# WHAT'S COMING NEXT?

1. 2015 promises to be an interesting year for local government, albeit against a backdrop of continued cuts, with localism, devolution and reform of local government finance all politically prominent issues, although it is too soon to predict what form they will take. After considering the general context, this paper addresses recent case law that is relevant to local government finance and in particular the caution that must be exercised against the unlawful use of charging to generate revenue. We then outline some of the main features of the Government's Deregulation Bill, which is currently at the report stage in the House of Lords, and conclude with a reminder of the potential pit-falls of promises in an election year.

## The Political Context

2. Asked by Local Government Executive "what does 2015 hold for local government" the Chief Executive for the Centre for Local Economic Strategies described the outlook as "bleak", citing a rising demand for services with diminishing resources to meet that demand. It is in this difficult climate that local government has to contend with the overhaul of social care and special educational needs that have been canvassed in the course of this conference.

3. More positively, perhaps surprisingly, a survey by Zurich Municipal found that, in 2014, 63% of people had not noticed a difference in the quality of service provided to them. Furthermore, "localism" and the devolution of greater powers to a local level is a popular political position. All of the major political parties are committed in one way or another to localism and de-centralisation. A BBC poll in October 2014 found that some 80% of adults supported devolution of powers to the major cities. The Liberal Democrats have proposed "devolution on demand". Labour proposes an

English Devolution Act and an English Regional Cabinet Committee. While it is too soon to make predictions as to the form that local government reform will take, it may be expected that issues around devolution and local governance may be an issue of some salience at the General Election on 7 May 2015, which will also see local elections in the 36 Metropolitan boroughs, 194 district authorities and 49 unitary authorities.

## Local Government Finance

4. Quite apart from the politics of devolution, there also appears to be a recognition that local government finance is in need of reform. On 30 October 2014, the Independent Commission on Local Government Finance (established by the Local Government Association and the Chartered Institute for Public Finance published its interim report. It is due to publish a final report in early 2015. The Chair described the current system of local government financing as "broken" and the way that it allocates money as "irrational" and "unintelligible".

5. Amongst other things, the Commission's interim recommendations include:
   - That Councils should have the power to set council tax bands locally
   - That Councils should have the power to raise additional revenue e.g. through business rates
   - That local government should become largely self-sufficient (by 2018/19, business rates and council tax revenues will exceed local government's projected funding)
   - That Council's should be able to borrow to invest in social housing on the same terms as registered social landlords
   - Multi-year funding settlements
   - Further integration of Council and NHS budgets in the context of Early Intervention and integrated cared

6. At this stage, the Commission's proposals are in outline form only. They have received a mixed reception: the present Government has indicated opposition to proposals for council tax revaluation and local revenue-raising powers (implicitly, the power to increase taxation).

7. In times of austerity, increasing demand and diminished funding, the temptation to raise revenue by any means possible can be strong. But local authorities must be cautious to ensure that revenue is raised by lawful means. There has been increasing public attention to the alleged use by local authorities of powers to charge as a means of generating general revenue. It is perhaps appropriate that this issue should be highlighted in year of the 800th Anniversary of Magna Carta, considered to be one of the foundations of the doctrine that a tax may be levied only if authorised by statute.

8. It follows from that doctrine, that a local authority may seek to raise revenue only if properly authorised by statute, and a power to charge for services does not, without more, constitute a fiscal measure allowing a local authority to raise revenue. See e.g. *R v Manchester City Council, ex parte King* (1991) 89 LGR 696, in which it was held that a local authority had acted unlawfully in setting the level of fees for street trading licenses with a view to raising revenue. The council could not use the licensing regime to make a profit.

9. Some powers to charge are subject to statutory scales or caps; others to a "reasonableness" requirement. The general powers to charge for discretionary services in s. 93 of the Local Government Act 2003 and section 3 of the Localism Act 2011 are subject to a duty to ensure that, taking one financial year with another, the income from charges does not exceed the costs of provision.

