

frESH Law Horizons – Key Developments in UK and EU Environment, Safety and Health Law, Procedure and Policy

September 2018



The Court of Appeal has reached a decision on legal privilege in *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corp Ltd (ENRC)*.

The much-anticipated decision has restored the conventional position as to when and in what circumstances a person can assert legal professional privilege, in particular litigation privilege, in relation to an investigation into circumstances that may culminate in criminal proceedings taken by a regulator. The dominant purpose test, in the context of showing a real likelihood of a prosecution, has been put back to the pre-May 2017 position, making litigation privilege easier to assert, provided that the dominant purpose can be evidenced, if challenged. The evidential burden of establishing a document is privileged is on the party claiming the privilege. Instructing a lawyer at an early stage is an indicator of the rationale that a prosecution is a real likelihood (for further details, see our [article](#) on this case).

A logistics company was fined £1.5 million after the death of a worker trapped between a trailer and a vehicle.

The Health and Safety Executive (HSE) issued a [press release](#) on the breach and the fine, which indicates that its investigation found that safety management arrangements for coupling trailers to vehicles failed to take account of a slope on-site. The company pleaded guilty. The HSE issued guidance on [vehicles at work](#) and, in particular, on [driving surfaces](#). Compliance with best-practice guidance is not legally binding, but it can be persuasive in the event of any enforcement action, or threat of enforcement action, for alleged breaches of health and safety law.



The Office for Product Safety and Standards (OPSS) has published its first strategy for the product safety system.

According to the [strategy](#), OPSS is seeking to address various challenges and opportunities in the product safety system through four objectives: analyse, inform, enforce and build. One of the challenges identified is low levels of registration of large domestic appliances by consumers and low levels of awareness in relation to registration schemes. The strategy also recognises that approximately 9 million shipping containers enter the UK every year, and so interventions to intercept unsafe goods need to be risk-based. In relation to enforcement, the proposed action plan includes adopting a risk-based and targeted approach to enforcement by developing intelligence profiles to identify problem goods, importers and production patterns and providing guidance and support to Local Trading Standards and National Trading Standards officers to help with targeting and prioritising product safety enforcement activities. OPSS has been relatively active since it formed. In [June](#), we reported on its Consumer Product Recall Code of Practice. It recognises in the new strategy that, over coming months, it will need to ensure the product safety framework continues to operate effectively after Brexit, by the relevant EU product safety directives (all 49 of them) being transposed into UK law.



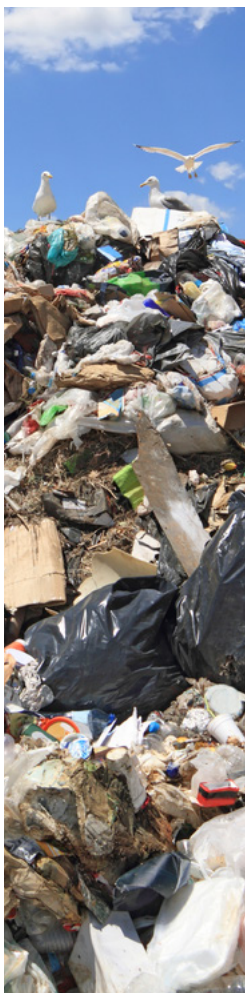
The Court of Appeal has reduced a fine imposed for breach of work at height requirements from £900,000 to £135,000. Electricity North West Limited appealed the fine and the court held that the judge had been wrong to categorise the company's culpability as high (as opposed to low to medium) and should have found the harm category was 3, as there was a low likelihood of harm on the facts of this case. The case demonstrates very clearly the impact that an incorrect categorisation under the Sentencing Guidelines can have on the resultant fine. The defendant was determined to be a "very large" organisation within the meaning of the guidelines and, as such, the difference between starting points for low and high culpability is significant (the starting point for low culpability and harm category 3 is £35,000, as opposed to £540,000 for high culpability). The case clearly demonstrates that appealing against a sentence that may not have been correctly categorised by the judge will often be cost-effective, depending, of course, on the facts of the case.

