

You are responsible for your data

Recent high profile losses of personal data within the public sector have highlighted potential shortcomings with data security and compliance. This, together with the fact that the Information Commissioner's Office has called for the right to impose unlimited fines for breaches of Data Protection Legislation (DP Legislation), means data security remains a hot topic.

The outsourcing of data to a "data processor" may suggest that the risks are also outsourced. However, this is not the case. It is the party that "owns" the data and determines how it is to be used (the data controller) that remains liable under the DP Legislation. It is therefore incumbent upon the data controller to ensure that any third party who processes data on its behalf complies with the law. At issue is how this can best be achieved.

The simple answer is that the data controller needs to ensure that "contractually" the data processor is committed to complying with the DP Legislation. However, it is also necessary to include protection not only for a breach by the data processor but also compensation for reputational and consequential loss. It is therefore fundamental, when drafting a contract relating to the processing of data by a data processor, to include the following:

- a warranty or undertaking that the data processor will not, by reason of its act or omission, cause the data controller to breach the DP Legislation;
- a commitment by the data processor to implement appropriate technical and organisational measures to prevent unauthorised or unlawful processing and accidental loss or destruction of data;
- an acknowledgement that the data processor will only process data in accordance with the data controller's written instructions;
- an acknowledgement that the data processor will not transfer data outside the EEA; and
- a commitment that the data processor will not



Data control remains a crucial part of any business even when put out to a data processor.

disclose the data to any third party (other than with the data controller's prior written consent).

To ensure compliance, the contract should also provide for a right of audit by the data controller (such audit to include access to the data processor's systems and controls).

The contract must be drafted in a way that ensures it is understood and implemented by those who are responsible for ensuring the data controller complies with the DP Legislation. If the contract is too complex, or fails to correctly reflect the systems and controls which will apply, it runs the risk of being consigned to the "bottom draw" which, for a data controller, can have disastrous consequences.

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Covenants and their enforceability

There have been a number of cases in recent years dealing with the enforceability of restrictive covenants.

The case of *Wayne Martin v David Wilson Homes Ltd (2004) EWCA Civ 1072* highlights the need to ensure the wording of a covenant, restricting the number of dwellings, is precise.

More recently is the case of *Winter & another v Traditional & Contemporary Contract Ltd [2007] EWCA Civ 1088*. Here the issue is one of the level of compensation for a modification of a covenant under s84 Law of Property Act 1925 compared to damages in lieu of an injunction for breach.

The court held that whilst the "negotiated share" approach is well recognised in proceedings for breach, under s84, compensation is based on the impact of the development on objectors and not on loss of

Continued on back page

INSIDE THIS ISSUE

Yet more changes to planning laws

See page 3

Good news for monitoring officers

Back Page

Health and safety at work – are your duty holders par for the course?

Enforcing the Health and Safety at Work Act is the job of the Health and Safety Executive (HSE) in most cases. But councils will be familiar with their responsibilities for shops, offices, pubs and sports venues. Wright Hassall has recently acted for a council's Environmental Health Department in prosecuting two golf courses.

In the first, a ball collector on a driving range was hit in the Adam's apple by a drive whilst collecting balls in an unguarded tractor. The tractor had no grille or windscreen because the latter had been broken by a ball in a previous incident and had not been replaced. The employee suffered breathing difficulties and had to go to hospital. The company that owned the range was fined £2,500 and ordered to pay £3,446 in costs which included the legal costs (a contribution of £1000) and the costs of the Health and Safety officers who investigated the case. This amounted to £2,446.35 making a total of £6,000 in fines and costs.

Although the defence thought the matter suitable for caution only, Wright Hassall and the judge



The importance of health and safety at work cannot be under estimated as two golf course owners recently discovered to their cost.



The Health and Safety of employees and the public should always be a priority. DAVID ELLIOTT looks at two recent cases where golf course owners were found liable.

disagreed on the following basis: there was no revised risk assessment following the broken windscreen; the grille and windscreen were not replaced; there was no instruction not to use the unguarded tractor; and there was no instruction not to collect balls whilst the range was in use.

Since this investigation, the company has spent £16,000 on Health and Safety improvements including the employment of a consultant and the holding of regular, monthly Health and Safety meetings – but prevention would have been better than cure.

In another similar case a golf course greenkeeper seriously injured his finger on a grasscutter (scarifier) whilst trying to restart it with the help of colleagues after it had broken down. In this case the owner of the business genuinely thought he had no formal Health and Safety responsibilities at all because he employed four staff. He had no Health

and Safety policy. He had undertaken no risk assessments, written or unwritten. His staff were not trained on how to use the scarifier. He had not reported the incident to the council, which was a serious one, because he did not know he had to. He was fined £5,000 and ordered to pay £5,000 towards the costs of the prosecution which were high because the investigating officers had to investigate non-existent Health and Safety systems as well as providing education and guidance.

