

**LONDON BOROUGH OF SOUTHWARK**

**Imperial Gardens Nightclub**

**Legal Advice to Southwark Overview and Scrutiny Committee**

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## 1. INTRODUCTION

- 1.1 We have been asked to advise the Council as to whether it has the power to negotiate a settlement with the claimant(s) in respect of the planning and administrative law dispute that has emerged.
- 1.2 We have not been asked to advise on the merits of either the potential litigious claim by the claimant(s) or the contents of the reports by the Local Commissioner and the District Auditor. Neither have we at this time sought input from an insolvency practitioner.
- 1.3 The objective of this report is to provide legal advice to the Council in respect of the most appropriate strategy to deal with this matter and in coming to a decision as to whether to settle, litigate or refer the matter to mediation or arbitration - with specific reference to its powers and other fiduciary duties.
- 1.4 In the event that the Council decides on a settlement figure, that figure will be subject to audit and the District Auditor has the power under section 17 (1) of the Audit Commission Act 1998 to apply to the court for a declaration that a payment is contrary to law.

## 2. SUMMARY OF KEY ISSUES

- 2.1 The Council is constrained in its response to this issue by the limited power it has to make payments in settlement of disputes. It may make a payment where it considers that loss has been caused as a result of maladministration (under s92 LGA 2000) or it may make a payment to settle court proceedings out of court (pursuant to s222 LGA 1972). **In order to exercise either power the Council needs further information.**
- 2.2 The Council cannot make a payment for loss caused as a result of maladministration (using s92) **until it has further evidence from the claimant that the maladministration caused the loss suffered** by him and it cannot settle out of court (using the s222 power) until it has further information from the claimant(s) **to quantify the scope and merits of the claimant'(s) court claim.** This is because the Council must ensure it considers all relevant matters before exercising its powers.
- 2.3 **It is vital therefore that a claim is formally made against the Council, including all relevant information, before the Council can consider using either of the two powers above to make a payment.**
- 2.4 The claimant(s) conducted their business through a company. Therefore on the face of **it is the company which has suffered loss and not its shareholders.** That company is now in liquidation and therefore in matters such as this we would expect any claim to be brought by the liquidator on behalf of the company. Until the Council knows whether the liquidator will bring a claim on behalf of the company **it does not know who is the correct party to make a payment to. The Council must also therefore contact the liquidator to discover whether he will bring a claim.**

- 2.5 If the liquidator decides not to do so, the claimant(s) may decide to bring the claim on their own behalf (assisted by the Council as stated above).
- 2.6 The Council does have the power to financially assist the claimant(s) to make their claim. An offer has been made to the claimant(s) that the Bar Council be appointed to determine an appropriate figure. **A response is awaited from the claimant(s)'s solicitors and, once this is received, the Bar Council will determine an appropriate sum.**
- 2.7 Only once the formal particulars of the claim are provided will the Council:
  - 2.7.1 know whom they are dealing with; and
  - 2.7.2 then obtain legal advice as to the merits of the claim; and
  - 2.7.3 decide whether arbitration is an appropriate method of reaching settlement.

### 3. POWERS AVAILABLE

- 3.1 Local authorities have the power to settle litigious claims. They also have a broad power to compensate those who may have suffered under maladministration:
  - 3.1.1 **Power to compromise litigation claims** – The Council has an express power to prosecute, defend or appear in legal proceedings (section 222 of the LGA 72), and an implied power to compromise such litigation (Re Norwich Provident Insurance Society (1878) 8 CH D 334). The Council also has the power to do anything which is calculated to facilitate or is conducive or incidental to the discharge of any of its functions under Section 111 Local Government Act 1972.
  - 3.1.2 **Power to make a payment** – The Council has broad power to make a payment where the Council considers that action or inaction taken by it or on its behalf in the exercise of its functions amounts to or may amount to maladministration and a person has been adversely affected by it under section 92 of the Local Government Act 2000.
- 3.2 The Council must have regard to the fundamental principles of administrative law when exercising these implied and statutory powers to settle this matter. (Please see Appendix 1 attached as to the Council's general administrative obligations.)
- 3.3 Should the auditor or an aggrieved third party challenge the Council's decision to settle this matter at a specific amount, an administrative court at judicial review will examine whether the authority had the power to take the decision and the process the Council used to exercise the power.
- 3.4 The Council has a choice as to which power it uses, i.e. the implied power to settle litigation under s222 of the LGA 72 or the power to make a payment for maladministration under s92 of the LGA 2000. The choice will hinge upon the merits of the claimant(s)'s claim and the taking into account of all relevant considerations and ignoring irrelevant considerations.

