LEGAL PROCEEDINGS

Introduction

1. This Legal Topic Note identifies the main types of legal proceedings (litigation) in civil law that local councils may become involved in and describes important considerations.

2. Except in this paragraph and paragraphs 20 - 23 below, this note is not applicable to employment law disputes. Councils may use mediation (see paragraph 13 below) at any stage of a grievance and disciplinary procedure to resolve a workplace dispute. Unless exempted, most workers must notify the Advisory and Conciliation Service (ACAS) before they lodge an Employment Tribunal claim. ACAS will assist the worker to try and reach a settlement with the employer through conciliation (see paragraph 12 below). ACAS has a statutory duty to offer early conciliation after the worker has agreed to participate. More information about early conciliation is available from ACAS' website using the following link http://www.acas.org.uk/media/pdf/c/1/Conciliation-Explained-Acas.pdf

Powers to commence or defend legal proceedings

3. Local councils may become involved in litigation for a number of reasons. Sometimes councils will be responding to claims made against them (in which case they will be the Defendant) and on other occasions councils may start legal proceedings themselves (in which case they will be the Claimant). Section 222 of the Local Government Act 1972 ('the 1972 Act') confirms that a council may bring or defend legal proceedings or make representations at any public enquiry in its own name if it is to promote or protect the interests of inhabitants of the area. Section 111(1) of the 1972 Act permits a council to do anything to facilitate or which is conducive or incidental to the discharge of any of its functions. Resolving a legal dispute before or after litigation has commenced, in the ways described in paragraphs 5 -19 below, would be permitted under s.111(1).

4. Usually, only those who have been granted a right by an authorised body (e.g. the Bar Council or the Law Society) have rights of audience (e.g. the right to act as an advocate on behalf of another) in court. Members and officers of a local council are permitted to appear on behalf of the council in the magistrates' courts (but not in the county courts or High Court) if so authorised by the council (Section 223(1) of the 1972 Act). A local council should ensure that authorisations are made by resolution and are given to the individual in writing.

Resolving legal disputes

5. Councils should remember that litigation, which is lengthy and costly, is only one way of resolving legal disputes. In general, it should be regarded as the last resort for disputing parties.

6. The Civil Procedure Rules (CPR) and CPR practice directions govern the conduct of parties in civil litigation and they set out the processes and powers of the County Court, the High Court and Civil Division of the Court of Appeal to manage claims. The CPR and practice directions encourage parties to settle their legal disputes as early as possible by use of alternative dispute resolution (ADR) methods.

7. The CPR practice directions require parties to try to settle disputes without issuing legal proceedings. They require parties to comply with the pre-action protocol if there is one which is applicable to the nature of the dispute, before starting legal proceedings. There are specific pre-action protocols which, for example, relate to personal injury, professional negligence, damages relating to the physical state of property at the end of a commercial tenancy and judicial review claims. Judicial review claims are explained in paragraphs 25-35 below. More information about pre-action protocols is available from the website of the Ministry of Justice via http://www.justice.gov.uk/courts/procedure-rules/civil/standard-directions/general/pre-action-protocols.

8. If there is no relevant pre-action protocol, the CPR practice directions require parties, unless the circumstances make it inappropriate, to-:

   i. exchange sufficient information about the dispute to allow them to understand each other's position, make informed decisions about settlement and how to proceed and

   ii. make appropriate attempts to resolve the matter without starting proceedings,

and in particular consider the use of an appropriate form of ADR in order to do so.

More information about the relevant practice directions is available from the website of the Ministry of Justice via http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct#7.1

9. In respect of (i) in paragraph 8 above , the CPR practice directions require:

- the proposed claimant to set out the details of the matter in writing by sending a letter before claim to the proposed defendant and
- the proposed defendant to give a full written response within a reasonable period preceded, if appropriate, by a written acknowledgment of the letter before claim. As a general guide, the defendant should send a letter of acknowledgment within 14 days of receipt of the letter before claim if a full response has not been sent within that period. If the matter is straightforward, for example an undisputed debt, then a full response should normally be provided within 14 days. If a matter requires the involvement of an insurer or other third party or where there are issues about evidence, then a full response should normally be provided within 30 days. If the matter is particularly complex, for example requiring specialist advice, then a period of longer than 30 days may be appropriate. A period of longer than 90 days in which to provide a full response will only be considered reasonable in exceptional circumstances.

