Nigel Giffin KC

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Nigel Giffin practises mainly in the field of public law at 11KBW, although he still undertakes employment law and commercial law cases of certain kinds. His practice covers commercial and environmental judicial review, as well as many aspects of local government law including education, social services, housing, powers and finance and elections. He was formerly a member of the Attorney General's "A" panel of Counsel to the Crown, and undertook a number of important Human Rights Act cases in this capacity.

He is a CEDR accredited mediator, and has undertaken a number of mediations as both mediator and counsel.

Nigel studied law at Oxford, where he was awarded a first in his degree. He is the author of the chapter on Administrative Court proceedings in Foskett's Law and Practice of Compromise, and a member of the editorial board of Butterworths Local Government Reports.

Nigel has recently been acting as counsel to the Public Inquiry into the murder of Zahid Mubarek at Feltham Young Offenders' Institution.

> ***On sensitive and complex legal issues, Nigel is very prompt, skilled and thorough. He supports the clients to make effective decisions.***
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Expertise

Local Government

Nigel Giffin KC has practised in local government law for 25 years. He undertakes this work as part of a broadly based public law, public procurement law and human rights practice, in the course of which he appears at all levels of courts and tribunals, including a large number of cases in the Supreme Court, House of Lords and Court of Appeal.

Nigel's clients include:

- Local authorities – he has acted for and advised a high proportion of county councils, London borough councils and other unitary authorities, and many district councils, in all parts of England and Wales, as well as authorities in Northern Ireland.
- Joint authorities and joint committees.
- Fire and rescue authorities and police authorities.
- Those dealing with local authorities, including service users, trade unions, contractors, joint venture partners, individual councillors, local government employees, regional development agencies and other statutory bodies, and central government departments.

Nigel's practice includes both a substantial volume of advisory work, and advocacy in litigation. He is a member of the editorial board of Butterworths Local Government Reports.

His particular areas of experience and expertise include the following.

Local government powers and finance

Nigel has regularly advised in this area for many years, dealing for example with:

- General powers under the Local Government Act 1972 and the Local Government Act 2000
- Charging and trading powers under the Local Authorities (Goods and Services) Act 1970 and the Local Government Act 2003, including the interface with public procurement law
- Local Government (Contracts) Act 1997 and powers to undertake PFI schemes and other major projects

> ***Nigel is excellent at getting into the detail of complex and sometimes esoteric areas of law, and is a real expert across local government.***
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- Local government reorganisation, including the implications of unitary reorganisation for employment and for existing commercial contracts, as well as advising on potential challenges to reorganisation decisions
- Central government funding of local authorities, including e.g. issues around revenue support grant, capitalisation directions, and specific grants
- Local authority budget-setting, discretionary council tax reductions and collection of revenue
- Issues of local authority funding and service provision, including e.g. withdrawal of grants, closures of museums and libraries and leisure facilities
- Local authority capital controls and use of capital receipts
- Local authority investment powers
- Credits and debits to Housing Revenue Account
- Land disposal issues, including best consideration, use of general consents and questions of state aid
- Issues of Wednesbury reasonableness, fettering, bias, proper consultation etc in a wide variety of factual context
- Public sector equality duties
- Disputes between local authorities and external regulatory bodies such as external auditors, the Audit Commission or other inspecting bodies

Local authority commercial contracts

Nigel Giffin's understanding, based on long experience, of the context in which local authorities operate, combined with his expertise in public law and procurement law, and his experience in commercial litigation more generally, make him well placed to deal with many issues and disputes concerning local authority contracts. Examples of his work include:

- Disputes concerning the ability of local authorities to bring about the early termination of waste collection contracts.
- Disputes concerning performance-related payments in revenue and benefits contracts.
- Local authority's damages claim for interruption of service following destruction of ICTprovider's premises in fire.
- Local authority's obligations to make financial contributions under development agreement.
- Claims for wasted expenditure arising from work done on project abandoned without formal conclusion of contract.
- Claim arising from authority's alleged misuse of confidential information obtained during abortive contractual negotiations on major ICT project.