- 3.5 If the Council seeks to use its implied powers to settle a litigious claim pursuant to s222 of the LGA 1972, it must exercise prudence in doing so, having regard to all the facts of the case and all relevant legal advice as to its best course of action.
- 3.6 In considering the best course of action, the Council must have regard to its duty to tax payers and should not make a payment in excess of that which the claimant(s) (or the company) would be likely to achieve if the matter proceeded to full litigation.
- 3.7 Put simply, until the claimant(s) do(es) set out the basis for their claim (whether through litigation or arbitration) the Council is without sufficient information to make a payment as it cannot then procure legal advice on the merits of his claim and respond to it appropriately.
- 3.8 Arbitration is an alternative route to litigation in establishing what an appropriate payment might be. Arbitration is very similar to litigation and the arbitrator would also ask the parties to state their case at the outset therefore forcing the claimant(s) to set out the basis for their claim and allowing the Council to defend itself as appropriate.
- 3.9 If the Council, arbitrator or court finds that the claimant(s) do(es) not have sufficient claim against the Council, this would not necessarily prevent the Council making a payment to the claimant(s) for maladministration under s92 of the LGA 2000. However, in doing so the District Auditor could bring a challenge that the Council's decision is unreasonable if the Council does not have compelling additional reasons to justify any payments above and beyond the recommended figure of £500 per claimant suggested by the Local Commissioner. The Council may also need to justify why it believed payment was equitable where a court or arbitrator had come to a different conclusion.
- 3.10 As with the use of the litigation settlement powers under s222, to use the power to make a payment for maladministration under s92 the Council must be satisfied that the maladministration caused the loss suffered – as it must consider that “a person has been, or may have been, adversely affected by [the maladministration]”. This means that in one form or another the claimant(s) would still have to provide evidence to the Council proving its actions caused their loss.
- 3.11 Therefore, whichever power is used by the Council to compensate the claimant(s), the Council cannot go further until it has further details of claimant(s)'s claim. This is dealt with in the strategy recommended below.

#### **4. THE LIQUIDATOR**

- 4.1 Whether or not the Council must involve the liquidator will depend very much upon who is the potential claimant against the Council here. If the claimant(s)'s companies are in liquidation the liquidator may bring a claim against the Council on the company's behalf.
- 4.2 Alternatively, as the claimant(s)'s solicitors Webster Dixon have stipulated in their letter of the 20<sup>th</sup> May, the shareholders of the company may have a right to bring a claim on their own behalf.

- 4.3 However individual shareholders can only claim in exceptional circumstances and the normal position is that if a company suffers a loss the shareholders cannot claim. The exception to this general rule is where there has been a “fraud on the minority”. For example, in *Eastman Co (Kilner Houses) Ltd v Greater London Council*<sup>1</sup>, a shareholder with no voting rights in a flat management company was allowed to bring an action on behalf of the company against the majority shareholder, the GLC, where the GLC voted to break its contract with the company in order to implement its new housing policy. In *Jones & Anor v APTA Nursing Services Plc*<sup>2</sup>, the claimants were allowed to sue on behalf of the company which had been taken over by the defendant company where the defendant had made withdrawals without the proper authority. This indicates that the Courts have been consistent in not allowing individual shareholders to bring claims except in genuinely exceptional circumstances. The claimant(s) would therefore have to establish similarly exceptional circumstances to justify their claim. (We have not been asked to provide insolvency advice at this stage and are able to do so if necessary but it is possible that only the liquidator could bring a claim against the Council here.)
- 4.4 Whether the liquidator will become involved will very much depend upon whether the liquidator decides to do so on behalf of the companies. It is advisable that the Council contact the liquidator to ascertain the likelihood of him bringing a claim against the Council. Only after entering into discussions with the liquidator, will the Council know who the correct party to any arbitration or litigation will be. This therefore is the first step in the strategy (see section 5 below).