There has been a series of significant fines for construction companies for health and safety breaches relating to persons other than employees. The HSE [press release](#) on the first case, involving dangerous gas installations, reports that the company failed to prevent carbon monoxide poisoning and pleaded guilty to breach of the section of the Health & Safety at Work Act 1974 (the Act) that deals with duties of employers to persons other than their employees (in this case, the general public), section 3(1) of the legislation. The case report does not indicate that there was any injury resulting from the breach, but gas installations were found to be either immediately dangerous or at risk following the report of a smell of gas by a householder, and the company was fined £1.25 million. A separate [press release](#) reports a total fine of £2.8 million for two construction companies fined after a worker's foot was trapped in a rotating screw. Again, the relevant breach was under section 3(1) of the Act.

The government has published further guidance on what a no-deal situation would mean for the UK. The UK is set to exit the EU in March 2019 and aims to reach a broad agreement with the EU on their future relations by the end of 2018. The government published an initial set of technical notes to explain what a no-deal situation would mean in a number of areas and how to prepare for it. We issued a retail sector [update](#) a few weeks ago that summarised those technical notes, addressing trade with the EU; customs arrangements; trade remedies; VAT for businesses; and workplace rights. However, the notes will also be relevant to sectors other than retail. In addition, the government has since published further guidance on a number of matters around labelling products and making them safe if there is no Brexit deal, and other matters likely to be relevant to environment, safety and health compliance managers. This includes guidance on [regulating chemicals \(REACH\)](#); [vehicle type approval](#); [producing and labelling food](#); [protecting geographical food and drink names](#); [upholding environmental standards](#); and [trading under the mutual recognition principle](#) (i.e. trading in goods that are regulated on a national level, as opposed to by the EU). The full list of current guidance notes on how to prepare for a "no deal" can be found on the [government website](#).

A steel company was fined £450,000 following a Crown Court conviction for a health and safety breach. Tata Steel UK Limited was fined after a worker fell 3-4 metres into a pit. The HSE [press release](#) indicates that the company had previously completed a risk assessment that had identified the need to provide a barrier when floor plates were removed to empty the skip, but this was not done until after the incident. The hefty fine imposed is a reminder that safeguards identified as part of a risk assessment procedure should be implemented without undue delay.





This month has also seen a large number of policy documents and reports being issued with respect to Brexit and environmental regulation. Key developments include:

- A Brexit [preparedness paper](#) on upholding environmental standards after Brexit, reiterating the government's commitment to maintain environmental standards after Brexit, the proposed environment watchdog and environment bill.
- Numerous government notices on how environmental regulatory regimes would be affected, and, where applicable, what would replace them, in the event of a no-deal exit from the EU, including [the Industrial Emissions Best Available Technique \(BAT\) regime](#); the [trade and use of fluorinated gases and ozone depleting substances](#); the [application and enforcement of CO2 standards for cars and vans](#); and the [regulation of chemicals \(REACH\)](#).
- A report from independent think-tank UK in a Changing Europe on the [Cost of No Deal Revisited](#), which includes a substantial section on the environment.
- The National Audit Office's [critical report on how the Department for Environment, Food & Rural Affairs \(DEFRA\) was preparing for Brexit](#), including comments that DEFRA has accomplished a great deal given the timeframe and circumstances, but only six work streams comply with DEFRA's own planning standards and DEFRA has missed 39% of project milestones. This gives rise to a high risk that DEFRA will not deliver the projects required in a no-deal outcome or deliver the necessary legislation.
- DEFRA [responded](#) to this report by highlighting new processes since it was completed and that it has secured additional funding for 2018-19. DEFRA has said that it is preparing 91 statutory instruments to be issued under the European Union (Withdrawal) Act 2018 in the event of a no-deal scenario.

A waste transfer company has been ordered to pay £70,000 for environmental permit violations. According to [reports](#) in the trade press, the violations resulted in dust pollution. The Environment Agency [press release](#) reports that in sentencing the company, the District Judge took into account the length of time that the breaches spanned and the history of non-compliance (both of which were aggravating features).

The Food Standards Agency (FSA) has published an evaluation of the proposed National Inspection Strategy (NIS). The FSA [reports](#) that it found an 80% match between the predicted food hygiene ratings based on a food business' data and the actual rating given by a local authority following an inspection. However, it is clear from this that one in five were not in accordance with predictions, although the FSA states that it is "confident" that, through NIS Standards and further testing, it can resolve the underlying issues to minimise discrepancies in the future. The [full report](#) recognises that businesses will need reassurance about the extent to which their data will be openly available, for example through freedom of information requests, and that a level of consistency is needed to maintain faith and credibility in the system. In our [September edition](#) of Legal NewsBITE, we reported that digital registration and changes to food hygiene risk assessments are also being proposed, all part of the FSA's "regulating our future" programme.

