

Councils going 'bankrupt' – the implications of section 114 notices

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Steve Broach KC

Section 114

- Local Government Finance Act 1988
- (2) The chief finance officer of a relevant authority shall make a report under this section if it appears to him that the authority...
 - (a) has made or is about to make a decision which involves or would involve the authority incurring expenditure which is unlawful,...
- primary reason – because they expect their expenditure to exceed their income for a particular financial year
- Effect of report is that the council cannot make new spending commitments and must meet within 21 days to discuss what to do next.

Options for section 114 councils

- Spending cuts – but must continue to discharge statutory duties
- Reallocating budgets
 - Potential for ‘capitalisation direction’ to allow use of capital budgets to cover day-to-day spending.
 - Asset sales
- Council tax rises – but limited to 5% without triggering referendum
 - In 2023/24, the government allowed Croydon to raise CT by 15%, and Thurrock and Slough by 10%.
- ‘Bailouts’

Potential for central government intervention – direct instruction or ‘Commissioners’

The problem with statutory duties

- Many are dependent on the available resources
- Short breaks duty in Breaks for Carers of Disabled Children Regulations 2008
 - ‘a local authority must provide, so far as is reasonably practicable, a range of services which is sufficient to assist carers to continue to provide care or to do so more effectively.’
- CSDPA 1970 s 2:
 - [a local authority] ‘must...make any arrangements within subsection (6) that they are satisfied it is necessary for them to make in order to meet the needs of the child.’
 - ‘Necessary’ is relative concept – former Fair Access to Care Services bands in adult social care allowed for ‘critical only’ eligibility’...

Some duties are not resource dependent

- CFA 2014
 - Section 42 – duty to secure / arrange education and health provision specified in Plan
 - Section 43 – duty to admit
 - Section 63 – fees for independent schools
- Education Act 1996 s 19
 - Duty to provide suitable education to all children of compulsory school age (*ex parte Tandy*)

Further non resource dependent duties

- CA 1989
 - Section 17 – duty to assess children in need
 - Section 17ZD-ZF – parent carers needs assessment
 - Section 20 – duty to accommodate certain children in need (inc those whose parents are prevented from providing them with suitable accommodation or care)
- Human Rights Act 1998
 - Prohibition on inhuman and degrading treatment
 - Bar very high – *Bernard v Enfield*
 - Right to respect for private life under Article 8 is qualified

Challenging decision to make a section 114 notice

- Decision of a public body which can be challenged by way of judicial review
 - Process where High Court considers lawfulness of decision by public body
- Two broad types of challenge – procedural and substantive
 - Minimal procedural requirements
 - Hard to challenge the substance of the decision – unless relevant officer has got her sums wrong...
- Difficult to see in practice where a judicial review of a decision to make a section 114 notice could succeed

YVR v Birmingham

- Challenge to charging for adult social care provision – Birmingham taking the maximum amount available (leaving the ‘Minimum Income Guarantee’)

36. The backdrop to the policy review was the Council's descent into unprecedented financial crisis. The Council, like other local authorities, is required by law to set a balanced budget. The financial plan it published in January 2023, setting out its proposed 2023/24 budget, included a very bleak prognosis as to its likely ability to do so. It identified a likely budget gap at that point of around £80m. The causes it identified were various. There was a significant impact from historic equal pay claims totalling more than £1bn. National government austerity measures and wider economic circumstances were being blamed to a degree. But the relentless rise in demand for adult social care was identified as a major unfunded pressure. Spend on adult social care was the Council's largest single area of net expenditure, at around 43%.

YVR v Birmingham

- Challenge to charging for adult social care provision

37. On 5th September 2023, the Council issued a notice under section 114 of the Local Government Finance Act 1988 . This was described to me as the 'nuclear option', an effective declaration of bankruptcy or inability to balance the budget. The projected deficit now stood at £87m. The consequence was a decision to impose radical spending controls and the cessation of all non-essential expenditure. But that was not projected to solve the problem in-year.

YVR v Birmingham

- Challenge to charging for adult social care provision

38. Central Government intervened at this point and sent in commissioners to oversee the Council. The commissioners reported on 27th February 2024 (the day before the hearing of the present challenge) to the effect that the Council was 'in an extremely serious financial position as a result of the past decisions it has taken...'. It stated that 'while this situation was brought about initially due to the scale of the potential Equal Pay liabilities the Council faces, this budget highlights wider and significant financial pressures and a fundamental structural collapse of the 2023/24 General Fund budget'. It confirmed that the Council had been provided with £1.255bn in exceptional financial support – a loan from central Government to be paid back through asset sales. It identified a 'narrow path' to financial sustainability dependent on making revenue savings of £293m over the following two financial years. The power (obligation) to increase council tax charges, at the same time as reducing services, was confirmed. The Council was instructed to pursue that two-year plan. 'There are no other choices available.'

YVR v Birmingham

- Claims of discrimination contrary to Article 14 ECHR and the Equality Act 2010 and breach of the public sector equality duty failed

101. I am unpersuaded that, on the basis that the substance of the decision challenged was justified, I have been given a sufficient basis for regarding it as nevertheless vitiated by reason of procedural failure including in relation to the PSED, or that failure to discharge the PSED in a way relevant to this claim is made out on the facts here. The Council considered the substantive aspects of the PSED relevant to this challenge with real focus and anxiety. That was so even given the overwhelming nature of its financial predicament. It cannot in all the circumstances fairly be criticised for not thinking more imaginatively or in any more structured way about doing something else. And if ever there were a case for accepting an argument that no further degree of procedural rigour would in any event have produced a different outcome it is surely the present one.

Likely areas of saving

- School transport
 - More restrictive policies for school age transport
 - Attempt to remove post 16 transport completely
 - Failure to recognise ‘adult transport duty’ for young people with EHCPs
- SEND placements
 - ‘Safety valve’ agreements
 - Resistance to independent special school placements
 - Refusal to pay sustainable fees

Others?