10. In respect of (ii) in paragraph 8 above, the CPR practice directions require that some of the options for resolving a matter without starting proceedings are –

- discussion and negotiation;
- mediation (a form of negotiation with the help of an independent person or body);
- early neutral evaluation (where an independent person, for example a solicitor or an expert in the subject, gives an opinion on the merits of a dispute); or
- arbitration (where an independent person or body makes a binding decision).

11. Non-compliance with the CPR practice directions outlined in paragraphs 7 and 8 above, which apply before legal proceedings have started may result in adverse costs consequences after proceedings have started, for the party at fault. Councils may require professional legal advice and representation (see paragraphs 20 - 23

below) to assist them to comply with such requirements. Councils may need assistance with the drafting of pre-action protocol letters and pre-claim correspondence.

12. As explained in paragraphs 7 and 8 above, a council should consider whether an ADR method could help it to settle a dispute without starting legal proceedings. ADR is designed to assist the disputing parties get a clearer understanding of the strengths and weaknesses of their dispute and explore the options for resolving their differences. ADR methods fall into two main categories being i) a facilitated process such as mediation or conciliation where a neutral third party helps parties with a negotiation or ii) an arbitration process where a binding decision will be made by an independent third party (usually a professional who would be capable of understanding the dispute e.g. a surveyor, solicitor) which will bind the parties.

13. A directory of mediators who work in a particular geographical area has been provided by the Ministry of Justice and is available via http://www.civilmediation.justice.gov.uk/

14. It should be noted that some leases and contracts entered into by councils expressly require disputes to be resolved by arbitration. These will include provision about the appointment of a suitable arbitrator, who is usually a professional who would have an understanding of the technical matters in dispute.

15. Once litigation has started, the CPR encourages parties to use an ADR method if the court considers that it is appropriate. If the parties agree, they have an opportunity to agree to stay proceedings whilst they attempt to settle the claim by ADR. Failure by the parties to use ADR at this stage may place the party who refuses to consider ADR at risk of adverse consequences in costs. Most parties prefer to choose their own form of ADR, rather than risk a court imposing a form on them. After litigation has commenced, most parties seek to settle disputes before trial stage. CPR imposes complex rules about offers to settle claims after litigation has commenced. Councils will require professional legal advice about this (see paragraphs 20 - 23 below).

Without prejudice communications

16. Before and after litigation has commenced, a party may make use of ‘without prejudice’ correspondence. Parties who may or may not be following the CPR and CPR practice directions may use ‘without prejudice’ correspondence. Put simply,

the purpose of 'without prejudice' correspondence is to enable a party to make genuine attempts to settle legal disputes without fear that concessions made for this purpose can be used against the party making them at a subsequent court hearing. The benefit of without prejudice correspondence is best explained using an example. In a dispute concerning a breach of contract, A argues that B has breached contract term(s) and, as a consequence, A has suffered damage and has incurred additional expense. B believes that the amount of compensation sought by A is excessive. However, if B believes that the dispute may lead to court proceedings (because, for example, it appears unlikely that the compensation can be agreed) he may be reluctant to make offers to settle the dispute if any such offers were treated as admissions of liability in court. 'Without Prejudice' correspondence is one way around this problem.

17. In the scenario set out above, B could write a 'without prejudice' letter to A . In the letter, B may explain his difficulties with complying with contract term(s) and offer A a payment in respect of this. A would be free to accept the offer or to refuse it. However, if A decides not to accept the offer neither A nor B would be able to rely on B's letter in court because it is 'without prejudice'.

18. Sometimes correspondence is marked 'without prejudice save as to costs.' The same principles set out above apply (namely that neither party can refer to the letter or the contents of it in court) but with one qualification in relation to costs. At the end of the trial it is usual for a court to order the loser to pay most of the winner's costs (different rules apply to small claims and most personal injury claims). At this point all the legal issues have been decided and a party may disclose to the court 'without prejudice save as to costs' correspondence when arguing about which party should pay the costs.

19. To continue the example set out above, B may send A a letter marked 'Without prejudice save as to costs' offering to settle the dispute by a payment of of £10,000. If A failed to accept the offer and at trial A was only awarded £8,000 in damages, B could point to his earlier offer to settle and argue that the costs of the case following the offer (which may be substantial) could have been avoided if A had accepted B's offer . In these circumstances B would be able to refer to the letter and its terms in an attempt to persuade the court that the costs needlessly incurred should be paid by A even though A's claim has been successful.