There is an updated code of practice for the investigation of protected electronic information under the Regulation of Investigatory Powers Act 2000 (RIPA). The code can be read on the [Home Office website](#). The updated code reflects changes to the oversight of investigatory powers made under the Investigatory Powers Act 2016. It provides guidance when exercising powers to require disclosure of protected electronic information in an intelligible form, or to acquire the means by which protected electronic information may be accessed or put in an intelligible form.



Asbestos: report that the UK is behind Europe and recent fines for non-compliance. This month, the press has [reported](#) that the UK's asbestos safety regulations and preventative measures remain weaker than in other countries, according to a report by a risk management firm. The paper calls for the setting of an occupational exposure limit for buildings known to contain high-risk asbestos and for the measurement of airborne asbestos fibre concentrations at the time of periodic re-inspections using modern air sampling and analysis techniques. Our [April edition](#) of frESH Law Horizons reported on a fine for a surveyor who failed to detect asbestos, demonstrating that liability for asbestos-related safety issues extends beyond the construction company. This month, there have been [trade press reports](#) of a £200,000 fine for a local council after asbestos was disturbed at a primary school in Kent. The duty to manage asbestos is contained in regulation 4 of the Control of Asbestos Regulations 2012, and the regulations also include a duty to provide relevant employees with adequate information, instruction and training (Regulation 10).

The FSA's 2017 Annual Report on UK Multi-Annual National Control Plan has been published. The UK Multi-Annual National Control Plan (MANCP) is required for each member state under EU law, to demonstrate that effective control systems are in place for monitoring and enforcing feed and food law; animal health and animal welfare regulations; and plant health law. The recent FSA [annual report](#), based on data collected in 2017, shows that the overall level of compliance in all sectors in the UK was satisfactory when assessed against expectations.

The European Commission (EC) is to authorise 140 recycling processes for food contact materials. Following the applicable regulatory procedure (so-called comitology, which [Euractiv](#) called "opaque"), the EC will authorise these recycling processes for food contact materials/ applications (FCM) after the European Food Safety Authority (EFSA) adopted preparatory [opinions on all 140 recycling processes](#) and concluded that 137 of them were safe. The risk assessments on the remaining three were inconclusive, according to Euractiv. In its Plastics Strategy, the EC announced it would "swiftly finalise the authorisation procedure for over a hundred safe recycling processes" for food-contact applications. [NGOs warned](#) that secondary plastics "will always risk containing toxic chemicals" dangerous for human health.

A Scottish turbine maintenance facility has received a substantial civil penalty under the EU Emissions Trading System (ETS). The [Scottish Environment Protection Agency](#) (SEPA) imposed a civil penalty of £55,106.53 on RWG (Repair and Overhauls) Ltd for operating without a greenhouse gas permit.

A confiscation order, community order and costs have been imposed on a waste operator that operated without a permit. An individual was ordered to complete 250 hours of unpaid work within two years, to pay £17,000 in costs and a confiscation order of £54,415.3 for operating a waste operation without an environmental permit.



The Scottish court has ruled that pre-liquidation statutory waste removal liabilities are dischargeable as a liquidation expense. In [Re Doonin Plant Limited](#), the Outer House of the Court of Session held that statutory liability under a waste removal notice continues despite the company's entry into liquidation and should be discharged as a priority expense in the insolvency process on the basis that Parliament must reasonably have intended them to be discharged in priority to paying the debts of its creditors. This is the first consideration of that question in either Scotland or England, and it is very rare for a court to decide that a statutory liability must be discharged ahead of an insolvent company's creditors purely based on statutory construction. This case raises a significant policy issue about the relative importance of environmental liabilities in an insolvency, and it will be interesting to see if the English courts take the same approach if this issue comes up in an English case, because the two jurisdictions have differed in their approach to other aspects of environmental liabilities in insolvency in the past.

