

Appendix 1 – Email from Jan Willis Section 151 Officer to Cameron Waddell External Auditor 8 November 2021

From: Jan Willis <[REDACTED]>

Sent: 08 November 2021 12:25

To: [REDACTED]

Cc: [REDACTED]

Subject: Confidential and Legally Privileged - International consultancy - legal position

Dear [REDACTED]

I write further to your ongoing work on preparing an external auditor's opinion in respect of the Council.

You have expressed some reservations in respect of the Council's international consultancy work. In particular, you have indicated that you may qualify your value for money opinion on the basis that this work may have been ultra vires, because it was "purely commercial and not in a company". In that context, you have asked the Council to explain why it considers that it has complied with the legal requirements in this respect.

In outline, the Council's view, which is informed by QC's advice, is as follows:

1. Section 1 of the Localism Act 2011 provides that a "local authority has power to do anything that individuals generally may do", including for a commercial purpose. Section 4 of that Act imposes certain limits on doing things for a commercial purpose in exercise of that power. In particular, section 4(2) requires that "where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company."
2. The meaning of "commercial purpose" in section 4 was considered by Mr Justice Warren, sitting in the Upper Tribunal, in R (The Durham Co.) v HMRC and HM Treasury [2017] STC 264. He stated at paragraph 63 that "it is a question of fact, in any particular case, whether the [local authority] is carrying out the relevant activities for a commercial purpose or otherwise than for a commercial purpose."
3. This approach was cited with approval by the High Court in R (Peters) v Haringey LBC [2018] EWHC 192 (Admin). Mr Justice Ouseley went on to hold, at paragraphs 135-136, that "[section 4] requires an overall view to be taken of "the thing" being done, and of the overall purpose for which it is done", that being the "primary" or "dominant" purpose. He noted that "if the purpose which is said to be commercial is simply an incidental or ancillary purpose to the non-commercial purpose, it is correctly seen as part of the non-commercial purpose, and not as a commercial purpose at all."
4. Mr Justice Ouseley also made clear that "[section 4] should not be interpreted so as to bring in a requirement for a company to be used where no such requirement had previously existed in respect of the same activity" (paragraph 117). He emphasised that "I do not consider that Parliament, which had already accepted that certain Council activities should be undertaken through a company, intended that those other "things" that could be done already without a company, now had to be done through a company, if they were to be done at all" (paragraph 132).

5. Both of these findings are relevant in respect of the Council's international consultancy work.
6. First, the Council's international activities did not initially have a dominant commercial purpose. These started out as an exploratory venture, driven by aims of international information exchange, learning, and the improvement of public health as much as by any commercial opportunities. Over time, the commercial aspect of the exchanges became more pronounced. Eventually the Council considered that the dominant purpose had become a commercial one and therefore, on 17 September 2020, incorporated a company to undertake any international consultancy work. It does not follow, however, that all prior activities had a dominant commercial purpose from the outset. As such, the absence of a company before 17 September 2020 does not mean the activities were ultra vires.
7. Second, and in any event, the Council's international activities are activities that it could already undertake without a company prior to the Localism Act 2011 coming into force:
 - a. Section 2B(1) of the National Health Service Act 2006 provides that "each local authority must take such steps as it considers appropriate for improving the health of the people in its area." Subsection (3) makes clear that such steps include, amongst others, "providing or participating in the provision of training for persons working or seeking to work in the field of health improvement."
 - b. This covers the kind of health focused international learning and information-exchange projects at the heart of the Council's foreign efforts. The power to carry out such projects therefore existed prior to the Localism Act 2011.
 - c. In the circumstances, section 4 of the Localism Act 2011 imposed no new compulsory requirement for a company to be used.
 - d. The fact that the Council ultimately did decide to undertake its international work through a company does not change that position. In any event, as explained above, that decision reflected the evolving purpose of its international activities.
2. 8. In light of the above, the Council considers that none of its international work was ultra vires.

I hope this assists you in the preparation of the opinion. I would be grateful if you could let me know if you disagree with any of the Council's analysis summarised above and as always, I would be happy to discuss if that would be helpful.

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