## 5. FURTHER ISSUES FOR CONSIDERATION

### 5.1 Staffing Issues

The above note provides advice to the Council as to how it should approach its strategy in dealing with the claimant(s). A further issue however is the appropriate officers to deal with this matter. The Council in its corporate capacity as employer of the staff, has a responsibility to those officers to take reasonable steps to protect them from harm or assault. The definition of the tort of assault includes situations where the victim reasonably believes the defendant will apply force to his person, even if no force is applied. Verbal threats of violence can therefore constitute an assault.<sup>3</sup>

### 5.2 Power to assist the claimant(s) to state their claim

We understand that the Council has had some difficulty in encouraging the claimant(s) to state their claim and, following advice from Counsel, an offer has been made to the claimant(s) to assist them with their legal costs using the s92 maladministration power to make a payment. However, the s92 power relates solely to payments as a result of maladministration. Therefore, while the power may be used to assist the claimant(s) to fund their legal case against the Council for maladministration, this power should not be used to fund the claimant(s) preparing a case against the Council on any other grounds. The

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<sup>1</sup> (1982) 1 WLR 2

<sup>2</sup> (1995) Unreported

<sup>3</sup> *Marvier v Dorset County Council* [1997] CLY 3849

assistance provided by the Council to the claimant(s) should relate to the maladministration findings of the Local Commissioner as contained in his report. It is possible however that in preparing a claim against the Council in respect of the maladministration, the claimant(s) 's solicitors may consider there is evidence of other potential claims, such as misfeasance in public office. Misfeasance in public office exists where:

- A person suffers loss or damage;
- As a result of administrative action or omission known to be unlawful by the officers taking it; and
- Those officers knew or were recklessly indifferent that the claimant would suffer loss.

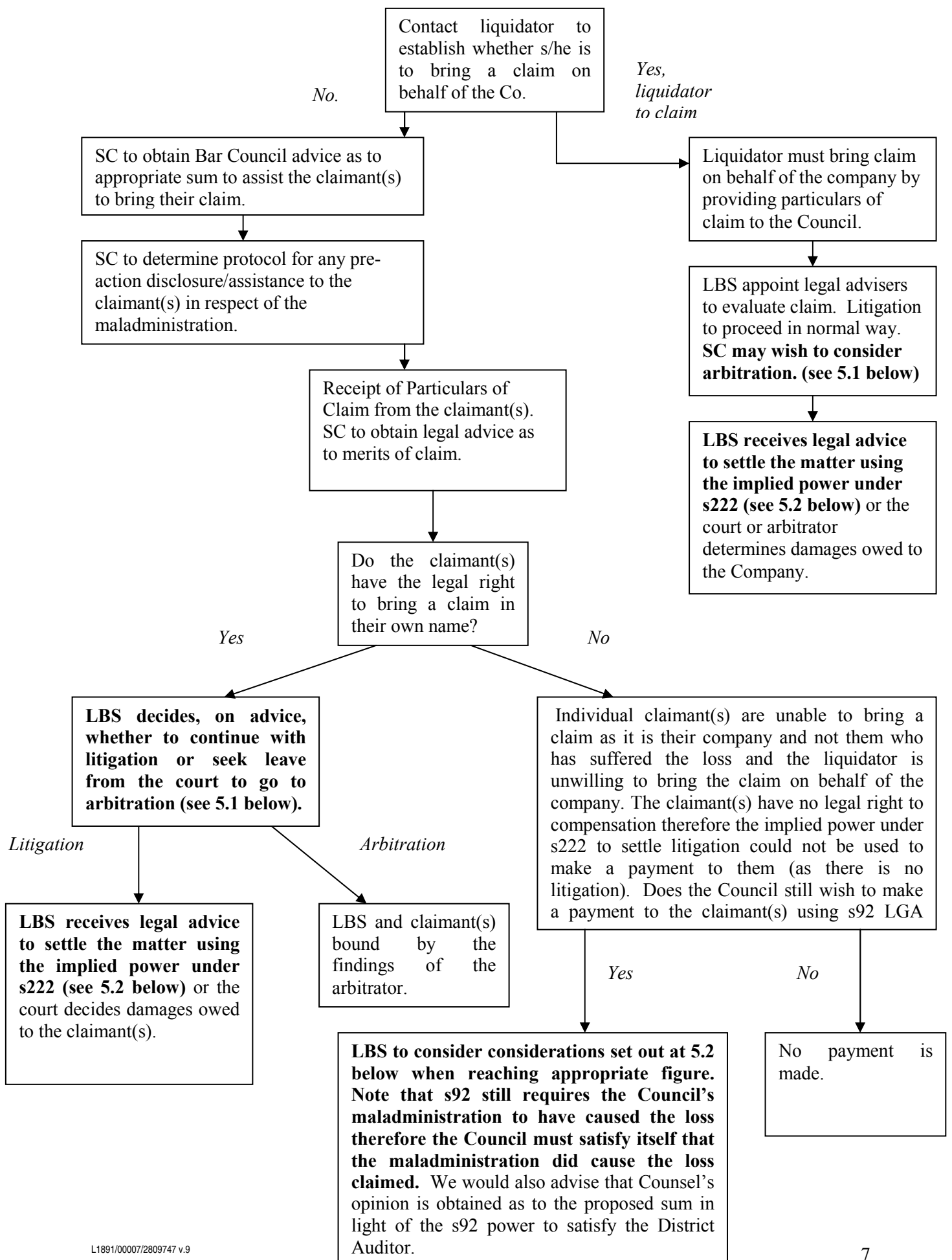
Please also refer to paragraph 2.2 of the main report and the attached copies of correspondence from the claimant(s)'s solicitors (Webster Dixon).