Client Earth has gained access to the EC's pre-legislative files. In [ClientEarth v. Commission](#), ClientEarth used the Aarhus Convention and the EU Treaty to gain access to pre-legislative files held by the EC whilst deliberating over legislative steps to agree with member states. The files were impact assessments relating to (i) the EC's decision not to introduce a directive to implement requirements for access to environmental justice under the Aarhus Convention; and (ii) the revision of the EU legal framework on environmental inspections and surveillance. The EC argued that the legislative process would be hindered if access were granted, and that there was a general presumption that disclosure of this sort of document would seriously undermine its decision-making process for developing a policy proposal. However, the European Court of Justice (ECJ) decided that the EC had to be more open to ordinary citizens and NGOs.

English water companies have committed to reduce pollution incidents by 90% by 2025. The companies have recently submitted draft business plans to Ofwat for approval. At the same time, Water UK issued its "[Manifesto for Water](#)". The reports also contain ambitious commitments on investment and leakage reduction.

The New Scottish Environmental Authorisations Regulations has come into force. The [Environmental Authorisations \(Scotland\) Regulations 2018](#) came into force on 1 September 2018, implementing the fundamental regulatory reforms that were first published eight years ago. The new regulations follow the example of the Environmental Permitting Regulations in England and Wales in consolidating, modernising and streamlining environmental regulation in Scotland.

The Environment Agency has issued a [regulatory position statement \(RPS\)](#) on small-scale land remediation. This means that businesses carrying out pilot trials and small-scale remediation schemes for land contamination activities involving treatment of waste for recovery will not need a permit if they comply with the RPS. The techniques such as air sparging, soil washing and chemical treatment, including oxidation and dehalogenation, previously needed a standard rules environmental permit.

The Environment Agency has published [new standard rules](#) for environmental permits for medium combustion plants and specified diesel generators. Following implementation of the Medium Combustion Plant Directive (MCPD) earlier this year, the Environment Agency has published nine sets of standard rules permits. Standard rules permits are easier and cheaper to apply for than more complex bespoke environmental permits and are intended for simple, lower-risk and common activities, using a one-size-fits-all approach. The standard permits cover typical applications, such as landfill gas engines, diesel-fuelled generators and gas boilers. Beyond the limits specified in the standard rules, or where different conditions are needed, bespoke permits will be required. Under the MCPD, permits must be obtained for new plants from 20 December 2018, with existing plants phasing-in from 2025 or 2030. If you have any affected plant, you should consider which permit(s) you will require and the conditions attached.



The government has issued [draft legislation on energy and carbon reporting](#). This follows its [consultation response](#) issued in July, which set out the scope of the proposed measures. This legislation makes changes to reporting requirements for quoted companies and introduces new reporting requirements for large unquoted companies and large limited liability partnerships (LLPs) to annually report on emissions, energy consumption and energy efficiency action. Large unquoted organisations that were not affected by the existing reporting requirements should prepare for the need to report on these issues for financial years starting on or after 1 April 2019. Quoted companies also should prepare for changes to their reporting requirements (such as the new requirement to annually disclose energy consumption and energy efficiency action (if any) in directors' reports).

The Environment Agency has confirmed it has never enforced the waste hierarchy and did not launch an investigation into Burberry's incineration of unsold stock, according to the freedom of information responses provided to [a waste consultancy](#). The nature and "woolly" wording of the waste hierarchy provisions makes them particularly difficult to enforce, but it will be interesting to see if the Environment Agency changes its approach following the high-profile Burberry story.

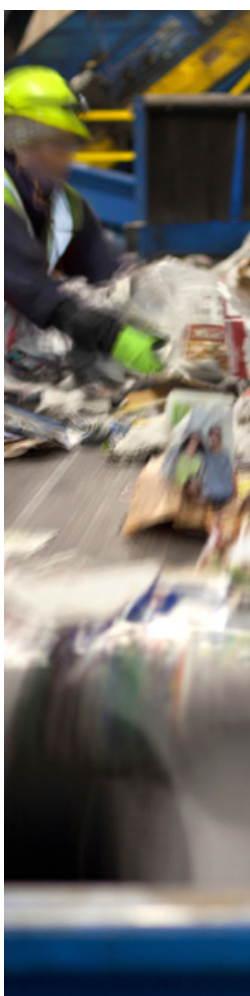
New [best available techniques \(BAT\) for the waste treatment sector](#) could mean significant cost implications for operators. The BAT standards update the technical standards/benchmarks for environmental regulators to use when setting permit conditions. With the increased standards included in the BAT, operators of mechanical, biological and physico-chemical waste treatment could find their permit requirements changing significantly as a result. Existing facilities will be phased in to the new standards, but new facilities will need to meet them from the start.

