Confidential and legally privileged

NORTHUMBERLAND COUNTY COUNCIL: INTERNATIONAL PROJECTS

OPINION

1. I am instructed by Northumberland County Council ("the Council"). My client is the Council, but I have been instructed specifically to advise its chief financial officer ("CFO") in her capacity as such, in order that she may best decide how to perform her duties under Part VIII of the Local Government Finance Act 1988 ("LGFA").

2. Under LGFA ss 114 and 114A, the CFO is obliged to make a formal report where it appears to her that, amongst other possibilities, the Council or one of its officers or employees has made a decision which involves the Council "incurring expenditure which is unlawful". The CFO is considering the potential need for such a report in connection with certain activities undertaken by the Council under the rubric "Northumbria International Alliance" ("NIA"). This Opinion confirms, and in some respects elaborates upon, the advice which I gave orally in consultation on 22 April 2022.

The background

3. NIA was not a legal entity. Rather, it was the description used to designate a certain area of activity undertaken by the Council in collaboration with the Northumberland Healthcare NHS Foundation Trust ("the Trust"). In a business case appended to a report compiled in about January 2021, this collaboration is described as having been undertaken in order to "test the opportunities of *[sic]* commercial activities for health and care consultancy in international markets". From the materials which I have seen, this is an accurate description, at two levels.

4. First, it is a correct summary in the sense that what the Council and the Trust actually did was to seek contracts from persons located outside the United Kingdom under which they were to use their experience in the delivery of integrated health and social care services to provide the contractual counterparties, or those parties' own clients, with advice of one kind or another (and perhaps also linked services such as strategic planning, project management, and training) to assist with the delivery of such services in the non-UK location in question.

5. Secondly, it is also accurate to describe the NIA activities as commercial ones. On the information I have seen, I have no doubt that the Council's predominant, and indeed perhaps its sole, purpose in pursuing the NIA collaboration was to generate a financial return which could be deployed to help fund its normal activities as a local authority (the same probably goes for the Trust as well, though that is of limited significance for present purposes).

6. For example, when the Council appointed a Director of International Projects and System Transformation in 2017, the report supporting the creation of the post referred to a "key expectation" being "that a profitable business growth will be accelerated and an increased margin delivered in order to re-invest in Northumberland services." The text of a speech given by the Leader of the Council to a reception at the House of Lords in June 2018 is to similar effect. A briefing by the Chief Executive to an informal Cabinet meeting in September 2019 described NIA as having "the strategic purpose of gaining entry and securing sustainable share of a growing global health and care trade market", and as having been "born from the desire to share innovative international best practice whilst delivering commercial income to [the Council and the Trust]." The January 2021 report to which I have already referred recorded that NIA's original 5 year strategic objectives had been "to develop income and brand". Also in January 2021, a report by the Chief Executive to the Council's Audit Committee set out the

background history in terms which repeatedly described the nature of the exercise, from discussions in 2016 onwards, as "income generation".

7. These examples could be multiplied, and the theme of commercial gain is consistent across the documentation. By contrast, I have seen nothing which suggests that, from the Council's perspective, NIA ever had any other real and substantial purpose. At most, the papers contain some passing references to the altruistic sharing of best practice, to projects on which NIA was working as being likely sources of job creation where they were located, or to NIA as providing an opportunity for career progression and upskilling for Council staff, and generating "international respect" for the Council. But such matters were evidently treated as being in the nature of desirable but peripheral side effects.

8. Further, there is no doubt that decisions (whether or not they were lawfully made by properly authorised persons) were in fact taken to pursue these activities, including by way of entering into contracts with third parties, and that these decisions involved the Council in incurring expenditure.

9. Thus, in 2017 or possibly early 2018[1] the Council entered into a contract with [redacted] Company for the provision of "healthcare consultancy services" in connection with the proposed development of certain health and care facilities in Dubai, and it appears that this contract was performed in the course of 2018. It is said to have yielded a net profit (which was apparently used to offset NIA start-up costs) of approximately £100,000 on a gross contract value of about £200,000.

