

# Local Authority Newsbites

Updating you on local authority issues



Welcome to our June edition of *Newsbites*, our monthly update on local authority issues. Amid great changes to the future of public services likely as a result of the recent emergency budget, we also highlight several other interesting developments. In particular we look at OGC's new guidance on payment of sub-contractors, a new case applying the *Uniplex* ruling as well as a case considering whether beneficiaries can enforce section 106 obligations. In addition we highlight the new statutory guidance on the duty to respond to petitions.

We are very interested to hear from you about other topics we could or should be covering in this update. If you have any comments or suggestions then please contact [Benjamin Smith](mailto:Benjamin.Smith@mills-reeve.com) or e-mail [LAlaw@mills-reeve.com](mailto:LAlaw@mills-reeve.com).

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## 30 day payment condition

The OGC has recently published this guidance on the new requirement for all public contracts to include a contract condition that suppliers of goods and services must pay their sub-contractors within 30 days. Note that the requirement does not apply to public works contracts. The aim of the new requirement is to assist businesses in managing their cash flow and to give encouragement to small and medium sized companies whose need for prompt payment is likely to be greater. The OGC provides suggested wording for the new clause, as follows:

"Where the contractor enters into a sub-contract with a supplier or contractor for the purpose of performing its obligations under the contract, it shall ensure that a provision is included in such a sub-contract which requires payment to be made of all sums due by the contractor to the sub-contractor within a specified period not exceeding 30 days from the receipt of a valid invoice."



To read the guidance, [click here](#).

## *SITA v Greater Manchester Waste Disposal Authority (GMWDA)* - first major case to apply the *Uniplex* ruling

In the previous edition of this update we reported on the recent European case of *Uniplex*, which has clarified the law on the limitation period for claimants to bring a claim for damages under The Public Contracts Regulations 2006. The Regulations state that the claim must be brought within three months of the date on which grounds for the claim first arose. There was previously a lack of clarity about how the latter date should be arrived at - was it the date of the breach of itself, or rather the date that the claimant obtained knowledge of the breach?



To read the case, [click here](#).

The *Uniplex* decision made it clear that the three month period will only start once the claimant has (or ought to have had) the relevant knowledge.

The recent case of *SITA v GMWDA* is the first UK case to be decided in the light of the *Uniplex* ruling. The facts were quite straightforward - GMWDA ran a competition for a massive £3 billion new project which would be the largest of its kind in the UK. In the later stages, Viridor Laing was appointed preferred bidder, with the SITA consortium as reserve bidder. SITA was sent an "unsuccessful bidder" letter accordingly on 18 April 2008. Following nearly a year's delay due to the global credit crunch, GMWDA finally entered into the contract with Viridor on 8 April 2009. Following the award of the contract, there was lengthy correspondence between the parties, in which SITA demanded further information about the procurement process and threatened to commence a claim if this was not provided. SITA alleged that there had been a breach of the Regulations as the final form of the contract had introduced new elements and that SITA ought have been brought back into the competition accordingly.

On 27 August 2009, SITA commenced its claim. GMWDA argued that SITA was outside the three month window in which to bring a claim - the date the "grounds" arose was no later than the date the contract was entered into, which was 8 April 2009. The limitation period therefore ended on 7 July 2009 and SITA was out of time.

SITA's answer to this argument was that it did not know whether it had actually suffered an actionable loss, until it possessed the information it obtained during the correspondence with GMWDA after 8 April 2009.

The High Court disagreed and ruled that a claimant is fixed with knowledge from the time it knows of the breach, regardless of whether any loss is also apparent at that point. It decided this not least in the interests of legal certainty, because the judge thought it easier to date a breach than to date loss arising from it (lack of legal certainty was what the ECJ criticized in the 2006 Regulations in the *Uniplex* decision).

#### **Practical commentary**

This decision is good news for contracting authorities as it shows that bidders do not have a carte blanche to "sit on their hands" but rather they must bring a claim as soon as they have knowledge of a breach, regardless of whether any loss/damage is yet apparent. The case does turn on its own facts to some extent - it is likely that, in most procurement claims, the challenger will become aware of both the fact of the breach and the loss/damage at the same time.

#### **Coulson J's seven golden rules of adjudication**

Adjudication is favoured by many in the construction industry as a way of resolving disputes because it is quick and relatively cheap. However, adjudicators' decisions are frequently challenged by the losing party. Thankfully, Coulson J has provided seven key pointers for adjudicators to maximise the chances of their decisions being upheld.

First, the adjudicator should be bold. Coulson J reminds us that the adjudicator's decision can be incorrect (in terms of fact and law) and still be upheld. The important thing is that payment is made to the correct person. Second, the adjudicator should not shy from dealing with challenges relating to his jurisdiction. Better to exercise caution and withdraw at an early stage than have the decision overturned. Third, the adjudicator should make sure he identifies the issues in dispute and deals with each one giving only concise reasons for his decision. Fourth, the adjudicator must act fairly but remember that the need to arrive at an answer quickly is greater than the need to arrive at the correct answer. The adjudicator should ensure that his decision is clear and free from ambiguities. Coulson J's sixth rule is that the adjudicator should deal with the adjudication "in time" not allowing deadlines to slip. Finally, the adjudicator should avoid silly mistakes such as arithmetical errors.

Coulson J is a High Court judge who frequently deals with challenges to adjudicators' decisions. While he makes no promises that his rules will prevent



successful challenges, adjudicators and those who find themselves party to an adjudication should try to follow his rules in order to increase their chances of the decision being upheld.