10. *Isle of Wight Council v Commissioners of Inland Revenue*[1] heard last year concerned an appeal by the Isle of Wight arguing that local authorities were entitled to be treated as non-taxable persons in respect of their supplies of off-street car-parking, and so were not obliged to charge VAT on those supplies like all their competitors did. The case ultimately concerned the question whether, if that were correct, it would lead to a distortion of competition in contravention of EC law.

11. However, as part of the determination of that question, the Court was invited to consider whether or not the Road Traffic Regulation Act 1984, which empowers local authorities to provide and charge for off-road parking, allows a local authority to use charging as a means of raising revenue; and whether, as a matter of fact, and quite apart from what the statute permitted, local authorities were using it to raise revenue.

12. A number of cases have considered aspects of the RTRA 1984 in relation to both on road and off road parking, all concluding that it is not a fiscal statute: *R v Camden LBC ex p Cran* [1995] RTR 346 at paragraph 360; *Djanogly v Westminster CC* [2010] EWHC 1825 (Admin); *R (Attfield) v Barnet London Borough Council* [2013] EWHC 2089 (Admin). In *Attfield*, the Administrative Court quashed a decision to raise charges for resident parking permits and visitor vouchers on the basis that the purpose of the increase was to generate additional income to defray other road transport expenditure. At paragraphs 54 – 55 of the decision in the *Isle of Wight* case, Proudman J said:

> 54 We are bound to say that we have encountered some difficulty with that argument. The appellants' case, as we have set it out above, is that the RTRA as a whole is not a revenue-raising measure. We accept that although Cran, Djanogly and Attfield relate to on-street parking, what

[1] [2014] UKUT 0446 (TCC) on appeal from [2012] UKFTT 648(TC), ([2013] SFTD 442) which itself had represented the seventh occasion in ten years on which a Court had been invited to consider the Local Authorities' challenge. After an earlier hearing the High Court referred 3 questions to the ECJ, the matter came back and was remitted, heard again, and appealed.

> was said in those cases is consistent with the appellants' argument on that point. We can also accept, as did the FTT, that it is legitimate for a local authority to structure its car parking prices so as to discourage parking in some places, and to encourage it in others, and that it is likewise legitimate to use surplus revenue generated from some car parks to make up for a shortfall in revenue from car parks which, whether for policy reasons or otherwise, are run at a loss, or where parking is free of charge. Thus there is no requirement that income and expenditure be balanced on a car park by car park basis, as the FTT found at [59]. However, it must follow, if the RTRA is not a fiscal measure, that overall, and perhaps taking one year with another, the cost to the local authority of meeting its statutory obligation of providing sufficient off- street parking and the revenue generated from the activity must be broadly equal. The FTT dealt with the points the appellants made in respect of Cran at [55] (it seems it was not referred to Djanogly and Attfield was decided after the FTT's decision was released, but neither adds materially to Cran) and at [57] it set out the statement made in Cross on *Local Government Law* that "The deliberate making of a profit would take the activity into the realm of trading". In short, we are not persuaded that the FTT misunderstood the nature of the legislative framework which governs local authorities in this area.
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> 55 The appellants' case is, necessarily, that what the legislation apparently demands is not what happens in practice, in that local authorities instead divert surplus funds to other purposes. Some of the evidence described by the FTT supported that view: for example, at [182] it referred to the evidence of one local authority witness that off-street car parking charges might be increased in order to help balance a council's overall budget, and at [186], as we have mentioned, to the policy of some local authorities of aiming for a surplus consistently from one year to the next. The FTT accepted too (see [200]) that local authorities did not always lower their car parking prices to reflect reductions in the rate of VAT, in part because of the impracticality of changing ticket-issuing machines which accepted coins, but in part for policy reasons, and that they would take account of other duties imposed on them which might be regarded as more important than the level of car parking charges (see [218]).