10. There have also been a number of contracts with companies belonging to the [redacted] of China: a feasibility study carried out in 2019 and early 2020 and said to have generated some £236,000 profit on a contract

[1] The copy in my papers bears an uncompleted 2017 date, and has been signed on behalf of [redacted] but not the Council.

value of about £600,000; and then a framework agreement for the provision of future services, concluded in June 2020, under which a contract was immediately called off for scheme design and clinical modelling services relating to a proposed hospital in Fujian. This contract was scheduled to be, and presumably was, completed by April 2021 in return for gross payments amounting to £2 million, and it is said that the Council incurred expenditure of just under £1.2 million in performing the contract (principally by way of payments to sub-contractors). However, further hoped-for call-off contracts have not materialised, at any rate to date. Nor, it appears, have further contracts been secured. A share of the net profits will have been due to the Trust, and I am instructed that the CFO and her staff have found it less than straightforward to determine clearly what costs should be allocated to these contracts, and exactly what income has been received. However, the precise figures are beside the point for present purposes. What matters is, firstly, that the Council has needed to incur significant expenditure to perform the contracts (so bringing ss 114 and 114A into play); and secondly, that the relevant activity was largely if not wholly completed before the formation of the trading company referred to in paragraph 13 below – the significance of this will become apparent.

The issues

11. There are two basic questions which have been raised with me. One is whether the Council had the statutory power to engage in these NIA activities at all. If it did not, then it is to my mind self-evident that the expenditure incurred solely for the purpose of those activities must have been unlawful expenditure. The second question concerns an allowance paid to the Council's Chief Executive in connection with her responsibilities concerning NIA.

The Council's power to engage in NIA activities

12. A local authority such as the Council has a very broad source of *vires* in the shape of the general power of competence under s 1 of the Localism Act 2011 ("GEPOC"). It extends in principle to doing things outside the United Kingdom: see s 1(4)(a). However, even this power is not without limits. In particular, if an authority wishes to use GEPOC to do things for a commercial purpose, it must act through a company: see s 4(2). This does not mean that the authority is required to use a company as its agent; rather, the authority will establish or participate in a company, and the company will undertake the trading or other relevant activity.

13. The problem in this case is that the Council did not even form a company until a late stage, and certainly did not act through a company until very late on, if at all. It was the Council itself which was party to the relevant contracts; it undertook (directly or through sub-contractors) whatever part of the work was not done by the Trust; it paid the bills; and it received the income. Although there seems to have been an intention from a fairly early stage to establish a trading company, this was not acted upon until a company called Northumberland Integrated Consulting Ltd ("NICL") was formed in about March 2021. Another company, Northumberland Enterprise Holdings Ltd ("NEHL"), had been formed rather earlier, in about September 2020, but it appears that this was intended as a holding company, and certainly that no actual use was made of NEHL before 2021. By the time that NICL was actually functional, the active life of the relevant contracts appears to have been largely at an end. At any rate, the subsequent formation of NICL cannot change the fact that between about 2018 and 2020 (and perhaps for longer than that) the Council pursued the NIA activities in its own right and without any company being involved on its side.

14. This being so, the Council did not, at material times, act through a company. Yet, as I have already indicated, I have no doubt that it was acting for a

commercial purpose. The inevitable corollary is that its decisions and actions cannot have been authorised by GEPOC (nor by the overlapping though somewhat narrower s 95 of the Local Government Act 2003, which is a trading power, but which also requires the use of a company).

15. If there were some other power which authorised the Council's NIA commercial activities, the inability to rely upon GEPOC would not matter – s 4(2) of the Localism Act only applies to the use of GEPOC, and GEPOC is not exclusive of other powers. But at present I am unable to identify any such alternative source of power, and nor indeed does anyone else appear to have done so at any stage, save in the respect to which I allude at paragraph 19 below. In particular, I note that:

    (i) The various contracts involved the Council in providing services directly to overseas commercial undertakings. Either the Council was the sole contracting party, or the Council and the Trust contracted jointly. So the Council's activity cannot be characterised as an exercise in providing services to the Trust or to any other UK public body.

    (ii) That necessarily precludes reliance either upon the Local Authorities (Goods and Services) Act 1970, or upon either s 74(1) or s 74(3) of the National Health Service Act 2006, quite apart from a number of other reasons why those provisions would not assist here.

    (iii) Additionally, I cannot see how these arrangements would fall within the joint working provisions of s 75 of the 2006 Act, given the limited nature of the functions to which the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 apply.

