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IN THE MATTER OF:

**POWERS OF SUBSTITUTION AND REPLACEMENT ON LOCAL
AUTHORITY COMMITTEES**

OPINION

INTRODUCTION

1. I am asked to advise Southampton City Council ("the Council") on its powers to determine membership of Council committees.

2. The Council adopted new Executive Arrangements in October 2001, which in essence follow the model Council Constitution proposed for local authorities operating Executive Arrangements under the Local Government Act 2000.

3. The Council's new Constitution sets out rules for appointment of substitute members of committees and sub-committees at paragraph 4 of Part 4. Under the rules, the Council itself must appoint substitute members to committees and sub-committees.

4. Rule 4.3 states: "*For each committee or sub-committee, the Council may appoint up to two substitutes in respect of each political group as that group holds ordinary seats on that committee or sub-committee*". The wording of Rule 4.3 is somewhat confused. It could mean either that each political grouping on a committee is entitled to two substitutes in total for that committee; or that each political grouping on a committee is entitled to two substitutes in respect of each seat on that committee. My instructing solicitor understands it to bear the latter meaning. Under Rule 4, committee substitutes have all the powers and duties of any ordinary member of the committee, but may attend committee meetings only where they are to take the place of an ordinary member who will be absent throughout the meeting.

5. Council members find this new system difficult to operate and restrictive. They question whether the old substitution system used prior to October 2001 could be reintroduced. Under this system, members who were unable to attend a committee meeting would resign from the committee prior to the meeting. Council officers had delegated authority to appoint a replacement member. That replacement member would in his turn resign after the meeting, and the previous member would be reappointed.
6. Alternatively, Council members question whether a system could not be put in place, under which a replacement committee member Councillor Y could simply turn up at the relevant meeting, and announce that “Councillor X, the nominated Councillor, is unable to attend and has sent Councillor Y in his place”.
7. My instructing solicitor has doubts about whether the scheme operated before 2001 is lawful, but questions whether what is in effect an amended version of that scheme could be put in place. Under this amended scheme, a member who was unable to attend a meeting would resign. The political group to which he belonged would then state whom it wished to replace him. A Council officer would put that wish into effect under delegated powers. After the meeting, the replacement member would himself resign, and the political group could indicate its wish for the former member to be appointed in his place.
8. My instructing solicitor believes that the above scheme would comply with the Local Government Act 1972 (“LGA 1972”), the political balance provisions of the Local Government and Housing Act 1989 (“LGHA 1989”), and the Local Government (Committees and Political Groups) Regulations 1990 (“the 1990 Regulations”).
9. In view of the above matters, I am asked to answer the following questions:
 - (a) Does the Council have any power at all to appoint substitute members to committees and sub-committees?
 - (b) If so, would the flexible approach suggested by Council members (and, in particular, the approach adopted by the Council prior to October 2001) be lawful?

- (c) If not, would the replacement scheme proposed by my instructing solicitor be lawful?
- (d) If there is no power at all to appoint substitute members to committees, are there any alternative mechanisms available, that would allow the Council to achieve its objectives?
- (e) If substitution is unlawful per se, would the Council's decision-making be rendered unlawful if the Council (say) maintained its current substitution regime in place?

10. Briefly, it is my view that the scheme proposed by my instructing solicitor, under which political groups could nominate replacement committee members to be appointed by a Council officer, would be lawful.

11. Since I consider that the proposed scheme would be lawful, it will not be necessary for me to consider at length issues of lawfulness raised by the Council's present scheme. Neither will it be necessary to consider in detail legal issues that might arise, if any substitution were unlawful. Nevertheless, I shall go on to consider the above matters so far as necessary.

LAWFULNESS OF THE PROPOSED SCHEME

LGA 1972/LGHA 1989: appointment of committees: legal principles

12. Section 101 LGA 1972 provides that local authorities may, subject to any express provision, arrange for the discharge of any of their functions by a committee, a sub-committee, or an officer of the authority, or by any other local authority. Section 102(1) LGA 1972 states, as far as relevant:

"102(1) For the purpose of discharging any function in pursuance of arrangements made under section 101 above...