13. It will be seen from that passage that there was at least some evidence that some local authorities might be vulnerable to the argument that car-parking prices were set at least in part with a view to raising general revenue. The issue is now before the Court of Appeal (although not yet listed) with a direct challenge on the findings

relating to revenue -raising and there may be matters of interest that will emerge from the hearing.

14. A related issue arose in *R (on the application of Hemming (trading as Simply Pleasure Ltd) and others) v Westminster City Council* [2013] EWCA Civ 591. That case concerned the fees charged for making an application for a license to operate a sex shop. The Council was entitled to charge a reasonable fee for a license application. The fee had been set with reference not only to the cost of administering applications for licenses by operators but the cost of taking enforcement action against unlicensed operators. The enforcement costs component amounted to some £26,435 of the £29,102 annual license fee. Case law had suggested that a local authority was permitted to decide that a licensing system should be self-financing and reflect the costs of enforcement in the fees charged: see e.g. *R v Birmingham City Council, ex parte Quietlynn Ltd* (1985) 83 LGR 461. However, that case law was decided before the coming into force of the Provision of Services Regulations 2009 ("**the 2009 Regulations**") by which Parliament sought to implement EC Council Directive 2006/123/EC ("**the Services Directive**"). The claimant challenged the lawfulness of setting the license fee so as to cover the costs of enforcement action by reference to regulation 18(4) of the Provision of Services Regulations 2009, seeking not only that the fee be quashed but restitution of the difference between the fees they had paid and what a lawful fee would have been.

15. Article 13(2) of the Services Directive provides:

> "Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures."

16. Regulation 18(4) of 2009 Regulations (read with the definition in regulation 4) provides that charges for schemes requiring a person to obtain the authorisation of a competent body to have access to or to exercise a service activity must not exceed the cost of authorisation procedures and formalities.

17. At first instance, Keith J held that the costs of taking enforcement action against unlicensed operators did not fall within the cost of "authorisation procedures and formalities". That followed from the clear language of both the 2009 Regulations and the Services Directive. It had therefore been unlawful to levy £26,435 of the license fee charged since 2009.

18. Westminster appealed, arguing that the constructive of the Regulations and Directive was unduly literal and did not adopt a purposive approach. It was contended that there was a real benefit to license holders from enforcement of the licensing regime because they would otherwise be undercut by unlicensed competition and, having regard to that, it was not the purpose of the Directive or of the Regulations that regulators should be prevented from charging a fee that reflected the cost of enforcement as well as that of operating the authorisation process. It was also contended that the judge's conclusion would have serious adverse implications for other regulatory bodies some of which may depend on license fees to cover their operating costs. Against that point, the claimants noted that, so far as local authorities are concerned, there are many regulatory activities that have to be paid for out of the local authority's general funds e.g. health and safety, environmental health, trading standards and Sunday trading.

19. Keith J's conclusion on that issue was upheld by the Court of Appeal. Neither the arguments advanced as to the purpose of the Directive and Regulations nor as

to the consequences of Keith J's interpretation of it could be said to outweigh the clear language.

20. The Court having accepted that the fees were unlawful, the claimant sought restitution. At paragraph 126, Beatson LJ said:

> 126 What the council must do is to determine the extent to which the council was unjustly enriched at the expense of the claimants by the payments. What the court must do is to indicate the applicable principles. It should be recognised that any system of retrospective determination of the sums due will have an element of imprecision at the margin. This, in part, is because it is accepted as a matter of principle that it is for the decision-maker, here the council, and not the court to fix the licence fee, and in part because it is recognised that deficits and surpluses can be carried forward and the accounting does not have to be on an annual basis. An element of imprecision also arises because of the practical difficulties which will arise (see paras 119 and 124 above) whichever solution is adopted.