- Arbitration concerning contractor's obligations under grounds maintenance contract.
- Bank's claim under guarantee given by authority, successfully resisted on ground that guarantee not validly given.
- Dispute between local authority and transport undertaking concerning amounts due under concessionary fare scheme.

R (Luton BC and others) v Secretary of State for Education

[2011] LGR 553

Appearing for local authority successfully challenging decision to terminate Building Schools for the Future funding

R (Risk Management Partners Ltd) v Brent LBC

[2010] LGR 99

Appeared for local authority in Court of Appeal in leading case on s 2 well-being power

Hazell v Hammersmith & Fulham LBC

[1992] 2 AC 1

Leading House of Lords case on "incidental" powers arising out of local authority interest rate swaps crisis – also acted for large numbers of authorities in restitutionary claims which followed decision that swaps were ultra vires e.g. TSB Bank of Scotland plc v Welwyn Hatfield DC [1993] 2 BankLR 267

R v Brent LBC ex p. O'Malley

(1998) 30 HLR 328

Challenge to major development project raising issues concerning capital finance regime then in force, and consideration for land disposals, as well as public procurement

R (Isle of Anglesey CC) v Secretary of State for Work and Pensions

[2004] LGR 614

Challenge to clawback of housing benefit subsidy

R (Liverpool CC) v Secretary of State for Health

[2004] LGR 635

Challenge to determination of preserved rights grant

R (Bedfordshire CC) v Secretary of State for Communities and Local Government

[2008] EWHC 628 (ADMIN)

Appeared for intervening authority to argue successfully against challenge to unitary reorganisation

R v Local Government Boundary Commission ex p. Somerset CC

(TIMES 4 JULY 1994)

Challenge to proposed unitary reorganisation

R v Secretary of State for the Environment ex p. Sutton LBC

(1997) 95 LGR 509

Successful challenge to decision that valuable commercial property passed to another authority without compensation on boundary change – also appeared in subsequent arbitration

R v Secretary of State for the Environment ex p. Hammersmith & Fulham LBC

[1991] 1 AC 521

Acted for several local authorities in challenge to first use of capping powers under community charge regime

R v Lambeth LBC ex p. Secretary of State for the Environment

(1990) 89 LGR 441

Dispute concerning local authority's ability to reperform budgetary calculations

R v Pembrokeshire CC ex p. Coker

[1999] 4 ALL ER 1007

Issue as to whether best consideration obtained for land disposal

R v Wirral MBC ex p. Milstead

(1989) 87 LGR 611

Challenge to scheme for factoring of future proceeds of council house sales

Procurement

Nigel Giffin is one of the leading public procurement specialists at the Bar, and is very familiar with all the relevant aspects of EU procurement law, as well as domestic legislation and the potential for judicial review in the contracting context. His advisory work has covered: Numerous town centre development schemes.

- Numerous waste disposal and collection projects, including major PFI and PPP schemes.
- Numerous local authority shared services schemes.
- BSF and NHS LIFT schemes and other similar procurements.
- The use of framework agreements.
- Recurrent issues in procurements of all kinds such as appropriate pre-qualification and award criteria, use of social clauses, variation of existing contracts, changing or abandoning projects in the course of procurement, and advice on the use of mitigation measures in relation to possible challenges.

> ***Nigel is a very bright and very experienced advocate.***
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> **CHAMBERS & PARTNERS**

Quasi-procurement issues such as the award of casino premises licences.

Other cases including: **Federal Security Services Ltd v Police Service of Northern Ireland**; **Irish Waste Ltd v Northern Ireland Water** [2010] NIQB 13; **Natural World Products Ltd v Arc21** [2008] LGR 49; **Rapiscan Ltd v HM Revenue & Customs** [2006] EWHC 2067 (QB);

Deane Public Works Ltd v Northern Ireland Water [2009] NICh 8; **R v Brent LBC ex p. O'Malley** (1998) 30 HLR 328; **Severn Trent plc v Welsh Water Ltd** [2001] CLC 107; **McLaughlin & Harvey Ltd v Department of Finance and Personnel**; **R (Menai Collect) v Secretary of State for Constitutional Affairs** [2006] EWHC 727 (Admin).