Legal advice and representation and costs

20. NALC recommends that councils have in place insurance policies which provide cover of legal expenses for bringing and or defending claims. Many insurance policies will not offer legal expenses cover for bringing and defending all types of legal claims. It is also rare for legal expenses cover to extend to bringing or defending a judicial review claim. It is recommended that councils arrange legal expenses cover for the types of litigation that may reasonably be expected to arise. Such litigation may include bringing or defending claims of personal injury and death, breach of contract, damage caused to council land and damage caused by the council to another person's land or property and defending employment and discrimination law claims. Councils should consult their insurers as soon as a claim is threatened or made against them to prevent insurance policies becoming void due to late notification. Assuming that a council has legal expenses cover in respect of the claim, the insurance company will appoint a firm of solicitors to act for the council.

21. If a council is a party to legal proceedings or is at risk of becoming one but is unable to rely on legal expenses cover it should always seek legal advice and representation from a qualified legal professional who is experienced in the relevant area(s) of law and the appropriate type of litigation. NALC's solicitors are unable to represent councils in threatened or live legal proceedings.

22. For a general claim (e.g. contract or debt) the solicitor should be experienced in civil litigation. For a judicial review claim, the solicitor should be experienced in administrative or public law. In other instances, expertise in a particular area of law such as personal injury, commercial property or charity/trust law may be necessary. It is preferable but not essential for the firm of solicitors to have experience of working with local authorities. Councils may use the Law Society's online directory of solicitors to find a suitable firm of solicitors. This can be accessed via http://www.lawsociety.org.uk/find-a-solicitor.

23. Councils should ensure that they discuss all possible methods of funding a claim or a defence including Conditional Fee Agreements (CFA), Damages Based Agreements (DBA) (both forms of No Win, No Fee) and the availability of After the Event Insurance. However, it is likely that a legal action will incur costs for the council that are not completely recoverable from the other side even if successful.

Limitation periods

24. Aside from judicial review claims (see paragraphs 31-32 below), the Limitation Act 1980 sets the time limits within which the certain types of claim must be issued at court. The limitation periods for the types of claims which are most relevant to local councils are listed in the table below. Failure to issue proceedings in time is likely to provide a defence to the claim. The courts have a very limited discretion to dis-apply the limitation periods.

Type of claim	Limitation Period
Negligence (and other 'Torts')	6 years
Contract	6 years
Leases	12 years
Sums recoverable by statute	6 years
Personal Injury	3 years
Recovery of Land	12 years
Recovery of rent	6 years

Judicial Review – Challenging Decisions

25. Judicial Review is a legal remedy which is sometimes available against public bodies. Public bodies susceptible to judicial review include district and county councils as well as local councils. This means that local councils (including parish and community meetings) can be the subject of judicial review claims made against them. Local councils also have the power to commence judicial review proceedings against other public bodies provided they meet the criteria below.

26. A judicial review only looks at the way in which a decision was reached and whether any decisions were made in a fair manner.

i. Grounds

27. In the past, the court has considered the following factors relevant when deciding whether or not a given decision was fair or was made in a fair manner:
    - whether it was rational;
    - whether it was so unreasonable that no reasonable authority could have made it;
    - whether the decision was made on the basis of an irrelevant consideration;
    - whether the authority failed to take into account a relevant consideration;
    - whether the authority was biased;

- whether the authority failed to follow the principles of natural justice (e.g. 'no man shall be a judge in his own cause' and the right of everyone to receive a fair hearing); and
- whether the authority did not have the power to make the decision (e.g. whether the decision was *ultra vires* the authority).

ii. Standing

28. Judicial review is not a remedy that is open to everyone. To prevent a flood of unmeritorious claims being made by individuals who do not have a real interest in the decision being challenged, the courts have developed two methods of weeding out claims. One method is the requirement for a party to obtain permission to bring a claim (see paragraph 30 below) and the other requirement is for that party to have 'standing'.

29. A person (or organisation) seeking to commence judicial review proceedings against an authority needs to demonstrate that he/she/it has 'standing' in the matter. 'Standing' simply means that a claimant has a genuine and legitimate interest in the matter e.g. because they are affected by the decision made. Thus, a person is likely to be able to demonstrate a sufficient interest in a neighbour's planning application to have standing to make a claim for judicial review against the decision of the planning authority.

iii. Permission

30. Claimants for judicial review are required to seek the permission from the court to commence proceedings. The aim of this requirement is similar to that of standing insofar as it aims to weed out claims which have no chance of success. The grant of permission serves to ensure that the claims which are allowed to proceed to a full hearing have merit. The court will generally consider the question of permission without a hearing. Neither the defendant nor any other interested party need attend a hearing on the question of permission unless the court directs otherwise. The grant of permission, however, does not mean that a claim will succeed at the full hearing. Many claims fail at the main judicial review hearing where the decision under review is scrutinised in greater detail.

iv. Time limits

31. The CPR requires judicial review claims to be lodged at the High Court promptly and, in any event, within 3 months of the making of the decision being challenged.