21. The Court held that Westminster had been unjustly enriched to the extent that it had set a fee that exceeded the fee that could lawfully be charged. That calculation would require a retrospective determination of what the appropriate level of fee would have been. In considering that question, the Council would be entitled to have regard to surpluses and deficits of one year to another, as it would have been entitled to have regard to that in setting the level of fees. There was a distinction between the period before the coming into force of the 2009 regulations, when the Council had failed lawfully to set a fee but was entitled to set a fee that included enforcement costs, and the period after the 2009 regulations came into force, when enforcement costs could not be included. The claim for restitution crystallised in April 2011, when proceedings were issued, at which point the fees recoverable became recoverable forthwith.

22. Unsurprisingly given its serious ramifications for the costs of regulation, the case is currently under appeal to the Supreme Court. The appeal was heard on 13 January 2015 with interventions from a range of bodies including the Local Government Association, the Care Quality Commission, the Solicitors Regulation Authority, the Architects Registration Board, the Bar Standards Board, the Farriers Registration Co, the Law Society, the Bar Council and Her Majesty's Treasury.

23. It is clear from the case law above that local authorities must take care to ensure that they are clear as to (i) the legal basis on which any charge is levied; (ii) any statutory limit on the charge that may be imposed or the costs that may be taken into account in determining the level of the charge; (iii) that local authorities do not allow the setting of charges to be infected by an impermissible purpose of raising revenue; (iv) that clear records are kept of the justification for the setting of a charge; (v) that clear records are kept of how monies levied are held and the purposes for which they are applied.

24. A related, and perhaps more populist issue, has been the alleged use of local authority enforcement powers e.g. in relation to parking as a means of generating revenue. The proposed Deregulation Bill takes aim at this practice, amongst other things, and it is to this that we now turn.

## The Deregulation Bill

25. The Government has introduced a Deregulation Bill which addresses a miscellany of issues with a view to removing or reducing what are said to be burdens on businesses, civil society, individuals, public sector bodies and the taxpayer. The Bill addresses everything from the sale of knitting yarn to legislative reform and only a few key features are summarised here. The Bill is to be reported to the House of Lords on 3 February 2015 with a view to enactment later in the year.

26. As noted above, the Bill takes aim at the perceived use of overzealous parking enforcement as a means of gathering revenue by empowering the Secretary of State to make regulations requiring notification of a fixed penalty charge to be affixed to a vehicle (therefore requiring a traffic warden in attendance) and restricting the use of "spy cars" (s. 39).

27. The Bill also reduces the qualifying time for a Council tenant to exercise the "right to buy" to three years.

28. The Bill includes a specific section entitled "Other measures to reduce burdens on public authorities." Section 80 repeals the duty to prepare sustainable community strategies. Section 81 repeals the duty to make local area agreements. Section 83 omits s. 3A of the Local Government Act 1999 which makes provision for best value authorities to involve local representatives in the exercise of their functions, as well as repealing a range of duties relating to consultation or involvement including:

- S. 91 of the National Parks and Access to the Countryside Act 1949: making of byelaws
- S. 1 of the Pests Act 1954: designation of rabbit clearance areas
- S. 23 of the Agriculture and Horticulture Act 1964: grading etc of horticultural produce
- S. 68 of the Control of Pollution Act 1974: reduction of noise from plant or machinery
- S. 7 of the Agriculture (Miscellaneous Provisions Act) 1976: metrication of measurements
- S. 2 of the Forestry Act 1979: metrication of measurements
- S. 1 of the Derelict Land Act 1982: grants for reclaiming or improving derelict land etc

- S. 3 of the Horticultural Produce Act 1986: movement of horticultural produce
- S. 61 of the Housing Act 1988: designation of Housing Action Trust areas
- S. 61E of the Land Drainage Act 1991: codes of practice
- S.72 of the Environment Act 1995: National Park grant
- S. 97 of the Environment Act 1995: hedgerows
- S. 99 of the Environment Act 1995: environmental subordinate legislation
- S. 23 of the Local Government Act 1999: keeping of accounts by best value authorities
- S. 91 of the Countryside and Rights of Way Act 2000: grants to conservation boards
- Sections 2 and 4 of the Fire and Rescue Services Act 2004: schemes for combining fire and rescue authorities
- [The above legislation only in relation to England]
- S. 101A of the Water Industry Act 1991 (further duty of sewerage undertaker to provide sewers)
- S. 53 of the Local Government Act 2003 (commencement of BID arrangements).