- (a) a local authority may appoint a committee of the authority; or*
- (b) two or more local authorities may appoint a joint committee of those authorities; or*
- (c) any such committee may appoint one or more sub-committees."*

13. It was argued before the High Court in **R v Brent LBC ex p Gladbaum and Woods ((1989) 88 LGR 627** that s.101 LGA 1972 permitted local authorities to

delegate to committees or sub-committees the power to appoint and remove members of committees under s.102 LGA 1972. Nolan J rejected that argument. He considered that s.102 LGA 1972 regulated the exercise of the power to appoint committees and members, setting out an express statutory scheme that could not be overridden by s.101 LGA 1972. Under that scheme, it was for a council to appoint members to a committee; and for a committee to appoint members to a sub-committee. Moreover, the nature of the power in question- the determination of committee membership- was fundamental to the proper discharge of local authority functions, and the legislature cannot have intended that such a power should potentially be delegable to a single council officer.

14. **Gladbaum** was decided before the provisions of LGHA 1989 came into force, regulating the membership of local authority committees. Under sections 15 and 16 LGHA 1989, membership of any ordinary committee or sub-committee of a local authority is subject to a duty to allocate seats on committees to political groups, to reflect the proportion of seats held by those groups in the membership of the authority as a whole.

15. Sections 15 and 16 LGHA 1989 set out an exhaustive code for allocation of seats on committees. By s. 15 LGHA 1989, every council is bound to review the representation of different political groups on council committees¹. Under ss.15(3)-(7) LGHA 1989, the authority must make allocations of seats according to overriding principles of political balance, set out in s.15(5) LGHA 1989.

16. Section 16 LGHA 1989 (“duty to give effect to allocations”) provides, so far as relevant:

“16(1) Where any relevant authority or any committee of a relevant authority have determined the allocation to different political groups of the seats on a body to which section 15 above applies, it shall be the duty of that authority or committee so to exercise their power to make appointments to that body as to give effect-

- (a) as soon as practicable after the determination; and*
- (b) if a vacancy subsequently occurs on that body, as soon as practicable after the occurrence of the vacancy;*

¹ In addition, every council committee is bound to review the representation of different political groups on a sub-committee to which it makes appointments.

to such wishes about who is to be appointed to the seats on that body which are allocated to a particular political group as are expressed by that group."

17. The only circumstances in which a council or a council committee can exercise a discretion to appoint committee or sub-committee members of its choice, rather than committee members chosen by the relevant political group, are those set out in Reg. 15 of the 1990 Regulations ("Appointments where political group fails to express wishes"):

"15. Where a political group has failed to express its wishes in relation to the appointment to such a seat as is mentioned in regulation 14 within the period of three weeks beginning with the day on which notice was given under that regulation [notice of allocation of seat/vacancy of seat], the authority or committee may make such appointment to that seat as they think fit."

18. Thus the effect of the LGHA 1989 and the 1990 Regulations is to alter authorities' previous exercise of discretionary power to choose committee members into a non-discretionary duty to appoint members chosen by political groups.

19. The question then is: does this alteration in the nature of the appointment process affect the manner in which councils and/or committees must exercise their power of appointment to committees and sub-committees, following **Gladbaum**? In my view, it does. This is not because of any alteration in the appointment hierarchy provided by s.102 LGA 1972 (under which councils appoint committee members, and committees appoint sub-committee members): the provisions of the LGHA 1989 do not alter this hierarchy. It is simply because it is strongly arguable that the concept of delegation no longer has any bearing upon the exercise of the power to make appointments, for the reasons set out below.

Delegation: legal principles

20. The rules governing delegation are concerned with the exercise of powers of a discretionary nature: the principle lying behind lawful delegation is that, where a particular decision-maker has been empowered to take a decision, either he or a lawful delegate must apply his mind to that decision, and no-one else. Although the relationship between delegator and delegate will share many of the characteristics of a relationship between principal and agent (both delegate and agent act on behalf of another person or body), the discretionary nature of a delegate's powers will

distinguish him from a mere agent, who carries out detailed instructions of his principal. See for example **Wade and Forsyth, Administrative Law 7th ed** at 352:

“Unlawful delegation must be distinguished from lawful agency. A public authority is naturally at liberty to employ agents in the execution of its powers, as for example by employing solicitors in litigation, surveyors in land transactions, and contractors in road-building. The essential thing is that it should take decisions of policy itself, and observe any statutory requirements scrupulously.”