We have been asked to advise whether the Council could use of the well-being power (s2 LGA 2000) to fund the claimant(s) generally in their preparation of claim against the Council. This is possible provided the Council establish a link between its motivation in funding the claimant(s)'s claim and the promotion of the economic, social or environmental well-being of the area having regard to the Council's Community Strategy.

In any event the Council, following the agreement of the claimant(s)'s solicitors, will be seeking the advice of the Bar Council as to an appropriate sum and this is taken account of in the strategy set out below.

## **6. RECOMMENDED STRATEGY FOR REACHING SETTLEMENT:**

- 6.1 In determining a strategy in dealing with the dispute with the claimant(s) the Council should take into consideration the principles attached at Appendix 1 and ensure that any decisions taken are justified taking into account all relevant considerations.
- 6.2 The following flowchart sets out how we advise that those principles should be applied in practice to the facts of this case. Where the flowchart refers to 'decision milestones' for the Council (highlighted in bold), we provide guidance as to what may be relevant considerations in making those decisions below.



### **6.3 Litigation or Arbitration?**

The OSC has previously been provided with advice from its legal advisers in respect of the respective merits of litigation, mediation and arbitration (Report dated 20<sup>th</sup> May). We would endorse the contents of this report and also attach a briefing paper setting out the mechanics of arbitration. Relevant considerations for the Council in reaching a decision may include:

- 6.3.1 The cost of each of the three methods of settlement - Arbitration is not always considered the cheapest form of settling a claim and often litigation may be more cost effective;
- 6.3.2 The likely chances of success of the claimant(s) should they bring a claim before the High Court or in arbitration;
- 6.3.3 The likely success of any discursive methods of settlement where the parties would be expected to work together to settle the dispute (i.e. mediation) over more structured proceedings determined by a third party (i.e. arbitration or litigation);
- 6.3.4 Following further legal advice on the merits of a claim by the claimant(s), whether the Council would require a ruling on a point of law. Arbitration might be regarded as not the best course if a point of law is at issue and mediation is unlikely to be appropriate at all in those circumstances;
- 6.3.5 Whether the route chosen will or should be binding on the Council or whether a right of appeal is available. The Council should not unreasonably fetter its own discretion and right to question a decision if determined by a third party. If arbitration is chosen, this should be borne in mind when agreeing the terms of the arbitration process.