29. A potentially more far-reaching provision is s. 88 of the Bill, which has been described by the Minister for Government Policy, Oliver Letwin, as "probably the single most important clause in the Bill". As noted below, it does not appear to be intended that this provision will be applied directly to local authorities but it is intended that it should apply where local authorities operate in conjunction with national regulators.

30. The Explanatory Notes state:

> The background to these provisions is the post-implementation review of the
> Regulators' Compliance Code which found that regulators had a tendency to regard the promotion of economic growth as subsidiary to their statutory duties, the Focus on Enforcement reviews which found

that businesses experience inconsistent or disproportionate enforcement decisions and Lord Heseltine's independent report entitled '*No stone unturned: in pursuit of growth'* which recommended that the government should impose an obligation on regulators to take proper account of the economic consequences of their actions.

31. In its current form, s. 88 provides:

> (1)A person exercising a regulatory function to which this section applies must,
> in the exercise of the function, have regard to the desirability of promoting
> economic growth.
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> (2)In performing the duty under subsection (1), the person must, in particular,
> consider the importance for the promotion of economic growth of exercising
> the regulatory function in a way which ensures that—
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> (a)regulatory action is taken only when it is needed, and
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> (b)any action taken is proportionate.

32. Section 89 provides for a Minister to specify by order the regulatory functions to which s. 88 is to apply. It will be seen that the potential scope of the provision is wide indeed. Section 90 provides for the Minister to issue guidance as to ways in which regulatory functions may be exercised so as to promote economic growth and as to how persons who have the duty may demonstrate, in a way that is transparent and accountable, that they are complying with it.

33. Section 91 provides the following definition of regulatory function:

> (1)In sections 88 to 90, "regulatory function" means—
> (a)a function under or by virtue of an Act or subordinate legislation of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to an activity, or

(b)a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which, under or by virtue of an Act or subordinate legislation, relate to an activity.
(2)In subsection (1)(a) and (b) the references to a function—
(a)include a function exercisable by or on behalf of the Crown;
(b)do not include—
(i)a function of instituting or conducting criminal proceedings;
(ii)a function of conducting civil proceedings.
(3)In subsection (1)(a) and (b) the references to an activity include—
(a)providing goods and services, and
(b)employing or offering employment to a person.

34. The Explanatory Notes state:

417. *Subsection (2)(b)(i)* expressly excludes from the definition of regulatory function the function of instigating and conducting criminal proceedings. However, this would not exclude the making of enforcement decisions prior to a decision to prosecute, such as a decision to investigate a matter or the reference to a prosecuting authority with a view to the prosecuting authority considering the commencement of proceedings in relation to the matter.
418. *Subsection (2)(b)(ii)* expressly excludes from the definition of regulatory function the function of conducting civil proceedings. The instigation of civil proceedings is not excluded.

35. Draft Guidance notes that this is a duty "to have regard" to the desirability of promoting economic growth. No particular weight is required to be attached to that factor – how much weight to attach will be a matter for the regulator. The Draft Guidance also states:

"In the context of achieving compliance, the growth duty does not legitimise non-compliant or illegal economic activity as this undermines markets to the detriment of consumers, the environment and legitimate businesses."

36. The Guidance states that:

> Local authority delivered regulatory functions will also not be specified. In many circumstances local authorities are also responsible for enforcing regulation on behalf of, or in conjunction with a national regulator. Regulatory functions of local authorities are covered by the requirements of the Regulators' Code, in particular Section 1. In that context regulators that work with local authorities should develop a common understanding of the shared outcomes that they and their delivery partners are working towards, including growth, and their contributions to these.