    (iv) In the light both of caselaw on s 111 of the Local Government Act 1972, and of the express but restricted provision now made for

trading activities in the legislative scheme, it is not realistic to suppose that s 111 could have authorised these activities.

(v) From as early as 2019[2], the Council appears to have been in receipt of advice to the effect that a company needed to be incorporated to carry on these activities. The delay in forming NICL and in seeking to novate contracts to it does not appear to have been the result of anyone believing that an alternative lawful approach existed. Whatever the reasons for that delay, and whether they were good or bad[3], the Council continued to engage in the relevant commercial activities meanwhile.

16. In my opinion, therefore, it is clear beyond serious argument that the Council was acting unlawfully when it entered the contracts in question, and also that expenditure incurred purportedly pursuant to those contracts was itself unlawful.

17. I should record that I have seen a brief set of instructions to counsel, apparently from some time in 2021, in which counsel (I understand Mr Nikolaus Grubeck of Monckton Chambers) was asked to advise on whether the Council had acted *ultra vires* in certain relevant respects. I have also seen a draft letter from the Council to its external auditor (I do not know whether this letter was in fact sent), which I am told was settled by Mr Grubeck. The letter takes two points by way of an argument that the

[2] Advice from Ward Hadaway, solicitors, in November 2018 had recommended the use either of a company or an LLP, but apparently without appreciating the potential *vires* issue that an LLP could not be used. However, a Co-operation Agreement concluded between the Council and the Trust in December 2018 contemplated that the supply of services to third parties would be through a company wholly owned by the Council. Further advice from Ward Hadaway in June 2019 on proposed incorporation of the NIA activity specifically referred to s 4 of the Localism Act.

[3] I have noted what is said in a document, I think prepared by the Chief Executive, headed "Narrative for discussion Integrated Care Consultancy March 2021", but it is not the function of this Opinion to pass comment on the reasons given for the failure to put a company in place earlier.

absence of a company did not mean that the Council had acted *ultra vires*. Before dealing with those points specifically, I should make clear, first, that I have seen no actual advice from Mr Grubeck (to settle a document making an argument does not imply that one regards that argument as objectively correct); and secondly, that the history of events set out in his instructions appears to me, in the light of the documentation which I have seen, to represent a materially incomplete and in some respects inaccurate account of the history. I note also that the instructions seem to have had in mind an argument that the Council could not have been acting for a commercial purpose until the point arrived at which it had actually made an overall profit. But any such argument (which was not adopted in the draft letter) would be plainly wrong – an authority's purpose is a function of what it is trying to do and why, and it does not depend on whether or when its objects are realised.

18. Paragraph 6 of the draft letter seeks to suggest that, although the Council's dominant purpose ultimately became a commercial one (seemingly at some point in 2020, according to the analysis in the letter), that was not initially the case, and that earlier on NIA had been "driven by aims of international information exchange, learning, and the improvement of public health as much as by any commercial opportunities." All I have to say about that is that, on the basis of the documentation which I have seen (which I suspect is rather fuller than was made available to Mr Grubeck), I do not regard that as a remotely tenable proposition.

19. Paragraph 7 of the draft letter suggests that the relevant activities were authorised by s 2B(1) of the National Health Service Act 2006, which imposes a duty (and hence also confers a power) upon local authorities to take such steps as they consider appropriate "for improving the health of the people in its area". The letter points out that, by virtue of s 2B(3), such steps expressly extend to providing training for persons working in the field of health improvement. It suffices to say that, if there is any evidence that

the contracts referred to in paragraphs 9 and 10 above, or any related activities by NIA or the Council, were undertaken with a view to improving the health of people in Northumberland, I have not noticed that evidence, and I would struggle to envisage (given the nature of the contracts) how that could have been the case. The mere generation of additional resources for the Council, some of which might potentially have been deployed in health-improving activities, obviously does not suffice.

