

Local authority leisure provision in a time of Covid

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16 July 2021

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As restrictions ease further from 19th July, it is a good time to take stock of the contractual position between many authorities and their operators.

How did we get here?

As the legal, economic and social impact of the pandemic hit the UK in March 2020, the Cabinet Office ([PPN 02/20 \(March 2020\)](#)) and Local Government Association ([Options for councils in supporting leisure providers through Covid-19, 29 April 2020](#)) advised authorities to:

- review their 'at risk' suppliers, and commit to paying them until at least June 2020
- support suppliers' cash flow. For example, by paying in advance rather than arrears, and paying invoices on receipt
- provide appropriate contractual relief from mechanisms such as KPIs.

The aim of the guidance was to encourage authorities to consider their supply chain, and how it could best be protected so that the services, and healthy market competition, remained available to them at the end of the crisis. As government moved to the next stage of its response to COVID-19, guidance ([PPN 04/20 \(June 2020\)](#)) encouraged the public sector to take steps back to some form of contractual normality. Whilst recognising that relief continued to be appropriate in some cases consideration of a sustainable model, or contractual termination where a contract might be unviable in the long-term, was encouraged.

Importantly, and contrary arguments which some authorities faced, there was no general legal obligation to make any payment to suppliers in excess of that required by the relevant contract. But, in the leisure sector, many councils made a commercial decision to support their operators – not least because local and affordable leisure provision is crucial to many authorities' health and wellbeing strategies. This support took the form, for example, of moving away from a guaranteed management fee, grounded in the base case submitted as part of the operator's bid, to an 'open book' position guaranteeing payment for actual losses and/or offering an interest free loan.

Lessons learned

A notable feature of guidance was that authorities and operators were enjoined not to fall back on legal remedies (such as the use of force majeure, relief events, or change in law provisions). Despite this, at least one case ([Westminster City Council v Sports and Leisure Management \[2021\] EWHC 98 \(TCC\)](#)) did go to the High Court over interpretation of the change in law mechanism. The Sport England standard leisure operating contract drafting aims to put the operator in a 'no better, no worse' position in the event that certain categories of legislation (which would include the Coronavirus Act 2020) have an impact on the operator's bidding assumptions. In the Westminster case the operator sought compensation but, because of the specific way in which the document was drafted, the court held that the

management fee due to the council could be reduced to zero, but could not go beyond this to become a positive payment to the operator – even if that was required in order to reach a ‘no better, no worse’ position.

Although specific to that operating contract, this outcome does illustrate:

- that we cannot assume that leisure contracts follow the Sport England standard form – drafting can often be tweaked, with significant implications; and
- the importance of ensuring that the drafting reflects the parties’ intentions: particularly in areas of the operating contract that are easy to overlook such as the change in law clause, and resulting financial adjustment provisions, which can be seen as ‘low likelihood, but high impact’.

The importance of operators and their customers working in partnership with their providers has also been underscored by the crisis and the subsequent commercial negotiations. Authorities, and their stakeholders, have unsurprisingly been more willing to offer support where the pre-existing relationship was strong and based on robust contract management processes demonstrating that value, flexibility and quality of the services offered to residents.

Moving forward

A small number of leisure contracts may no longer be viable. As noted above, government guidance encourages authorities to consider this as a possible route forward, and the Local Government Association has issued detailed guidance ([A guide to the emergency insourcing of leisure services, June 2021](#)) to councils who may need to consider this when all else has failed.

But, in most cases, authorities will be looking to move from temporary support arrangements towards a greater level of normality. There is no standard approach. However, authorities will wish to consider a clear trigger for moving from any ‘support period’ to the position, similar to that under the contract prior to the pandemic, with a guaranteed management fee and operational and commercial risk resting with the operator.

Determining an appropriate trigger event may not always be straightforward. For example, between the two poles of closure of leisure facilities on one hand, and the ‘old normal’ on the other, there is a nuanced area of low-level restrictions, guidance and long-term, pandemic-induced changes in customer behaviour. An operator might argue that, notwithstanding relaxation of restrictions on 19 July, there is a continued impact on the business model from guidance and the COVID secure safety measures recommended by guidance, or merely expected by users.

An operator might also believe that changes in behaviour (such as customers becoming more accustomed to exercising at home or outdoors) mean that, even as all legal restrictions and guidance fall away in months (and perhaps years) to come, the original base case and management fee are no longer sustainable. As a result, they may seek to revise the base case by agreement even as any support period draws to a close. If this cannot be agreed, consideration of whether the arrangement is viable may be required. Of course, the authority will have a greater incentive to accept revised, long-term proposals from an operator where the best offer likely to be received in the current market is likely to be inferior to that offered by the operator, and the idea of a long-term relationship with an unwilling operator is not appealing. In such cases, authorities may wish to consider an extension of temporary arrangements, with a reversion to a normal management fee, or a fresh procurement which seeks a management fee from the leisure market, as operators recover.

There is no single, clear answer to these issues for authorities as they seek to put leisure contracts on a more normal and sustainable footing. However, it will be important to consider the viability (or otherwise) of the contract given the condition of the operator, whether superior offers might be available from the wider market, and an appropriate balance of financial risk and reward moving forward.

Ensuring that these issues are taken into account will give authorities the best opportunity to deliver vital leisure services for their stakeholders as we move from crisis to normal or, at least, the ‘new normal’.

We have recently advised numerous local authorities on these issues – for more information please contact [Craig Elder](#).

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