37. It is important to note that the fact that local authority delivered regulatory functions are not to be specified is a feature of the Draft Guidance but not of the Bill itself. The Bill is certainly broad enough to permit the Minister to specify local authority regulatory functions amongst the functions to which the Bill applies.

## Election

38. In an election year, there may be a heightened risk of statements by elected members in the form of policy promises or commitments which can give rise to legal challenge to subsequent decisions.

39. One risk that arises is a challenge based on pre-determination or bias. The paper on Governance prepared by Jonathan Auburn and Peter Mant sets out the current state of the law on predetermination and bias (at paragraphs 20 – 23). A claimant seeking to challenge a decision on the basis that the decision-making process involved an elected member who has expressed views about or campaigned on a

particular is likely to face an uphill struggle absent some further evidence of predetermination or a closed mind.

40. Another risk concerns legitimate expectations. In *Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change* [2014] EWHC 3677 (Admin), the claimant renewable energy companies sought to challenge a change of policy on the part of the Department for Energy and Climate Change by which the Department brought to a premature close a "levy" supported scheme which was due to run until 2017 but was now to close in 2015. Amongst other things, the claimants argued that that repeated statements of police from 2010 onwards that the scheme would not close before 2017 in order to protect commercial security gave rise to a legitimate expectation which could not be trumped by any policy arguments advanced by the Government in support of its change in stance. The challenge failed.

41. An important piece of the factual background, on which the Secretary of State placed significant weight, was that the levy supported scheme was always subject to an overall financial limit under which it was clear that if there was overspend in relation to some categories of supplier (because e.g. of greater demand under the scheme) then that would have to be balanced by cuts elsewhere (e.g. by bringing a scheme to an end more quickly than envisaged).

42. While articulating no new principle of law, Green J. gave a helpful summary of the law on legitimate expectations as follows:

> 71 A characteristic of a protectable legitimate expectation is that it acquires a sufficient degree of certitude. In Bhatt Murphy v Independent Assessor [2008] EWCA Civ 755 Lord Justice Laws stated ( *ibid* paragraph [43]) that it will constitute *"… a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured.* He also stated (paragraph [46]) that previous case law illustrated *"the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced"*. Lord Templeman in Preston [1985] AC 835 at pages 866 – 867

referred to *"conduct … equivalent to a breach of contract or breach of representations".* In Ex p Baker [1995] 1 AER 73 reference was made to a *"clear and unambiguous representation"* .

72 When what is objected to is the abrogation of a policy or a change of policy the starting point is that once a policy is promulgated and said to be settled there needs to be a rational ground for terminating it: Bhatt Murphy paragraph [34] per Lord Justice Laws. But there is no presumption that policy cannot change; on the contrary it plainly can do so and frequently does. So the issue become whether there can be identified a representation of sufficient certitude that the policy will *not* be changed regardless of surrounding circumstances. As to this a representation that a policy will continue until a specified date is not the same as a promise that it will <u>never</u> be changed even if circumstances change. If it were otherwise then an intention to pursue a policy for a fixed period would become set in stone and permanently unyielding to changes in relevant circumstances however compelling they might be.

73 And even if a sufficiently certain promise or representation has been made that a policy will continue in force and not be changed until a fixed date there is <u>always</u> a balance still to be struck between the retention of that policy and the strength of the ( *ex hypothesi* ) rational grounds which have arisen and which now are said by the Government to necessitate a frustration of that prior representation or promise. The test laid down by the Courts is whether the change of policy and the concomitant thwarting of the prior expectation amount to an abuse of power.

43. He went on to note the authorities to the effect that the size of the class of persons asserting the expectation and the extent of any detrimental reliance will also be relevant factors. At paragraph 76 he said:

"Finally, recognising that policy can change there is still a duty on the decision maker to weigh up the competing interests. There is no unfettered right to change policy (even for good reason) without putting those good reasons into the melting pot with the other countervailing reasons favouring retention of the policy and forming a rounded assessment of where the balance lies: See Ex P Coughlan (ibid) at paragraph [89] — the authority must *"weigh the conflicting interests correctly"* ."