He is currently acting for Virgin Trains in its challenge to the award of the West Coast passenger franchise.

Nigel has also acted as a mediator in procurement litigation, and he regularly lectures on the subject.

Letting International v Newham LBC (no 1)

[2007] EWCA CIV 1522

Appeal to Court of Appeal against refusal of interim relief in procurement dispute.

Letting International v Newham LBC (no 2)

[2008] LGR 908

Appeared for successful claimant in then leading case on extent to which sub-criteria and weightings to be used in evaluation process must as matter of EU law be disclosed to tenderer in advance.

R (Unison) v Wiltshire NHS PCT

Ability of trade union to challenge outsourcing decision by judicial review, relying upon breaches of procurement law

Risk Management Partners Ltd v Brent LBC

[2010] LGR 99

Procurement claim concerned application of the Teckal exception to the requirements of the Directive, and time limit for commencing proceedings (case later went to Supreme Court after claim against this defendant had been compromised).

Henry Bros (Magherafelt) Ltd v Department of Education

[2012] EULR 230

Appeal concerning appointment to frameworks, proper approach to identification of most economically advantageous tender, and delay in commencing proceedings.

Morrison Facilities Management Ltd v Norwich CC

Appeared for claimant alleging unlawful failure to disclose award criteria, and unlawful failure to investigate abnormally low tender by winning bidder – successful in obtaining interim relief (case subsequently compromised).

Resource NI Ltd v Northern Ireland Courts and Tribunals Service

[2011] NIQB 121

Appeared for claimant in first case of successful resistance to application to lift statutory suspension of award process.

R (A) v B Council

[2007] LGR 813

Appeared for claimant in judicial review claim raising issues relating to Local Government Act 1988 provisions concerning local authority contracting decisions.

Governance issues, including reorganisations, standards, elections, and information law

This has been another mainstay of Nigel Giffin's local government law practice. He has frequently advised on issues such as:

- Delegation of functions
- Local authority constitutions
- Distribution of functions between executive and non-executive matters in light of authority plans and strategies and budgets
- Use of joint committees
- Operation of overview and scrutiny committees
- Standards issues and member disqualification from participating in particular decisions
- Provision of indemnities to members and officers

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Nigel has provided advice in a number of difficult situations arising out of joint working between local authorities, including: the proper apportionment of losses following the discovery of fraud in the operations of a joint committee; one authority's desire to withdraw from a major joint transport project following a change of political control; and potential financial liabilities of an authority considering withdrawal from a joint waste procurement project.

He has experience in the operation of the Freedom of Information Act 2000 and the Data Protection Act 1998 (appearing for example in the House of Commons expenses case, Corporate Officer of the House of Commons v Information Commissioner [2008] EWHC 1084 (Admin)), and has frequently advised local authorities on these issues. He has also advised on the application of the Regulation of Investigatory Powers Act 2000 in the context of local authority functions.

He has also undertaken a number of cases arising out of local authority elections, acting both for returning officers and for candidates.

R (Buck) v Doncaster MBC

[2012] EWHC 2293 (ADMIN)

Leading case on division of responsibilities and powers between full council and elected mayor.

R (Raphael) v Highbury Corner Magistrates Court

[2011] EWCA CIV 462

Acted for local licensing authority in successful defence of challenge to variation of licence conditions based upon alleged absence of proper delegation of powers

Sanders v Kingston (no.2)

[2006] LGR 111

Acted for councillor in successful appeal against disqualification

Hare v Marcar

[2006] EWHC 82 (ADMIN)

Acted for authority intervening in opposition to councillor's appeal against suspension decision

Ullah v Pagel; Ahmed v Kennedy

[2003] 2 ALL ER 440

Procedure on election petition

Local government employment and superannuation

Nigel began his career as a specialist employment lawyer, appearing in many significant cases including several of the early leading decisions on the application of TUPE to the contracting-out of services, and has continued to take an interest in the field, particularly as it relates to public sector employment (for example, he appeared in the first case on the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 to reach the Supreme Court, **Duncombe v Secretary of State for Children Schools and Families** [2011] UKSC 14). He has also developed a particular interest in the public law aspects of pension provision, including statutory superannuation schemes, and is currently acting for several trade unions in a challenge to the switch from RPI to CPI as an uprating measure in public sector pension schemes.

