



Neutral Citation Number: [2008] EWHC 692 (Admin)

Case No: CO/4667/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2008

Before :

LORD JUSTICE STANLEY BURNTON

Between :

The Queen on the application of
RISK MANAGEMENT PARTNERS LIMITED Claimant

- and -

THE COUNCIL OF THE LONDON BOROUGH OF
BRENT Defendant

- and -

THE LONDON AUTHORITIES MUTUAL LIMITED (1) Interested
THE COUNCIL OF THE LONDON BOROUGH OF Parties
HARROW (2)

and between:

RISK MANAGEMENT PARTNERS LIMITED HQ07X01934
Claimant

- and -

THE COUNCIL OF THE LONDON BOROUGH OF
BRENT (1)
LONDON AUTHORITIES MUTUAL LIMITED (2)
THE COUNCIL OF THE LONDON BOROUGH OF Defendants
HARROW (3)

John Howell QC, Javan Herberg and James Segan (instructed by Halliwells) for the
Claimant in both claims.

Nigel Giffin QC and Deok Joo Rhee (instructed by Brent Legal Services) for the Defendant
in both claims

James Goudie QC and Rhodri Williams (instructed by Weightmans Solicitors for London
Authorities Mutual Limited and instructed by Legal and Governance Services, Harrow
Council) for the Council of the London Borough of Harrow in both CO/4667/2007 and
HQ0701934

Hearing dates: 9, 10, 11, 12, 13, 14 February, 10 April 2008

Approved Judgment

Lord Justice Stanley Burnton:

Introduction

1. I have before me two claims. Both concern a new mutual insurance company, The London Authorities Mutual Limited (“LAML”), established, as its name suggests, by a number of London local authorities, of which the London Borough of Brent (“Brent”) is one.
2. In February 2007, in accordance with the Public Contracts Regulations 2006, Brent invited tenders, to be submitted by 23 February 2007, for Combined and Miscellaneous Insurance, divided into 7 lots, to provide cover for a period from 1 April 2007. The Claimant (“RMP”) submitted a tender which appeared, when the contract award procedure was abandoned, to have been the most financially advantageous of the offers received by the Council, although further information and clarification was required. However, on 27 March 2007 Brent informed RMP that the contract award procedure for 6 of the lots had been abandoned, because Brent were proposing to award a contract for insurance (except for one of the lots) to LAML, which had taken no part in the public procurement exercise.
3. In its claim in the Administrative Court, RMP contends that Brent’s participation in LAML is outside the powers granted to Brent by Parliament: i.e., it has acted *ultra vires*. In the alternative, it alleges that Brent’s participation was not duly authorised. It seeks appropriate declaratory relief. Its claims are disputed by, in addition to Brent, Harrow London Borough Council, one of the other participants in LAML, and by LAML itself. In addition to their substantive contentions, they contend that RMP failed to bring its proceedings promptly or within the period of 3 months after the grounds to make the claim first arose, as required by CPR Part 54.5, and their formal position was that permission to apply for judicial review should be refused by reason of that delay, or alternatively that relief should be refused by reason of delay. As will be seen, both Brent and the Interested Parties have sensibly departed from this initial position.
4. In its claim in the Queen’s Bench Division, RMP contends that in awarding the insurance contracts to LAML Brent acted in breach of the requirements of the Public Contracts Regulations 2006, and it seeks damages for that breach. This claim too is disputed by Brent. By order dated 23 January 2008, the Interest Parties have been added as Defendant to this claim for the purposes of making written oral submissions to the Court.
5. By order dated 8 August 2007, Dobbs J directed that RMP’s application for judicial review and the substantive application for judicial review should be heard as a “rolled-up” hearing, with the substantive hearing to follow immediately on the application for permission, if permission was granted; and she ordered the claim under the Public Contracts Regulations 2006 (claim number HQ07X01934) to be heard with the application for judicial review, apart from issues as to causation and quantum. Both claims were listed for hearing before me for the four days beginning on 11 February 2008. In the event, however, it rapidly became clear that submissions on the issues of *vires* and authority would themselves take up the four days, and it was therefore agreed to sever the hearings of the judicial review claim and of claim number HQ07X01934.