44. What is useful in Green J's exposition of the doctrine is that it brings into focus that it is not sufficient to establish that statements were made which gave rise to a reasonable expectation that a policy would be maintained or benefit conferred; what must be shown is that having regard to whatever reasonable and relevant countervailing considerations are in play, the frustration of that expectation would amount to an abuse of power. Of course, what meets that threshold may be different in the context of a vulnerable individual as compared to the commercial operators engaged in a commercial venture who were the claimants in Solar Century Holdings, who may be expected to have been aware of the commercial risks they were taking.

45. On the facts, Green J did not accept that there was a legitimate expectation, on the basis that the claimants were or ought to have been aware of the systemic risk that, should demand for support under the scheme be greater than expected, the scheme might have to be curtailed in order to maintain the overall spending limit. In any event, even if there had been a legitimate expectation, it was not unreasonable to frustrate it. In a time of austerity the following points may be of particular importance:

> 86 First, the countervailing public interest flows in large measure from the macro-economic imperative need for the Government to impose its austerity budgetary discipline across all spending departments, which of course includes DECC. If DECC could not pray in aid of a change in policy its requirement to adhere to HM Treasury rules then it is hard to see why any other Government department would feel constrained to remain within the budgetary thresholds and limits imposed upon it. The right of HM Treasury to impose and demand adherence to the LCF is not challenged in this case and, in my view, is a public interest consideration of the highest order. Accordingly, when there was a material change of circumstance and the LCF disciplines kicked in this was a powerful reason why DECC was entitled to alter its policy.
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> 87 Secondly, adherence to the LCF is not just important from the perspective of budgetary discipline *across* Whitehall it is also important

> *within* DECC. DECC has to balance priorities within a limited budget. There will always be winners and losers amongst those whose activities fall within its remit. If more (unanticipated) money is spent on solar PV then less can be spent on other forms of energy generation, including renewables generation, or upon other objectives which may be equally, or possibly more, important. This in addition is a good and sufficient reason for DECC changing its policy.

46. As ever, however, it was also important that the Secretary of State had squarely faced the conflicting interests involved and was clearly able to demonstrate that the relevant factors had been taken into account:

> 89 Fourthly, the Secretary of State did conduct an overall balancing exercise between the conflicting interests. He looked at costs and benefits in the round. He adopted a fair procedure and took into account the concerns of those likely to be adversely affected. He tailor made the rule changes on grace periods to draw what he assessed to be a reasonable dividing line between those whose pre-accreditation investments would be protected and those whose investments would not and hence he took account of detrimental reliance. He took account of the fact that there was an indeterminate class of persons who might be affected but that on the other side of the balancing exercise were large but difficult to define groups.

47. It may also be useful to bear in mind the case of *R v Secretary of State for Education and Employment ex parte Begbie* [2000] 1 W.L.R. 1115. In that case, the Court of Appeal affirmed both (i) the proposition that statements made by a politician in opposition should not be considered to found a legitimate expectation because they do not amount to representations made on behalf of a public authority and (ii) elected politicians ought not to consider themselves irrevocably bound to put into effect manifesto pledges. Note, though, Sedley LJ's caution that a pre-election promise may be expressly adopted by a new administration once in office and may then be treated analogously to other representations by a public body.

48. Of course, whatever comfort can be derived from the dicta quoted above, the best means of avoiding the legitimate expectation type of challenges means

avoiding the sort of unqualified promise or representation that is apt to enable a claimant to get over the initial hurdle of formulating a claim. We should say, that as we hasten towards the hustings (at which unqualified promises will proliferate), in the year of Magna Carta's 800th birthday, it may be that hidden in the hurly burly of the fight some deep questions may arise.

49. How these profound questions about the exercise of increased local power, the raising of local revenue and the management of significant policy change are answered remains, at present, to be seen.

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