20. Accordingly, nothing in the letter drafted by Mr Grubeck changes the view that I have expressed in paragraph 16 above. Since this Opinion is concerned with whether the CFO needs to make a report under s 114 or s 114A, I shall not spend time here looking at precisely what the potential legal consequences of the unlawful activity I have identified might now be, although I have had some initial discussions about that with my Instructing Solicitor and the CFO, and will advise further as required[4]. In broad terms, it is fair to say that since the Council appears to have been a net beneficiary of the arrangements, albeit on a modest scale, it is unlikely to be in the Council's own interests to attempt any general unwinding (even if that were possible in principle), whilst there are a number of reasons why it may also be unlikely that other parties would consider any attempt to reopen the transactions to be a worthwhile exercise.

<u>The NIA allowance paid to the Chief Executive</u>

21. I now turn to the issue of the allowance paid to the Chief Executive. In this respect the factual history so far available to me may not be wholly complete. However, I am instructed that it can be said that in the calendar year 2018 and in each of the subsequent years to date, the Chief Executive has been paid, in addition to her salary, an allowance at the rate of £40,000 per annum, and that during that period the whole of this cost has been met by the Council (a point which it is necessary to make because, as a result

[4] The same applies to the allowance paid to the Chief Executive, where somewhat different considerations may arise.

of certain joint working arrangements, the Chief Executive was, until May 2021, also a salaried officer of the Trust).

22. Although in one sense part and parcel of the Council's NIA activity, the payment of this allowance raises some discrete issues. I would not necessarily regard a payment of salary made by a local authority to an employee as unlawful simply on the basis that the activity in which the employee was required to engage was one not being lawfully undertaken by the authority. There may be more room for argument about this if one is dealing, as here, with an allowance which related specifically and entirely to an unlawful activity. However, I do not think it is necessary to embark upon this potentially difficult topic, because there appears on present information to be a more fundamental problem with the payment of the allowance here.

23. Any payment made to the Chief Executive needed, in order to be lawful, to fall within s 112 of the Local Government Act 1972, which allows an authority to appoint officers "on such reasonable terms and conditions, including conditions as to remuneration, as the authority appointing [the officer] think fit." By virtue of s 112(2A), this power is subject to s 41 of the Localism Act, which in turn requires any determination relating to the remuneration or other terms and conditions of a chief officer to be made in compliance with the authority's pay policy statement under s 38 of the Localism Act.

24. I am unable on present information to express any concluded view as to whether the £40,000 p.a. allowance was, when it was paid, substantively "reasonable" within the meaning of s 112. That would have been something for the properly authorised decision-maker within the authority to judge, subject to normal judicial review principles. The Chief Executive's total salary, excluding the allowance, was £190,000 at the end of 2017 (the Council and the Trust each separately contracted to pay her a salary of half that amount, and she was supposed to devote half her working time to each

body). An allowance of £40,000 was therefore, in proportionate terms, a very substantial addition to her remuneration. It would, I think, be somewhat unusual for a senior local authority employee to receive such a substantial additional amount for taking on overall managerial responsibility for a particular area of activity – especially where, as here, another full-time senior officer (the Director of International Projects) had been appointed with specific responsibility for the Council's NIA activities and related matters. But I do not think that it can be ruled out that, for some or all of the relevant period, there might have been some rational justification for granting at any rate some form of allowance. Were it necessary for any purpose to come to a definite conclusion about this one way or the other, further investigation would be required.

25. The more clear-cut point, and a fundamental problem, is that so far as investigations to date have been able to identify, the allowance was not paid as the result of any decision taken by a properly authorised decision-maker. At the start of December 2017 the Chief Executive took up that position substantively, having previously acted for a number of months as Interim Chief Executive. She was issued with a statement of terms of employment which identified her salary as being £135,000 per annum. It is evident that this was the sum of £95,000 (i.e. half of £190,000 – see paragraph 24 above) and £40,000 (the allowance), and the statement of terms did refer specifically to the salary as including a £40,000 international allowance. However, the decision to appoint her as Chief Executive had been made by the full council on 1 November 2017, and as part of that decision it was specifically resolved that her remuneration would be as outlined in a report from the Leader of the Council. The report referred to the proposed salary of £190,000, gave a brief justification for that level of payment, and referred to the post being a 0.5 wte one under joint arrangements with the Trust. But it made no reference to any international allowance. So the remuneration authorised by the full council on 1 November did not include any such allowance.