Examples of his work include:

- Advising many local authorities on employment issues concerning senior officers, including remuneration, disciplinary measures and termination of employment, and severance terms. He appeared in the leading case of **Foster v Eastbourne BC** [2004] LGR 275.
- Advising individual officers on potential claims against local authority employers.
- Appearing for the local authority in the only reported case concerning the role of a designated independent person (**Leatham v Hillingdon LBC** [2007] LGR 45).
- Advising authorities on schemes for compensation on the termination of employment, including associated age discrimination issues.
- Advising local authorities and trade unions on the conduct and implications of outsourcing exercises, including the application of TUPE, the use of social clauses in the light of the Local Government Act 1988, and the implications of the former Code of Practice on Workforce Matters, and the Best Value Authorities Staff Transfers (Pensions) Direction 2007. He appeared in leading TUPE cases such as **Kenny v South Manchester College** [1993] ICR 934 and **Dines v Initial Health Care Services Ltd** [1995] ICR 11.
- Advising on the proper attribution of deficits in multi-employer superannuation funds and on the setting of employer contributions.
- Advising on the proper use of admission agreements for superannuation funds, and the consequences of termination of such agreements.
- Appearing in dismissal, discrimination and equal pay claims in the employment tribunal, as well as cases on appeal from the tribunal such as **Wandsworth LBC v D'Silva** [1998] IRLR 193 on the incorporation of staff handbooks into contracts of employment, and **Hammersmith & Fulham LBC v Jesuthasan** [1998] ICR 640. He also has experience in dealing with industrial action disputes, and has appeared in a number of such cases, including in the local government context **Wandsworth LBC v NASUWT** [1994] **ICR 81 and P v NASUWT** [2003] 2 AC 663.

Environment & Energy

Nigel Giffin's experience in the field of environmental law includes a number of matters concerning the need for and adequacy of environmental impact assessments, and similar matters, including **R v Rochdale MBC ex p. Milne** (CA, 21 December 2000); **R v Oldham MBC ex p. Foster**; and **R v Somerset CC ex p. Morris & Perry** (Gurney Slade Quarry) Ltd (1999) 79 P&CR 238.

In connection with his public procurement practice, Nigel has dealt with many waste disposal projects and waste-related contracts, and has become very familiar with this area of activity. He has advised on other waste-related issues as well, including on: the powers of a waste collection authority to instal waste disposal facilities on its housing estates; the legal relations between waste collection and waste disposal authorities; the apportionment of a waste disposal authority's costs between constituent authorities. He appeared in a challenge to the allocation of landfill allowances in **R (Newport CC) v Welsh Ministers** [2009] EWHC 3149 (Admin).

Nigel is not a specialist planning law practitioner, but has developed a good general understanding of this area of the law as part of the necessary background to work in the procurement and waste management field, and has appeared in some planning law cases (e.g. **R (Belgrave Land Ltd) v Bedford BC** [2001] EWHC Admin 1127, Grosvenor 52 [2001] EWHC Admin 1063, and **R v Secretary of State for Environment Transport and the Regions ex p. Edwards** [2001] ACD 164). He recently acted for an authority being challenged for a failure to make use of compulsory purchase powers to accelerate a regeneration project.

He has advised a number of local authorities on applications to register land as village greens, and has in that connection conducted a public inquiry as the local authority's inspector. He has also advised a number of authorities on the proper use and management of land held by them as parks and open spaces, and appeared in one of the few cases on the allotments legislation, **R v Secretary of State for the Environment ex p. Gosforth Allotments & Gardens Association** (1996) 74 P&CR 93.