



APSE National Sports & Leisure Seminar

Some Legal Issues

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November 2018

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Summary

- › Where now for leisure trusts?
- › Brexit and procurement law
- › Employment law update



Where next for leisure trusts?

- ▶ Level playing field between trusts and the private sector
- ▶ HMRC guidance on VAT following the Ealing Case
- ▶ NNDR position
- ▶ Alternative outsourcing options



Where next for leisure trusts? Cont'd

- ▶ Level playing field
 - ▶ The VAT and NNDR advantages on outsourcing are diminishing with private sector pocket trusts
 - ▶ Trusts will remain the outsourcing option of choice with
 - ▶ The ability to access funding not available to either local government or private sector
 - ▶ NPDO – all income invested in the service rather than shareholders



Where next for leisure trusts? Cont'd

▶ Level playing field cont'd

- ▶ First aspiration is to work with and on behalf of their local communities
- ▶ The local authority can have a significant role in supporting the Trust
- ▶ Some large Trusts (registered as charities) operate in the leisure market



Where next for leisure trusts? Cont'd

- ▶ HMRC guidance on VAT following the Ealing Case
 - ▶ VAT on sporting services was originally charged by local authorities but not not-for-profit bodies such as charities
 - ▶ LB Ealing v HMRC (Case C-633/5) at CJEU decided that VAT exemption should apply to local authorities
 - ▶ HMRC Brief 6 (2017) published 29 December 2017, indicated that local authorities could make claims for refund of VAT paid, subject to a 4 year time limit and “passing economic burden of the VAT charge to their customers”



Where next for leisure trusts? Cont'd

- ▶ HMRC guidance on VAT following the Ealing Case
 - ▶ Do local authorities reduce their sporting charges on account of VAT ruling or keep existing prices and keep the difference?
 - ▶ Private sector continues to have VAT problems through being not-for-profit



Where next for leisure trusts? Cont'd

› NNDR position

- › Prior to 2013 – in England, 80% mandatory relief for charities, paid by central pool, and 5% of 20% discretionary relief
- › After 2013 – in England, 50% paid centrally of 100% - and in Wales, 90%
- › Eventually 100% of NNDR paid to local authorities but unclear as to any central subsidy
- › 2016 Culture White Paper promised continuation of 50% subsidy



Where next for leisure trusts? Cont'd

- ▶ Alternative outsourcing options
 - ▶ Full outsourcing to private sector, with or without pocket trust
 - ▶ Full outsourcing to new locally created or existing trust
 - ▶ Local authority controlled company
 - ▶ Direct contract negotiation as Teckal company
 - ▶ No more than 20% of work for outside entities
 - ▶ Acquiring charitable status is difficult
 - ▶ Discretionary NNDR award may have state aid implications



Brexit and Procurement Law

- ▶ Freedom for UK to adopt its own procurement rules?
- ▶ Social Value as a component of any rules
- ▶ Rules may benefit public service mutuals and charities



Brexit and Procurement Law cont'd

- ▶ Freedom for UK to adopt its own procurement rules?
 - ▶ Remaining in single market during transition period – no major change in Regulations
 - ▶ Remaining in customs union alone – scope for introducing new rules under WTO system
 - ▶ Some significant advantages in WTO procurement rules, including restricting number of public bodies subject to the new Rules
 - ▶ Less gold-plating when EU Procurement Directives translated into UK legislation



Brexit and Procurement Law cont'd

- ▶ Social value as a component of any rules
 - ▶ Public Services (Social Value) Act 2012
 - ▶ Obligation to consider how procurement might improve the economic, social and environmental wellbeing of the area and how procurement might secure such an improvement



Brexit and Procurement Law cont'd

- ▶ Social value as a component of any rules cont'd
 - ▶ Social value extended into criteria and decision-making during the process
 - ▶ Awards based upon ecological criteria [Finnish Bus Case] and local community factors
 - ▶ Weighting of 45% is acceptable



Brexit and Procurement Law cont'd

- ▶ Public service mutuels and charities under new rules
 - ▶ Light touch regime under Regulation 74
 - ▶ Public service mutuels and charities under Regulation 77 BUT for one three year contract
 - ▶ Covering overlapping range of services
 - ▶ Create new form of Regulation 77 for a wider number of services and for longer contracts of 15 years or more
 - ▶ Promoting local contractors and SMEs and the third sector



Employment Law Update

► Implications of Brexit

- No immediate changes in legislation on 29 March 2019 or during transition
- Status of EU settled status scheme and checks on existing EU workers changing jobs remains to be clarified
- Further significant changes are unlikely



Employment Law Update cont'd

Changes in National Minimum and National Living Wage from 1 April 2019

National Living Wage		National Minimum Wage			
Year	25 and over	21 to 24	18 to 20	Under 18	Apprentice
April 2018	£7.83	£7.38	£5.90	£4.20	£3.70
April 2019	£8.21	£7.70	£6.15	£4.35	£3.90



Employment Law Update cont'd

- ▶ Personal liability for whistleblowing dismissal – Timis and another v Osipov [2018] EWCA CLU.2321
- ▶ Changes in 202
- ▶ Termination payments above £30,000 tax free threshold will be subject to Class 1A National Insurance contributions
 - ▶ Parental Bereavement (Leave and Pay) Act 2018 gives all employed parents a statutory two weeks' leave on loss of an under 18 or stillbirth from 24 weeks of pregnancy
 - ▶ Public Sector Exit Payments – consultation expected on plan to cap payments at £95,000



Employment Law Update cont'd

- ▶ Dress codes and sex discrimination is a potential minefield for employers
- ▶ Government consultations on introducing mandatory ethnic pay gap reporting and reform of Gender Recognition Act 2018
- ▶ Consultation on recommendations in Taylor Review of Modern Working Practices covering zero hours contracts, more transparency between employer and employee and broadening entitlement to sick / holiday pay



Conclusion

- ▶ Charitable trusts and public service mutuals will remain best outsourcing option
- ▶ Brexit will provide an opportunity for the UK to develop UK-centric procurement rules
- ▶ Employment legislation subject to constant change and court interpretation
- ▶ Watch for implementation of some of the Taylor Review recommendations

https://www.conservativelawyers.com/sites/www.conservativelawyers2.com/files/Public_Procurement.pdf

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