6. It was also agreed that I should determine the issues of *vires* and authority and hand down a judgment on them, leaving questions of remedy, if any, to be considered in the light of my judgment at a subsequent hearing.
7. This is my judgment on the issues of *vires* and authority.

The facts

The constitution of LAML

8. LAML is a company limited by guarantee. It was incorporated, as a shell company, on 12 May 2006. Its business is that of a non-life insurer. Its Memorandum and Articles of Association were signed on behalf of the subscribers in January 2007, and were then adopted. Of the 32 London Boroughs, the City Corporation of London and the Greater London Authority, 10 Boroughs subscribed to the Memorandum of Association, including Brent and Harrow. Its main objects are:

- (i) To receive premiums from Participating Members or Affiliates and to indemnify through a mutual fund the liabilities, losses or expenses incurred by Participating Members or Affiliates in accordance with the Rules;

- (ii) To grant or effect with Participating Members or Affiliates for the purpose of mutual insurance such classes of insurance business as the Mutual may from time to time be authorised to carry on and to enter into or arrange insurance or reinsurance contracts on behalf of any Participating Member or Participating Members or Affiliates as deemed necessary from time to time and to negotiate directly or indirectly with the insurance market cover for any risk on behalf of any Participating Member or Participating Members or Affiliates.

However, its subsidiary objects include entering into partnership or joint venture in relation to any business which it is authorised to carry on or from which it might derive any benefit.

9. "Member" means any London Authority that has subscribed to the Memorandum and Articles of Association; "Participating Member" means a Member who receives an Indemnity (a defined term) from the Mutual. Articles 4 and 5 of the Memorandum provide that the liability of the Participating Members is limited to £100. Affiliates for whom insurance may be obtained from LAML are the governors for the time being of Voluntary, Foundation and Voluntary Controlled Schools; the Management Committee of an Arms Length Managed Association; and the Board of a company wholly owned by a Participating Member: see rule 6 of the Rules referred to below.
10. The Articles of Association include, in a schedule, the Rules, which may only be altered by ordinary resolution of the Participating Members in general meeting, unless it involves a variation to a Member's obligations concerning Capital Contributions, in which case the Rules may be altered by ordinary resolution of the Members, provided that the Board has first approved the alteration.

11. The business of the Mutual is managed by the Board of Directors, the majority of whom are appointed by the Members with a minority of independent directors.
12. The Articles of Association and the Rules provide for the payment by Members or Participating Members of the following:
 - (a) Premiums due from Participating Members in respect of any Indemnity granted pursuant to the Rules “against such risks as the Board shall ... determine”.
 - (b) Supplementary Calls, which the Board may require a Participating Member who receives an Indemnity during any Financial Year to pay at any time during or after the end of any Financial Year (until it has been closed), up to 100 per cent of the premium paid by that Participating Member in respect of that year. In other words, the liability of a Participating Member for the premium for its insurance may be doubled.
 - (c) Paid Capital Contributions. Paid Capital Contributions are payable at the discretion of the Board by a Member or Participating Member prior to, on or after admission to the Mutual.
 - (d) Guaranteed Capital Contributions are the amounts which, at the discretion of the Board, are guaranteed to the Mutual by a Participating Member pursuant to the Rules on or after admission to the Mutual.
13. It is for the Board of LAML to determine the type of capital contributions required, their amount and the time at which they are made, and in the case of a Guaranteed Capital Contribution the form in which it is to be made. LAML is required to have capital as determined under the rules of the Financial Services Authority, which is referred to in the Articles of Association and in the Rules as the General Insurance Capital Requirement. Capital contributions are to be used to support the funding of LAML particularly with regard to the General Insurance Capital Requirement. This requirement is to be maintained in order of priority by drawing down on Guaranteed Capital Contributions, Paid Capital Contributions from Participating Members, Paid Capital Contributions from Members and, if the Board exercises its powers, by additional Paid or Guaranteed Capital Contributions from Participating Members.