26. I note that an earlier report to full council, dated September 2017, and seeking agreement to a revised executive management structure, set out a high level summary of areas of responsibility for the posts in the proposed new structure, and one of the bullet points for the Chief Executive read "Commercial international lead for [the Council] and System Transformation support with Northumberland Commissioning Group (CCG) (separately remunerated)." This passing reference to separate remuneration in the September 2017 report is in my view irrelevant: since it refers to no particular amount, it cannot have amounted to authority to pay an allowance of a specific amount[5]; the wording is at best ambiguous as to which authority was paying or would pay that "separate remuneration"; and it must in any event be regarded as superseded by the specific remuneration decision taken on 1 November 2017.

27. I have seen e-mails passing between the Council's Executive Director of Human Resources and Organisational Development ("the HR Director"), and a [redacted] Manager tasked with making the payment arrangements, between 4 and 7 December 2017. It is clear that the HR Director initially understood (one imagines from what she was told by the Chief Executive herself) that the international allowance was something already being paid by the Council, and to begin with she simply instructed her colleague that it should remain in place. However, the latter pointed out that the Council was *not* currently paying any such allowance – rather it was "paid on the NHS payroll". After what appears to have been a further meeting with the Chief Executive, the HR Director gave the instruction that the Council was to pay the £95,000 plus £40,000. I am informed that this is said to have been done with the approval of the Council's then Leader.

[5] The only specific amounts set out for the Chief Executive in the new structure were those in Appendix 2 to the report – gross salary of £186,915, and cost to the Council including on-costs, of £123,081. It will be immediately apparent that these figures did not include a £40,000 allowance payable by the Council on top of its half share of the gross salary.

28. So it can be seen that there was in effect a decision by the HR Director that the Council should pay the allowance, and it may be assumed on present information (although the documentary material before me does not as yet establish this) both that the allowance was something previously paid to the Chief Executive in her capacity as an officer of the Trust, and that its payment by the Council is something that the Leader approved. Nonetheless, I do not think that this represented a lawful basis for paying the allowance. There are four interconnected reasons why I take that view.

29. First, there is no doubt that a positive decision on the part of the Council to pay the allowance was required (and, of course, such a decision would have had to meet normal *Wednesbury* standards of decision-making). The assumed fact that the Trust was previously paying the allowance was in this respect irrelevant. There was no transfer of any contract of employment from the Trust to the Council. If the Trust was already properly paying the allowance, that might have been an argument for the Council paying a similar allowance, or a half share of it, but that was not something which could happen automatically.

30. Secondly, matters relating to the terms and conditions of employment of officers are non-executive decisions under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000: see Schedule 1, Item I37. It follows that, whilst the Leader undoubtedly had the authority to take certain executive decisions under the Council's constitution, the Leader by himself cannot have had the power to decide upon or approve the allowance. From a legal perspective, his involvement is irrelevant.

31. Thirdly, I have looked at the Council's published pay policy statements for the financial years 2017/18 to 2021/22. There is no difference between the 2019/20 to 2021/22 statements which is material for present purposes, and only minor differences in the 2017/18 and 2018/19 statements.

32. The statements need to be considered against the statutory background that, under s 38(4)(a) and (c) of the Localism Act, a pay policy statement must include, amongst other matters, the authority's policies relating to "the level and elements of remuneration for each chief officer", and "increases and additions to remuneration for each chief officer". Although the Act does not require actual numerical amounts to be determined as part of the policy (as the statutory guidance confirms), it is plain that the statement should identify what elements a chief officer's remuneration will contain, and how those elements will be fixed.

33. The Council's pay policy statements provide (see paragraphs 6 and 10) for the full council to determine salary bands, and for senior staff to be appointed to a spot point within their salary range, with the possibility of incremental increase within the range as a result of performance review. By itself, this evidently does not contemplate any additional payment for particular responsibilities. Paragraph 15 (in the earlier versions) and paragraph 14 (in later versions) does assume that chief officers (who include the Chief Executive) may receive fees and allowances other than basic salary, but this refers to the approved salary package on appointment. Even if this general provision is sufficient to comply with s 38(4)(a) of the Act, which may be questionable, it clearly does not contemplate the post-appointment addition of further allowances.