21. The courts have not always been clear about the distinction between delegation and agency, sometimes treating the two as indistinguishable (see for example **Huth v Clarke (1890) 25 QBD 391**). Nevertheless, in my view there is an important distinction to be made: and it is one that lies behind decisions of the courts on the lawfulness of actions taken on behalf of another body. Where no, or minimal, exercise of discretionary power is involved, the courts will tend to view action on behalf of a public body, outside an explicit scheme of delegation, as lawful: whether this is analysed as the exercise of an implied power to sub-delegate, or, (more satisfactorily) as a question of authorisation to carry out administrative tasks, rather than of delegation².

22. For instance, a particularly clear example of the distinction between administrative functions of an agent, and delegated functions, is provided by **Devlin v Barnett [1958] NZLR 828**, concerning police promotion exams. Exams were held by the

² Indeed, the House of Lords in **Provident Mutual Life Assurance v Derby City Council [1981] 1 WLR 173** has arguably extended the principle of “authorisation” to cover certain functions which would more be viewed as delegated. In **Provident Mutual**, the House of Lords, considered the validity of a rating notice issued by a subordinate rating officer of the Council. The notice was issued on a blank form containing the Council Treasurer’s photocopied signature. It was accepted that the Treasurer did not ratify or otherwise approve or review the notice. **Provident Mutual** argued that the rating notice was a nullity because, *inter alia*, there had been no valid delegation by the Treasurer to the Principal Rating Assistant. The House of Lords held by a 4-1 majority that the Treasurer was the responsible officer. However he was not required to act personally in every case. Lord Roskill stated (at 181-182):

“...Parliament has conferred very wide powers on local authorities and Parliament plainly contemplated that the actual machinery of enforcement and collection would not be operated personally by some senior local government official but would be so operated by the relevant senior official’s staff... On this part of the case the question is not whether the Respondent’s treasurer delegated power to Mr Wells [the Principal Rating Assistant]. The question is whether what Mr Wells did was authorised by the Respondent’s treasurer so as to be the relevant opinion of the Respondent....”

It is notable that Lord Roskill considered that the issue was not a matter of delegation, but simply authorisation. On the facts of the case, this is surprising, since it seems clear that there was a delegation in the sense that the Rating Assistant was the operative decision maker who exercised his own judgment, without any input or control from the Treasurer. Nevertheless, the distinction made in **Provident Mutual** between authorisation to perform administrative tasks, and delegation of decision-making functions, holds good as a general principle.

Police Promotion Appeal Board; and it was argued before the court that the examination process had been unlawful, because the exams had been conducted not by the Board itself, but by other senior officers, known as “associate members”.

Hutchison J held (see 839) that the process was not illegal:

“I do not think that the actual conducting of the tests need be by the Board itself or even by individual members of the Board. There would be a delegation on the part of the Board if the deliberation on the matters relating to promotion was entrusted to others. But all that we are concerned about within this cause of action is that the other senior officers took a leading part in the conduct of the tests and reported the results of the tests to the Board...”

Application to the present case

23. Since the Council must appoint committee members chosen by political groups, the appointment process is in my view one that can validly be performed by a person authorised for the purpose, without any delegation of powers being involved. Once any political group has notified the Council of its choice of committee member, the Council has no discretion over that member’s appointment. Hence the appointment itself is a purely administrative matter, that can properly be carried out by a senior Council officer.

24. I view it as highly likely that a court would consider committee appointments made by Council officers to be valid on the above basis. But even if a court were to view the present situation as one involving a delegation, I nevertheless consider that committee appointments by officers would be held valid, on the basis of an implied power to delegate. Rules against delegation are rarely absolute, but depend upon the context (statutory or otherwise) in which a delegation is exercised: thus, in **Gladbaum**, the court’s primary objection to delegation of the power to choose committee members properly lay in the nature of the power in question. Per Nolan J, the power to choose committee members was a discretionary matter, fundamental to the exercise of the Council’s functions: hence, non-delegable. However, the provisions of the LGHA 1989 have significantly altered the statutory context in which committee appointments take place. Under the LGHA 1989, the Council has no power to choose committee members: therefore **Gladbaum’s** policy objections to an implied power of delegation do not apply.

25. Of course, the strict statutory regime for committee appointments, under which the Council must appoint members to committees, and committees must appoint members to sub-committees, means that both the Council itself, and any relevant committee, must put in place clear standing orders, giving the proper senior Council officer authority to make appointments on their behalf. Provided, however, that such authorisation is in place, I do not consider it necessary that every individual change of committee membership should be officially ratified by the whole Council itself, or by any relevant committee.