Brent’s decisions

14. By late 2006, Brent, in common with other London authorities, was dissatisfied with its existing insurance, which had been for some time placed with commercial insurance companies. Its dissatisfaction related to the lack of competition, the premiums it was paying and claims handling. Hence its consideration of the establishment of a mutual insurance company for it and other London authorities.
15. At some date after January 2007, Malcolm Davies, the Head of Risk and Insurance of the London Borough of Croydon, produced a document entitled “Establishment of the London Authorities’ Mutual Ltd (LAML): A Case Study”. He stated that ten London authorities, of which Brent, Croydon and Harrow were three, were committed to setting up LAML. Under the heading “What was the Catalyst for this Project?” and the sub-heading “Legal Powers”, he stated:

The Local Government Act 2000. The so-called “well-being powers” have been designed to effectively allowed (sic) local authorities to work together for any purpose likely to promote benefit, financial or other, in their own area.

16. Brent’s insurance policies were due to expire on 31 March 2007; it followed that any alternative insurance had to be in place by that date.
17. Duncan McLeod, the Director of Finance and Corporate Resources of Brent, produced a report for the meeting of the Executive of 9 October 2006. Its summary and recommendations were as follows:

1.0 Summary

- 1.1 This report describes the proposal to establish a “Mutual” insurance company controlled by, and run for the benefit of, participating London authorities. They would pool their risks and the costs of administration, whilst retaining the current levels of self-insurance. The Mutual will reinsure high-level risk and issue policies to its members annually. It will register with the Financial Services Authority as an insurance company and it will need to capitalise (by guarantees from member authorities) and appoint experienced executive directors as well as London Finance Directors to ensure it was run appropriately.
- 1.2 The Mutual is likely to generate economic and other knock-on benefits from financial savings and improved risk managements.
- 1.3 Participating authorities will be full members. The Mutual will be run by a board of directors comprising of directors appointed by the member authorities and a minority of independent directors.
- 1.4 The report therefore asks for approval to explore further the option of joining the proposed Mutual. Officers will report back to the Executive once the options have been explored further and legal advice has been obtained. It also asks for approval for the carrying out of a tender process in parallel with examination of the Mutual, should the Mutual proposal not proceed or not be ready to issue insurance contracts by 1st April 2007.

2.0 Recommendations

- 2.1 The Executive agrees in principle to participate in the Mutual but subject to receiving a further report back from officers once they have fully explored this option and once external legal advice is obtained.

- 2.2 The Executive notes that the proposal is that the Council would become a full member of the company and would agree to purchase Brent's corporate Property, Liability and Motor insurance requirements for a minimum period of one year through the Mutual with effect from 1st April 2007. In the event that the Mutual is unable to assume risk by that date the Council would obtain interim cover through the tendering process described below.
- 2.3 The executive further notes that the proposal also is that the Council would participate in capitalising the company by way of a financial guarantee of no more than £1m.
- 2.4 The Executive gives approval to officers to the inviting of tenders for insurance services as an alternative to joining the London Authorities Mutual on the basis of the pre-tender considerations set out in sections 3-5 of the report and gives approval to officers to evaluate tenders on the basis of the evaluation criteria set out in section 5 of the report.

18. Under the heading "Detail", paragraphs 3.1.3, 3.1.9 and 3.1.10 stated:

3.1.3 The steering committee and the LCE commissioned Charles Taylor Consulting PLC (CTC) to carry out a feasibility study using data from 26 authorities – London Boroughs, the City of London and the GLA. CTC reported that a mutual would offer its members savings of between 15% and 20% on average on insurance premiums for liability and property insurance and accumulate surpluses between £8.3 million and £15 million over the first five years of trading. The surpluses would be available to members and could be used to reduce premiums further.