34. Paragraph 26 of the 2017/18 document (paragraph 27 in 2018/19 and paragraph 24 in later versions) provides that:

> "To ensure the Council has sufficient flexibility to cope with a variety of circumstances, foreseeable or not, the Head of Paid Service, or an individual nominated by the Head of Paid Service, may agree the use of market supplements or other such mechanisms for individual categories of posts, individual posts, or individual employees."

35. Again, I do not think this provision could justify what seems to have occurred in this case. It would defeat the whole object of having a formal

pay policy statement if additional allowances of unspecified amount could be paid at will. This paragraph must be confined to extra payments which need to be made in order to meet staffing requirements in current market conditions, i.e. "other such mechanisms" must be read as being limited to payments of a kindred nature to market supplements. I have seen nothing to suggest that any such rationale underpinned the allowance now in question. Quite apart from that, the Council's Chief Executive, under its current constitution, also occupies the statutory role of Head of Paid Service. It cannot be the case that the pay policy statement is to be read as permitting the Chief Executive herself, or a necessarily more junior officer nominated by her, to increase her own remuneration.

36. My conclusion is that (leaving aside the special case, irrelevant here, of returning officer fees) no allowance on top of salary could be paid to the Chief Executive consistently with the pay policy statement as it has stood at the material times. Had it ever been considered appropriate to pay such an allowance, the pay policy would in effect have needed to be amended, which would have required a decision of the full council.

37. Fourthly, it is necessary to consider the Council's constitution, and specifically the extent to which the full council had at the material time in fact delegated its power to determine the terms and conditions of the Chief Executive. The starting point, of course, is that if a non-executive function has not been delegated, it is only the full council which may exercise that function.

38. I have been provided with the constitution both in its current (February 2021) form, and in the version adopted on 1 November 2017. I have not identified any difference between them which is material for present purposes, although the numbering of some of the provisions is different. For convenience I refer below to the current version.

39. The only specific provision of the constitution which I have identified concerning the fixing of terms and conditions of service generally, or of remuneration in particular, is paragraph 9.1(g) of Part 4, which makes decisions on employee terms and conditions a matter for the Chief Executive, in conjunction with a nominee of the HR Director. Unsurprisingly, however, decisions relating to the Head of Paid Service (i.e. the Chief Executive herself), and indeed other Executive Directors, are expressly excluded from this delegation.

40. The terms of reference of the Staff & Appointments Committee ("SAC") are contained in Part 3 Section 22 of the constitution. Item (a) is to consider and determine "the overall scheme and policies in relation to employee terms and conditions" – that evidently does not cover a decision about what an individual should be paid. Item (b) is to "determine appointments" of chief officers (and deputies). It is debateable whether that includes the setting of remuneration upon appointment (it probably does) or subsequent changes in remuneration (it probably does not). Even if the SAC does have power to deal with changes to chief officer remuneration under item (b), item (c) draws a clear distinction between chief officers generally on the one hand, and the Head of Paid Service on the other – in the latter case, the role of the SAC is limited to making recommendations to the full council on the appointment. My conclusion is that the SAC would have had no authority under the constitution itself to decide that the NIA allowance should be paid.

41. The constitution does not stand alone here. As I have noted above, when the Chief Executive was appointed by the full council on 1 November 2017, it was resolved that her remuneration would be as outlined in the report before the meeting. It was also resolved that such remuneration would be "subject to ongoing review by the [SAC]."

42. In my view the full council could in principle delegate decision-making in this matter to the SAC even without the constitution being amended to

reflect that delegation. There is nonetheless some room for debate as to what the resolution meant – that is, whether the SAC's task of "reviewing" the Chief Executive's remuneration extended to making changes to that remuneration, or whether it was merely to review the matter so that recommendations could be made to the full council as contemplated by the constitution. In any case, the SAC could not have been given authority to depart from the pay policy statement. But apart from any of that, the more fundamental point is that, so I am instructed, there appears to be no sign of the matter ever in fact having been formally considered, and a decision taken, by the SAC or a properly constituted sub-committee of it.

43. For completeness, I note that Executive Directors are given a general delegated authority, under Part 4 paragraph 6.1(d) of the constitution, to "put in place staffing and management arrangements for the delivery of services", this applies only within their own areas of responsibility – see paragraph 4.1. I can see no serious argument that this provision would have authorised the HR Director to vary the Chief Executive's remuneration. More fundamentally still, when the HR Director was dealing with the matter in December 2017, the full council had just resolved that that remuneration should be as set out in a particular report, which did not provide for such an allowance. The HR Director, who presumably overlooked or was unaware of that fact, cannot possibly have been entitled to do something which in effect contradicted what the full council had decided.