32. However, certain specific types of judicial review have different time limits. In respect of judicial review claims which challenge decisions made by the Secretary of State or the local planning authority under the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 and the Planning (Consequential Provisions) Act 1990, the claim must be lodged at court within 6 weeks of the decision being challenged. Judicial review claims governed by the Public Contracts Regulations 2015 must be brought within 30 days of the date on which the grounds for bringing the claim first arose.

v. Remedies

33. A successful claimant for judicial review can ask the court for one or more of the following remedies:
    - damages;
    - an order that the decision of the authority be quashed;
    - an order compelling the authority to carry out their duty properly; and
    - a declaration (which can be used to obtain a statement of the legal relationship between the parties).

vi. Costs

34. Costs rules for Judicial Review are similar to any other type of court proceedings except that a party with limited resources (usually an individual) can ask the court for a Protective Costs Order at the beginning of the case. This order will specify the maximum amount of costs (which could be £0) that the person concerned will have to pay if they lose the case. These orders are used to allow the weaker party to challenge a public body without fear that the costs (if unsuccessful) will make them bankrupt. If the party with the Protective Costs Order is successful they will normally still recover all their costs from the public body.

35. Enhanced provisions apply in related to environmental matters as a result of the Aarhus Convention which is designed to allow individuals to challenge decisions affecting the environment more easily. In these cases the protection of the Aarhus Convention has to be specifically asked for at the beginning of the legal action.

36. The appendix defines some of the basic terms used in civil litigation in the County Court and the High Court. A glossary of other commonly used terms is available from the website of the Ministry of Justice via https://www.justice.gov.uk/courts/procedure-rules/civil/glossary

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
3	Powers of a parish meeting with a separate parish council	Explains that parish meetings may be a party to legal proceedings.
4	Powers of a community meeting in community without a separate community council	Explains that community meetings may be a party to legal proceedings.
14E 14W	Byelaws (England) Byelaws (Wales)	Explains that byelaws made by local councils may be enforced in the magistrates' courts.
24	Human Rights Act 1998	Explain the relevance of the Human Rights Act to legal proceedings.
35	Contracts	Provides an overview of the legal remedies available in a dispute about breach of contract terms.
40	Local Councils' Documents and Records	References limitation periods as reasons to retain key documents for certain periods.
56	The Provision of Sports and Play Equipment on Village Greens	Sets out the powers of local councils to commence proceedings in respect of nuisances and interferences on village greens.
58	Planning	References the powers of local council to challenge planning decisions by judicial review.

APPENDIX – GLOSSARY OF LITIGATION TERMS

- **Claimant** is the person (individual or body corporate such as a local council) who brings a case in court against another.
- **Defendant** is the person (individual or body corporate such as a local council) against whom a case is brought in court.
- **Appellant** is the person who appeals to a higher court.
- **Respondent** is the defendant in an application against him or in an appeal.
- **Small claims track** is the procedure for claims with a value up to £10,000 except in personal injury cases where the compensation claimed for pain and suffering must not exceed £1000 and the total claim does not exceed £10,000 or where tenants of residential premises claim for repairs not exceeding £1000 and the value of other claims do not exceed £1,000. The small claims track is a relatively informal and quick procedure which a lay person could conduct himself/herself. Each party bears their own legal costs and the winning party does not usually recover costs from the losing party except for court fees and some small expenses. The small claims track will be appropriate for the recovery of small debts and in many contractual disputes.
- **Fast track** is a more complicated process which is the normal procedure for claims above the value of the Small Claims Track but not more than £25,000. Normally the trial lasts no longer than one day. In a Fast Track claim the court will normally order the losing party to pay the winning party's costs and set a figure for those costs at the end of the trial.
- **Multi track** is also a more complicated process and the normal procedure for claims with a value of more than £25,000 or which are particularly complicated. Normally the trial will be expected to last more than one day. In a Multi Track claim the court will normally order the losing party to pay the winning party's costs and the figure for those costs will normally be set by a different judge at a later time.
- **County Court** the local court that deals with Small Claims, Fast Track claims and some Multi Track claims.
- **High Court** the court to deals only with Multi Track claims. The High Court sits in most major cities in England and Wales. All Judicial Review claims are heard by the Administrative Court which is a division of the High Court.