Duty holders still appear to be failing to comply with their obligations under the act.

If you have any queries on the Health and Safety at Work Act and the regulations made under it, contact Ian Besant, Suki Harrar or David Elliott.

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STOP PRESS: Wright Hassall will be presenting a prosecution workshop with Birmingham City Council at this year's Local Government Weekend in Exeter from 3-6 April.

Rebecca's vital support service

The articles in *Overview & Scrutiny* require considerable research and that service is often provided by Rebecca

Mushing, pictured right.

Rebecca supports the Housing and Local Government team and Planning and Environment team on a day to day basis at Wright Hassall.



As part of her role, Rebecca delves into the background material that forms the basis for several of the articles used in this newsletter – a task that enables her to develop a deeper understanding of the services Wright Hassall provides to its clients.

No respite in planning reform

As the dust has just settled on the Planning and Compulsory Purchase Act 2004, the Planning White Paper (published in May 2007), paved the way for the new Planning Bill, introduced in the Commons on 27th November last year. The pace of change in the world of planning is unrelenting and further major reforms to the town and country planning system are likely to reach the statute books before the end of 2008.

The Planning White Paper sets out detailed proposals for reform of the planning system, following Kate Barker's sweeping recommendations for improving the speed, responsiveness and efficiency in, and of, land use planning. Concurrently Rod Eddington was commissioned to make recommendations for reform of major infrastructure planning for energy, waste, water and transport projects – against the backdrop of challenges posed by economic globalisation and climate change. It is intended that such projects come under the aegis of the Infrastructure Planning Commission (IPC), a body created by the Planning Bill.

Membership of the IPC will be drawn from experts from the private and public sectors, commerce and industry. It is proposed that there will be no right of appeal against the decision of the IPC, except by Judicial Review and that the Secretary of State and not the IPC, will decide on any application only in exceptional and very prescribed circumstances.

The Bill also includes proposals to establish a new Community Infrastructure Levy (CIL) in order to increase investment in the necessary infrastructure so vital to growing communities (the lack of which is a source of complaint nationwide). The CIL replaced the previously proposed Planning Gain Supplement which was



Building for the future: planning laws face further reform before the end of the year

perhaps viewed as a revenue raising exercise. One important feature of CIL is that it will be collected by the Local Planning Authorities and not the treasury which was the case under the previous proposals. Further details on exactly how the new CIL will work will be set out in due course.

Surprisingly, a new procedure is proposed whereby planning applications that are frequently delegated to officers could be reviewed by members but, critically, with no right of appeal to the Planning Inspectorate. This would involve the establishment of Local Member Review Bodies (LMRBs).

The Bill also aims to tidy up some loose ends left over from the Planning and Compulsory Purchase Act 2004.

■ LPAs will be given more flexibility over the preparation of the new-look local development

plans, including policies that address climate change. The government is also consulting on streamlining the local development frameworks.

■ It also sets out changes to the appeals system – including for the first time the setting of fees to cover the cost of appeals (note: there is still no right of appeal for third parties).

Some of the proposals will need secondary legislation. Although the government is hoping to implement all of the Bill's measures by this October, it is anticipating a rough ride through Parliament.

On the face of it, the Bill appears to take away some of the democratic accountability which has been entrenched in the planning system since (at least) 1948. Community involvement and engagement has been a high priority for this government but it does seem to be giving with the various recent Local Government Acts and taking back with the proposals in the Planning Bill.

Has the government been indirectly influenced by the Chinese system (with no public consultation), which is looking to build its Olympic stadium and new airport on time and (hopefully) to budget? What is clear is that the planning system needs to tackle the housing shortage, climate change, energy (reusable/renewable forms) and transport through better quality, quicker decisions. The world of planning is never static and more demands are constantly being imposed on the planning regime to deliver. I believe the Planning Bill is just the start of a swathe of further primary and secondary legislation.

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Parish council – the royal 'we'

Local Government Minister, John Healey MP, confirmed earlier this year that local authorities will be able to create new parish and town councils without seeking the approval of the Secretary of State.

Previously, as provided by the Local Government and Rating Act 1997, the local authority handling the residents' petition had to seek central government's approval.

This could create difficulties. A few years ago the Royal Leamington Spa Charter Trustees successfully converted to

town council status following a residents' petition. The matter was co-ordinated by the district council. The Secretary of State said the proposed new town council had to pay £2000 a year to central government for the privilege of having the word "Royal" in the new town council's name.

The district council's legal department advised that, as the title "Royal" had been conferred on the inhabitants of the town in person by Queen Victoria by way of Royal Charter, no annual fee was payable. After

an exchange of correspondence the council's view was surprisingly accepted!