### ***Bryn Chetwynd v South Norfolk District Council (2010)***

In this case, the defendant had granted retrospective planning permission in relation to a fishery in an area of fenland with Country Wildlife Site status. The claimant believed this development had an adverse impact on the fen habitat, its hydrology and on his own fishery and so applied to quash this permission on the grounds that the conditions were defective and there should have been consideration of an EIA.

The court found the conditions attached to the planning permission were indeed defective as they failed to address the views and concerns of the planning committee and statutory consultees. One condition could not even be complied with given that this was a retrospective permission.

The decision was also unlawful as the defendant breached the EIA Regulations by failing to properly produce and register a screening opinion. It was insufficient for an LPA to merely state that the need for an EIA had been considered as this did not allow objectors to understand the reasoning behind the decision or see that the proper screening procedure had been followed. In any event, the defendant's reasoning in claiming this development did not fall within "Schedule 2 development" in the EIA Regulations was flawed as a liberal approach to interpretation of the regulations should be given to ensure that all developments with potentially adverse environmental impacts are properly assessed.



To read the case, [click here](#).

### **Can beneficiaries enforce section 106 obligations?**

This question was considered in *Milebush Properties Limited v (1) Tameside MBC (2) London Borough of Hillingdon (2010)*. Here, Milebush sought declaratory relief that Tameside was obliged to grant a right of way over a service road in accordance with a section 106 agreement between the first and second defendants (an agreement to which Milebush was not a party). Tameside in return claimed that in any event such an agreement to grant a right of way over land amounted to a disposition of the land which would have required a signature from Milebush under section 2 of the Law of Property (MP) Act 1989 ("1989 Act") to be valid.

The court held that Milebush had no entitlement to declaratory relief. Although Tameside was obliged to grant the right of way, section 106 TCPA did not provide for enforcement by a beneficiary of a planning obligation. Such a decision to enforce would be in the hands of the local planning authority having regard to its planning objectives. The court felt it would be pointless to grant relief given that LB Hillingdon would ultimately retain a discretion whether or not to enforce the section 106 obligations against Tameside.

Further, the court disagreed with the defendant's argument under the 1989 Act and stated it would "substantially frustrate" the scheme in section 106 TCPA if the 1989 Act was to be interpreted as requiring signatures from third parties benefiting under a section 106 agreement to make if the agreement valid.



To read this case, [click here](#).

### **New statutory guidance on the duty to respond to petitions**

Under sections 10 to 22 of The Local Democracy, Economic Development and Construction Act 2009 local authorities are required to meet certain obligations in respect of petitions.

Councils will have to set out clearly how local people can submit both paper and electronic petitions. The most popular petitions will also trigger a full council debate or require a senior council officer to answer to scrutiny hearings.



To read the guidance, [click here](#).

On 30 March DCLG published statutory guidance and a commencement order for the petitions scheme. This requires the Council to have a petitions scheme (in line with the guidance) in place by 15 June 2010.

### Privacy policies under scrutiny

Control of private information on social networking sites has recently come to the forefront due to members unintentionally making their personal information available to strangers, with the potential to cause embarrassment to themselves and detriment to their career.

Facebook changed its privacy policy on 26 May 2010 after its settings were criticised for being too complicated. Further, the default privacy settings, for those who did not alter them, were set to allow extremely wide access to personal information by third parties. Because the privacy policy was so confusing, users could not possibly give free and unambiguous consent for third parties to access their personal information, resulting in a potential breach of data protection legislation. European privacy commissioners are increasingly calling for default privacy settings that release the minimum necessary amount of personal information.

In the light of this, any local authority dealing with personal information should consider the following:

- is its privacy policy sufficiently easy to understand, specifically regarding third party access to personal information; and
- should its default privacy setting continue to give broad access to a person's information unless it is specifically instructed otherwise?

Simon Davies of Privacy International, a human rights watchdog, suggests that "the big battle is yet to come". All indications point towards a movement to a presumption of privacy rather than the need for users to request privacy.



### Outsourcing dispute settled for £318 million

Hewlett Packard (HP) and British Sky Broadcasting (BSkyB) have finally concluded one of the most expensive pieces of litigation ever. HP has agreed to pay BSKyB £318 million after the court found that HP's IT services arm (EDS) made fraudulent and negligent misrepresentations to BSKyB in order to win a multi-million pound outsourcing contract. Local authorities should note that this case has implications for all supplier/customer relationships.

Knowing that delivery of the project within certain timescales was critical to BSKyB, in its tender submission EDS provided a timescale estimate to satisfy BSKyB. EDS had not conducted any supporting analysis but the employee responsible for the tender submission represented to BSKyB that the timescales were realistic. As he knew what he was saying was false, or at the very least was reckless as to whether it was true or not, and BSKyB successfully argued that these pre-contract representations induced it to enter into the contract, this was held to be a fraudulent misrepresentation, for which liability cannot be limited or excluded.

It is worth noting that in this case the contract did not document the detail of the project work to be carried out by EDS. If it had done, BSKyB would have had a much more straightforward claim for breach of contract, and it would not have had to construct a complex case alleging fraudulent and negligent misstatement, meaning the litigation would almost certainly have been less expensive and less time-consuming. Consequently, when dealing with suppliers, local authorities should ensure that any specific requirements, including timeframes for delivery, are expressly set out in the contract.



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