

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