Wright Hassall offers a full legal service to parish and town councils. If you have any queries please contact David Elliott on 01926 880756 or Pritpal Singh-Swarn on 01926 880795 or via email.

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Royal status was given to Leamington in Victorian times.

Covenant enforceability

Continued from page 1

opportunity. As compensation under s84 is likely to be substantially less than damages in an action for damages, a defendant in an action for damages would be well advised to apply for a stay on proceedings to allow an application under s84.

Lastly is the case of *Lawntown v Camenzuli* [2007] EWCA Civ 949 concerning the effects of s610 Housing Act 1985, a little utilised provision (before now perhaps!).

Under s610 a local authority or person interested in any premises may apply to the county court where:

- a) owing to the change of character of a neighbourhood premises cannot readily be let as a single dwelling house but could be more readily let if converted into two or more dwellings, or
- b) planning permission has been granted under part III Town and Country Planning Act 1990 for use of the premises as converted into two or more dwellings

(and conversion is prohibited or restricted by lease provisions or restrictive covenant).

The court may, on application, vary the terms of a lease or other instrument imposing such a restriction.

The Court of Appeal held that the court's discretion to vary covenants is one where it is to be exercised judicially having regard to the purpose of s610 to facilitate more intensive use of (usually) large dwellings. The statute provides for a variation to be ordered "subject to such condition and upon such terms" as the court thinks just. The emphasis of s610 is very much on "conversion" rather than construction of a separate dwelling.

Depending on which side of the fence you are on it is as well to bear in mind these cases when either selling or buying.

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Escape for monitoring officers

Monitoring officers breathed a sigh of relief when the Court of Appeal delivered its Judgment on the 18 December 2007 in the case of *R (Ware) v Neath Port Talbot County Borough Council* [2007] EWCA Civ 1359.

A council decision to grant planning and hazardous substance consents for a development by National Grid of a natural gas pressure reduction station was quashed by Judge Collins based on an alleged procedural irregularity. This turned on the belief that four councillors (members of the planning committee) had acted upon misleading advice from the council's deputy monitoring officer and had subsequently abstained from voting on the item under a misunderstanding of the law.

The four councillors had attended a meeting at which objectors to the development presented their objections to the applications for consents. The councillors, acting on advice from the deputy monitoring officer, declared to the planning committee that none of them had expressed any kind of opinion on the application or any predetermination on it in order to avoid any subsequent complaint to the ombudsmen. Although Judge Collins felt that the monitoring officer's advice was right at the time, there was no evidence that the councillors had expressed any kind of opinion in relation to the National Grid application. Therefore he took the view that the councillors' decision to abstain from voting was influenced by concerns that there might



be a perception of predetermination. However, because of the inherent doubt, he quashed the decision.

The judge cautioned against being inhibited by the monitoring officer's over-cautious advice which he believed was wrong as it raised the spectre of a complaint to the ombudsman without there being any real risk. If the councillors decided they had done nothing wrong then there was no reason why they should not stay and participate; introducing the ombudsman merely increased the pressure on the councillors.

Where did this leave officers of the council and in particular monitoring officers? Damned if they give over-cautious advice and damned if their advice is deemed so liberal that it appears there is a bias.

The Court of Appeal judgment enables the officers to breathe a sigh of relief. The court felt that there were public interest reasons to exercise its discretion and hear the appeal, despite being overtaken by events because National Grid, having received fresh

consents, had completed the development.

The Court Appeal decided that Judge Collins' decision was incorrect and that the advice given to the councillors by the monitoring officer was not in fact wrong; the councillors were not acting under a misunderstanding of the law and they were not influenced as a result of wrong advice.

Lord Mummery noted that the councillors were, by their own admittance, left to make their own decision about whether or not to vote on the business in question. *'They were not directed or pressurised by council officers to abstain from voting or to leave the meeting prior to the vote. Nor was abstention from voting recommended by officers.'*

Advice regarding the ombudsman was only given in response to a question about the worst possible scenario and was only given to two of the four councillors. Neither were the councillors told that a complaint to the ombudsman would disqualify them from voting. They were clearly advised by the officer that it was their decision whether or not to vote.

Mummery concluded by saying 'in deciding individually not to vote the councillors were exercising their own judgment in the light of the advice that was given. None of the advice given to them was wrong or amounted to an immaterial consideration giving rise to a procedural irregularity or to unlawfulness in the granting of consents.'

The refreshing message from the decision seems to be that local government should be permitted to locally govern unless there is convincing reasons for intervention.

If you have any queries in relation to this decision or decision making in the planning process generally please contact Pritpal Singh-Swam on 01926 880795 or David Elliott on 01926 880756 or via email.

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