[The European Chemicals Agency \(ECHA\) has consulted on authorisation for bisphenol A and 17 other substances](#). This is the ninth round of recommendations for substances that should be subject to authorisation in order to be sold and used in the EU. Bisphenol A (BPA) is one of the most widely used chemicals, but the authorisation proposal relates to a specific use, as an epoxy resin hardener. If you may be affected by these proposals, then progress can be monitored on the ECHA website and responses to the consultation can be submitted.

Environmental NGO ClientEarth has reported companies for inadequate climate change reporting. [ClientEarth has reported](#) EasyJet, Balfour Beatty, EnQuest and Bodycote to the Financial Reporting Council (FRC), alleging that they inadequately disclosed climate change risks in their annual corporate reports as required by the Companies Act 2006 and associated rules. ClientEarth considers that the strategic reports do not include sufficient information or analysis of climate change risk. ClientEarth has also written to the auditors of those companies to ask them to explain their approach to climate change risks when auditing these reports. Climate change risk reporting is relatively new, and it will be interesting to see how the FRC approaches this complaint.

EU proposals could significantly impact recycling rates for WEEE products, according to [the European Recycling Industries' Confederation \(EuRIC\) and the European Electronics Recyclers Association \(EERA\)](#). They claim that proposals to reduce the threshold requirements for decaBDE trace contaminants (through changes to the POP Regulations on persistent organic pollutants) would have the effect of ending recycling of WEEE products because levels of decaBDE in recycled materials will never be that low. Clearly, this is a stark conclusion and would not be the intended effect of this measure, but it remains to be seen if the EU can be convinced of this argument.





The Environment Agency has launched a [consultation on the Compliance Classification Scheme \(CCS\)](#). This is the scheme under which the Environment Agency assesses and scores an operator's permit compliance. The Environment Agency recently published its own internal guidance on how it assesses compliance under the CCS and has now issued a brief consultation on a new version of the CCS that it proposes to introduce in 2020. Proposals include the consolidation of scores so the annual compliance score is more reflective of the overall risk position, and the ability to suspend scores in a flexible and proportionate manner. This will be of interest to companies with environmental permits regulated by the Environment Agency.

A new think-tank, [Broadway Initiative](#), has called for ambitious new environmental legislation. This new group of environmental policy experts from business, academia, policy and NGOs has issued its [blueprint](#) for ambitious new environmental legislation, including a general duty of care for the environment. The report claims that we are now in a unique position (mainly due to Brexit) and now have the opportunity to "set a credible direction" for environmental policy in the UK and "to establish a world-leading framework for the environment both on land and at sea".

The European Parliament (EP) has adopted a [resolution on chemicals, product and waste legislation](#). The EP plenary adopted a [non-legislative resolution](#) reacting to the EC on options to address the interface between chemical, product and waste legislation (CPW) that the EC issued in January. The resolution includes a call on member states, the EC and the ECHA to step up their regulatory activities to promote substitution of substances of very high concern (SVHC) and to restrict substances that pose unacceptable risks to human health or the environment in the context of REACH. In addition, the resolution stresses that substances of concern should be tracked and information relating to them should be fully available to recyclers and to the public. The resolution also calls for full cooperation on the development of end-of-waste criteria, believing that measures should be taken at EU level to bring about more harmonisation in the interpretation and implementation of end-of-waste provisions, and states that lack of enforcement of EU waste legislation is unacceptable and must be addressed as a matter of priority. The EC's [public consultation](#) on its communication continues until 29 October 2018.

The EC has adopted a [report on the implementation of EU waste legislation, giving 14 member states an "early warning"](#). The EC identified 14 member states at risk of missing their 2020 target of 50% recycling of municipal waste under the Waste Framework Directive: Bulgaria, Croatia, Cyprus, Estonia, Finland, Greece, Hungary, Latvia, Malta, Poland, Portugal, Romania, Slovakia and Spain. It proposes actions to help meet waste recycling targets. The directive was recently revised to include more ambitious targets – 55% by 2025, 60% by 2030 and 65% by 2035 – and introduces a system of early warning reports to assess member states' progress towards these targets three years ahead of the respective deadlines.