### **6.4 Considerations if negotiating a settlement:**

- 6.4.1 If the Council determines upon an out of court settlement with the claimant(s), based upon without prejudice negotiations and using its implied power to settle litigation under s222 LGA 1972, any sum settled upon must be reasonable and proportionate to what the claimant(s) might reasonably be expected to be awarded were they to litigate the claim and be successful in doing so. This may be balanced against any sums the Council considers it may save in not proceeding to full litigation in the High Court.
- 6.4.2 Clearly such a sum may only be agreed with regard to all relevant legal advice on the merits of the claimant(s)'s claim. (In both litigation and arbitration the Council could get a measure of protection of costs by making a formal offer to settle for a specified sum – then, if less is recovered by the claimant(s), in principle costs after 21 days from the date of the offer should be awarded against the claimant(s).)
- 6.4.3 The Council should also take note of Local Commissioner's recommendation in his report. In making his recommendation the Ombudsman will have had regard to the Guidance. The Ombudsman's assessment suggests a figure well below that claimed by the claimant(s) (i.e. £1000). If the authority chooses to exercise its power under section 92 and settles upon a figure substantially above this, we would advise specifying the reasons for this departure in any final resolution – for instance with reference to legal advice estimating the claimant(s)'s chances of success in proceedings.

**Nabarro Nathanson, 29 June 2004**





## APPENDIX 1

### THE EXERCISE OF DISCRETIONARY POWERS - GENERAL

The Council must have regard to the following general principles when reaching decisions regarding the exercise of the settlement/compensation powers above:

6.5 General principles of **Wednesbury reasonableness**<sup>4</sup> in making decisions - in other words, the Council must have regard only to relevant considerations and disregard irrelevant considerations when determining what will be “reasonable” in the circumstances. “Relevant considerations” will obviously be dependant on the circumstances but will certainly include consideration of all advice from officers and legal advisers as to the respective merits of the claimant(s)’s claim in coming to a figure – notably whether the Council’s actions alleged by the claimant(s) actually caused the loss suffered by them.

6.6 Members must also be careful of **irrelevant considerations** such as party policy or loyalty or exercising their powers for an improper purpose. Having regard to party policy in the decision making process is not strictly prohibited but only provided that it is also consistent with legal and other advice provided to members<sup>5</sup>. However there has been recent case law which has taken a firmer line with the taking of decisions with a view to electoral advantage and there is a danger it could be deemed an irrelevant consideration.<sup>6</sup>

6.7 Members **must have regard to advice** (see section 6 of the Code of Conduct):

When reaching decisions a member must have regard to any relevant advice provided to him or her by:

6.7.1 The Authority’s Chief Finance Officer acting in pursuance of his or her duties under Section 114 of the Local Government Finance Act 1988; and

6.7.2 The Authority’s Monitoring Officer acting in pursuance of his or her duties under Section 5(2) of the Local Government and Housing Act 1989

and they must also give reasons for those decisions in accordance with the Authority’s and any statutory requirements in relation to the taking of an executive decision.

Also, see Article 13.02 of the Council’s constitution:

*“all decisions of the Council will be made in accordance with the following principles including due consultation and the taking of professional advice from officers”*

6.8 The Council must have regard to its **budget and policy framework** if it is considering a large expense which does not fit within the current framework:

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<sup>4</sup> Associated Provincial Picture Houses Ltd v Wednesday Corporation [1948] 1 K.B 223

<sup>5</sup> Porter v Magill (1999) 97 LGR 375

<sup>6</sup> R v Local Co for Local Government for North and North East England ex parte Liverpool City Council (2000) Times 3 March

*“where the Council assembly accepts that the decision or proposal is contrary to the policy framework or contrary to or not wholly in accordance with the budget, and does not amend the existing framework to accommodate it, require the decision taker to reconsider the matter in accordance with the advice of either the Monitoring Officer/Chief Financial Officer and refer it back to the Executive ... a decision taken outside the policy or budget framework will be unlawful”.*

- 6.9 The Council has a fiduciary duty to tax payers to exercise its functions and powers prudently and with regard to advice. It should not agree to make compensation payments to the claimant(s) for reasons other than because they are likely to be legally entitled to such payments if the matter progressed to court e.g. for reasons of political expediency (see 3.2 above). The case of *Roberts v Hopwood*<sup>7</sup> sets out the principles of exercising reasonableness when exercising discretion on matters of authority expenditure. The District Auditor also successfully challenged the decision of the authority in *North Tyneside Metropolitan Borough Council v Allsop*<sup>8</sup>.

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<sup>7</sup> [1925] A.C 578

<sup>8</sup> (1992) 90 L.G.R 462