44. In the absence of any current evidence that the NIA allowance was approved by the full council (or even by the SAC), it must follow that there has never been a decision properly taken on behalf of the Council to pay that allowance, and that the payment of it to date has accordingly amounted to unlawful expenditure.

The CFO's reporting duty

45. I have concluded that all the expenditure about which I am asked to advise was unlawful. In the circumstances, and subject to anything which may emerge during the required statutory consultation, it seems inescapable that the CFO must make a statutory report or reports. The reporting function under ss 114 and 114A is by way of a duty that must be fulfilled when the conditions arise for it to apply. Even if there might be cases in which the incurring of unlawful expenditure could properly be treated as something *de minimis* and to be disregarded, the present case cannot be regarded as falling into that category. The sums in question are material, and the reasons why the expenditure was unlawful are far from technical[6]. Even if past income and expenditure were by some means now to be re-routed through NICL (probably not easy to achieve), that would not alter the fact that the relevant expenditure had been unlawful when it was incurred, and nor would it solve the problem with the allowance paid to the Chief Executive.

46. There is some room for debate as to whether a report in this case would need to be made under s 114, s 114A, or both. Since the unlawful allowance related to a non-executive matter, and the unlawful contracts to an area of executive decision-making, it may well be that in theory the report in respect of the former should be made under s 114, and the report in respect of the latter under s 114A. However, I understood from the consultation that the CFO's present intention was to produce a single report to be placed before both the Cabinet and the full council. Given that the issues arise from the same course of conduct, and that elected members will need to have a proper understanding of the full background, this seems eminently sensible,

[6] The reasons why it is important for payments to senior officers to be properly authorised are self-evident. In the case of the commercial activity, the reasons for the statutory requirement to act through a company include the policy intention that corporation tax should be payable on the profits of such activities, and probably also that there should be that clarity of accounting treatment which seems to have been lacking in the present case.

albeit that Cabinet and full council will need to have in mind their respective spheres of responsibility in deciding how to respond to the reports.

47. Although my specific remit in this case is to advise the CFO, I agree with the suggestion that has been made to me that the logic of what I have said above is that the Council's monitoring officer's reporting duty under s 5 and/or s 5A of the Local Government and Housing Act 1989 must also have been triggered, on the basis that there has been a contravention of an enactment or a rule of law. Engaging in commercial activity without statutory power to do so can be regarded as a contravention either of s 4 of the Localism Act, or of the rule of law that statutory bodies must act within the powers given to them by statute. Making unauthorised payments to an employee in circumstances such as this is similarly a contravention either of s 112 of the Local Government Act or of the *ultra vires* rule.

48. The CFO is required under the LGFA to consult the monitoring officer when preparing a report. In such circumstances, I see no reason why the monitoring officer's own reporting duty cannot in substance be discharged by the provision of appropriate comments within the CFO's report (e.g. to the effect, if this is the case, that the monitoring officer agrees with what the CFO has said, considers that the facts set out amount to a s 5 or s 5A contravention, and wishes the comments to be treated as a report by the monitoring officer).

CONCLUSIONS

49. In my opinion it is clear that the Council in this case engaged, otherwise than through a company, in activities undertaken for a commercial purpose. It had no power to do so, and the expenditure incurred specifically for the purpose of those NIA activities was therefore unlawful.

50. Further, the Council's Chief Executive was paid an allowance on top of her normal salary on account of responsibilities undertaken in connection with

NIA. It is unlikely that the decision to pay such an allowance could have been validly taken by any body other than the full council. Certainly there is no evidence, that I have so far seen, of the allowance being decided upon or approved by any body or person who might even arguably have had the power to do so. Accordingly, the payment of the allowance also amounted to unlawful expenditure.

51. It is evident that the CFO must make a statutory report or reports on these matters. There may be other issues to consider as to the present consequences of these past transactions, but that is not the subject of this Opinion.

NIGEL GIFFIN QC

11KBW

15 May 2022

11 King's Bench Walk
Temple
London EC4Y 7EQ