26. I therefore consider that the Council could properly put in place a scheme similar to that proposed by my instructing solicitor, under which:

- (a) Committee members who were unable to attend meetings would resign from the committee, informing the relevant senior Council officer;
- (b) That officer would write to the relevant political group informing it of the vacancy (see Reg 14 of the 1990 Regulations)
- (c) The political group to which a relevant committee member belonged would notify the officer of the person, whom it wished to take the resigning member's place (see Reg 13 of the 1990 Regulations);
- (d) The senior officer, acting under official authorisation from the Council, would appoint the replacement member;
- (e) The process could, if necessary, be repeated, so that the replacement member resigned, to be replaced by the original member.

27. Arguably, the 1990 Regulations envisage just such an administrative process of appointment, carried out by an authorised Council officer, since Regulations 13 (“Wishes of Political Groups”) and 14 (“Notifications”) provide that the wishes of a political group on appointments are those “*expressed to the proper officer*” (Reg 13) and that “*for the purposes of enabling a political group to express its wishes in accordance with section 16 of the 1989 Act, the proper officer shall notify in writing the leader... of a political group...*” (Reg 14).

28. I note only that where a political group failed to express its wishes for a vacancy in the manner envisaged by Regulation 13 of the 1990 Regulations within the prescribed period, and where appointment to a committee or sub-committee was

consequently at the discretion of the Council or a committee of the Council under Reg. 15 of the 1990 Regulations, it would be for the Council or committee itself to appoint a replacement, as the case may be.

29. I should also mention that in my view, the system operated by the Council prior to October 2001 may be improper, because:

(a) It is not clear from my instructions, that replacement committee members are notified to the appropriate officer by the relevant political group, rather than simply specified by the resigning member;

(b) Specification by the resigning member only would not be proper. In such a case, although replacement members might in practice be those chosen by the relevant political group, the proper formalities of Regulations 13-15 of the 1990 Regulations would not be met, and the Council could not be certain that replacement members really were chosen in accordance with group political wishes.

30. I take the point made by Council members, that the proposed scheme is artificial, to the extent that committee members who resign may be reappointed to committees after one meeting's absence. However, I do not consider that this element of artificiality in itself makes the scheme any less lawful. "Artificiality" is not a ground of challenge per se: it is only so, if it indicates that a scheme has been adopted for an improper purpose, or is otherwise objectionable on public law grounds. In the present case, I do not consider that the proposed scheme's purpose is objectionable. In fact, the aim of the scheme is the wholly proper one of ensuring that business is conducted by fully constituted committees with the proper political balance.

SUBSTITUTION: LEGALITY

31. First of all, it should be noted that a system of "substitution", in which committee members resign and are replaced by other members, and a system in which substitute members are appointed, who stand in for absent full members at committee meetings, raise fundamentally different questions of legality. The first system, to which my instructing solicitor's proposals for the Council belong, is

actually not a system of “substitution” at all, in the strict sense. The proposed system should in fact be identical to the protocol for replacing members when a vacancy appears on a committee, and a (permanent) replacement is required. The fact that the system is used temporarily to substitute members, rather than permanently to replace them, is a question of policy, rather than of legal form.

32. What I understand my instructing solicitor to mean, when he mentions the specific legal difficulties of “substitution”, are the problems of appointing “substitute” members to committees; that is, committee members with less than full rights, who are only entitled to vote or attend meetings when a full committee member is absent for some reason. This is of course the way in which the Council’s substitution scheme is presently structured under Part 4 of its Constitution.

33. There is no express statutory authority, whether in the LGA 1972 or elsewhere, to appoint “substitute” members in the above sense: neither has the appointment of substitutes ever to my knowledge been considered by a court.

34. The powers of local authorities to determine the procedure of committees, are laid down in s.106 LGA 1972 and Schedule 12 to the LGA 1972. Section 106 (“Standing Orders”) states that a local authority may make standing orders for any of its committees with respect to the quorum, proceedings and place of meeting of the committee. Schedule 12 to the LGA 1972 (“Meetings and Proceedings of Local Authorities”) does not add significantly to the provisions of s.106 LGA 1972, as respects any potential power to appoint substitute members of committees: paragraph 42 of Schedule 12 states that: *“subject to the provisions of this Act, a local authority may make standing orders for the regulation of their proceedings and business and may vary or revoke any such orders”*.