The EC has adopted a [roadmap on RoHS evaluation](#). The evaluation will assess the performance of Directive 2011/65 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS). It will focus on the EU, taking into account aspects related to the global trade in electronic and electric equipment, and will assess the directive according to its effectiveness, efficiency, relevance, coherence and EU added value. Feedback on the roadmap can be submitted until 12 October 2018 and a public consultation is expected to be launched in spring 2019. It is expected that the evaluation will be completed by the fourth quarter of 2020, allowing the EC to report on its results to the EP and the council by July 2021.



It has also been a very busy month for policy developments relating to single-use plastic (SUP).

Highlights include:

- **Amendments have been made to the proposed SUP Directive tabled in the EP.** 717 amendments (part [1](#), [2](#), [3](#)) have been tabled in the environment committee (ENVI), including in its [draft report](#). Until 2 October 2018, ENVI will work on compromise amendments. A first set of five compromise amendments (not officially available) includes proposals to explicitly task the EC with keeping the list of banned SUP product categories under review and adding further product categories if appropriate. It also adds very lightweight plastic carrier bags, except when required for hygienic reasons; products made of oxo-degradable plastic; and food and beverage containers made of expanded polystyrene, to the banned product categories, and introduces a minimum recycled content requirement for drink bottles of 35% by 2025. Member states would also have to ensure that, by the same year, at least 70% by weight of waste from SUP bottles is recycled. Another compromise amendment seeks to reduce tobacco product waste by introducing extended producer responsibility (EPR) schemes and setting reduction targets for plastic tobacco product filters. ENVI is scheduled to adopt its report on 10 October 2018. The EP plenary is then scheduled to adopt it on 22 October 2018. The text of a final EU Directive will be the result of these negotiations (so-called trilogues).
- **A compromise text of the current Austrian Council Presidency [has been leaked](#).** Its definition of producer includes (again) everybody who “professionally [...] treats, fills, sells or imports” SUP products, not only manufacturers. (The EC previously narrowed the definition – see [our client alert of May 2018](#).) If applied to EPR, it would distribute the costs to a broader group, including supermarkets and cafés. The text also distinguishes between packaging and non-packaging SUP products and includes a controversial proposal to allow member states to implement the EPR by means of agreements with industry. Austria will prioritise finalising and adopting the council’s negotiating position by the last Environment Council under its presidency on 20 December 2018. Trilogues with the EP could then start with a view to adopting the SUP Directive before the EP elections in May 2019.
- **The water industry has demanded responsibility for wet wipes producers.** EurEau, the European federation of national water services, published an [opinion piece](#) calling for the SUP legislative proposal to address the impact of wet wipes on the wastewater infrastructure. This “devastating” impact would be at least partly due to inappropriate labelling by manufacturers, perpetuating “the myth that these can be disposed of via the toilet through sometimes misleading or overly discrete product labelling”. The report asserts that real improvement is only possible if the EPR includes the sewer network and the related economic and environmental damage. The EC proposal on SUP already provides for marking requirements, awareness raising campaigns and EPR for wet wipes.
- **The EP has adopted a resolution on the Plastic Strategy.** The EP plenary adopted a [non-legislative resolution](#) reacting to the EC on a European Strategy for Plastics in a Circular Economy that the EC issued in January (please see [our client alert of January 2018](#)). Amongst many other things, it calls on all industry stakeholders to take concrete actions to ensure that all packaging plastics are reusable or recyclable in a cost-effective manner by 2030; calls on the EC to come forward swiftly with quality standards; calls on member states to consider introducing reduced value-added tax (VAT) for products containing recycled content; and calls on the EC to introduce a ban on micro-plastics in cosmetics, personal care products, detergents and cleaning products by 2020.

Contacts



Rob Elvin
Partner, Manchester
T +44 161 830 5257
E rob.elvin@squirepb.com



David J. Gordon
Partner, Birmingham
T +44 121 222 3204
E dave.gordon@squirepb.com



Ken Huestebeck
Associate, Brussels
T +322 627 11 02
E ken.huestebeck@squirepb.com



Nicola A. Smith
Director, Birmingham
T +44 121 222 3230
E nicola.smith@squirepb.com



Anita Lloyd
Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com



Gary Lewis
Director, Manchester
T +44 161 830 5373
E gary.lewis@squirepb.com