35. True it is, that the above provisions have nothing explicit to say about the power to appoint substitute members. Nowhere in the LGA 1972 is there any consideration of whether there can be more than one class of committee member. However, in my opinion the better view is probably that the wide discretion of local authorities under the LGA 1972 to regulate their own proceedings, and the general power to set down standing orders, imply a power to set up a committee system, in which certain

(substitute) members are only entitled to attend and vote in the absence of a given full member. Some assistance for this view can be derived from dicta of the courts about the width of local authority powers as regards committees. See for example **R v Newham LBC ex p Haggerty (1986) 85 LGR 48** at 55 per Mann J: "... a local authority has indeed a very wide discretion as to who or who not they will admit to a committee and to continued membership of the committee." (Although it should be noted once again that Mann J does not refer to the terms on which membership can be conferred, but only to admission and continuation of membership).

36. Moreover, the use of substitutes would be consistent with the general scheme of the LGHA 1989, whose purpose is to balance political representation on committees to reflect the overall political balance between council members.

37. Without deciding the point, therefore, I consider on balance that it would probably be lawful to appoint substitute members to a committee. I also consider that there is no particular reason why appointing 2 substitute members for each committee member should be any more or less lawful, than appointing just one. The rationale for appointing one substitute member only per committee member would presumably be that, in the absence of the full committee member, no (potentially impermissible) discretion could be exercised by the committee, committee members, or officers, as to which substitute member should appear in his place. Nevertheless, in my view, this factor alone should not make the use of two substitute members any more objectionable than the use of one. Both substitutes would be appointed by the Council, and would therefore be equally valid replacements in the event of a full member's absence. In any case, the question of discretion as to a choice of substitute could be solved, simply by providing that substitutes would replace absent full committee members in a predetermined order (i.e. the second substitute would only attend committee meetings in the absence of a full member if the first was unable to do so.)

THE EFFECT OF UNLAWFUL SUBSTITUTION UPON THE COUNCIL'S DECISION-MAKING

38. Both the LGHA 1989 and the LGA 1972 prevent decisions taken by committees, that are improperly constituted under their provisions, from being invalidated on that ground alone. See paragraphs 43 and 44 of Schedule 12 LGA 1972:

"43. The proceedings of a local authority shall not be invalidated by any vacancy among their number or by any defect in the election or qualifications of any member thereof.

44(1) Paragraphs 39 to 43 above (except paragraph 41(3)) shall apply in relation to a committee of a local authority (including a joint committee) or a sub-committee of any such committee as they apply in relation to a local authority"

See also s.16(3) LGHA 1989:

"(3) The proceedings of a body to which section 15 above applies [a body to which appointments have been made on the basis of the political balance provisions in the LGHA 1989] shall not be invalidated by any defect by virtue of this section or that section in the appointment of any person to that body"

39. The effect of the above provisions is that decisions of a Council committee, whose use of substitutes is found to have been unlawful, would not be challengeable on that ground alone (though the committee's use of substitutes would itself of course be challengeable by way of judicial review.)

CONCLUSION

40. In my view:

(a) The "substitution" scheme proposed by my instructing solicitor, under which a properly authorised Council officer could authorise the appointment of replacement members of committees and sub-committees, chosen in accordance with the political balance requirements of the LGHA 1989 and the 1990 Regulations, is lawful;

(b) The Council scheme for replacement of absent committee members, in place before October 2001, may not have been lawful, since it may not have complied with the formal requirements of the 1990 Regulations;

(c) The “substitution” system proposed by the Council, under which full committee members are replaced by other full members in the event of absence, should be distinguished from a system, such as the Council presently has in place, in which committees have both full members and substitute members, empowered to vote in the absence of a full member;

(d) The latter system, involving substitute members, is on balance likely to be lawful. However, given my conclusions on the lawfulness of the system which the Council proposes to adopt, I do not express a concluded view on the point;

(e) Decisions of a Council committee, whose use of substitutes is found to have been unlawful, will not be invalidated on that ground alone (though the Council’s use of substitutes could of course itself be challenged by way of judicial review).

MS.

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2nd September 2002

IN THE MATTER OF:

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AND REPLACEMENT ON LOCAL
AUTHORITY COMMITTEES**

OPINION

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