3.1.9 In principle, these thresholds would remain, and the Mutual would only carry risk above these levels. The exact levels would be subject to the discussion on commercial terms between the Mutual members. In addition, the Mutual would reinsure the very highest level risks – for example, catastrophic risks where claims involve very large sums of money – with a commercial insurer, after a procurement exercise benefiting from the extra purchasing power of a group of local authorities. Therefore the Mutual itself would only have to cover mid-range claims, above the deductible limits and below the level for reinsurance. These would be met from the premiums paid to the Mutual and the capital held by it, or, if that should prove insufficient, by contributions from the participating authorities who have placed insurance with the Mutual that year. The Maximum amount levied on a participating authority in respect of any one financial year without a special resolution passed by the authorities at an annual or extraordinary general meeting is

50% of the premium paid by each authority in relation to that financial year. This right by the board of directors to raise additional premium income is considered to be very much a last resort. The intention is that the reinsurance protection afforded to the Mutual covers the risk of adverse years, therefore this right is not one expected to be exercised in practice.

3.1.10 The advantage for the authority in participating in a Mutual is the economic benefit both to the authority itself and to its area as a result of the reduction in premiums which frees up council money for other spending. There is an additional advantage for all the participants, because the Mutual can develop risk management standards for its members to encourage better risk management practice, and reduce unmanaged risk. The Mutual could offer financial inducements to participating authorities that met these standards.

19. Under “Capitalisation”, the report stated:

3.3.1 FSA registration requires the Mutual to be able to access a capital fund sufficient to cover its prospective liabilities. The size of the fund will depend on the number of members, but it is anticipated that the initial fund will be in the region of £5 million.

3.3.2 Authorities which become full members will be required to provide a financial guarantee of no more than £1m. It is believed from advice taken that the amount of the guarantee will not need to be provided for in the accounts of the authority. It would be regarded as a contingent liability with a note to the Council’s annual accounts explaining this. LAML will decide the basis on which authorities joining the Mutual will at a later time contribute their share to the on-going capitalisation requirements of the Mutual and such basis will recognise the benefits to the Mutual on the initial contributions.

20. “Financial implications” included:

The council would also seek to benefit from improving its risk management, with support from the Mutual. This will not only lessen the financial risk to the Mutual, but also help to reduce payments out of the Council’s self insurance Fund.

21. In relation to “Risk analysis”:

4.10.1 Risk: the risk of the cost of capitalisation

Advice from the Financial Services Authority is that initial capitalisation can be provided in the form of a guarantee by each authority which would be treated as a contingent liability rather than having to ‘tie up’ additional capital in the vehicle.

4.10.2 Risk: How will the Mutual guard itself against the risk of recapitalising?

The Board of Directors of the Mutual have the powers to require members to make supplementary calls in the event that the Mutual has or is considered to be likely to need additional resources.

It will be necessary for the Board of Directors to ensure that the Mutual, will underwrite prudently and will structure its reinsurance protection in such a way that will mean that the Mutual's net assets are unlikely to be insufficient to meet its retained liabilities.

The Mutual will be exposed to the risk of failure of its reinsurance programme but will be placing its reinsurance with reinsurance markets whose Standard & Poor's financial rating is A or above.

22. The legal implications of the proposal were addressed in part 6 of the report, of which paragraphs 6.1 and 6.5 are the most important.

Counsel instructed by those leading on the project and who specialises in local government law has advised that it is within the power of local authorities to participate in the Mutual. The primary source of legal power identified is section 2 of the Local Government Act 2000. Under section 2, a local authority has power to do anything which it considers is likely to achieve the promotion or improvement of the economic, social or environmental well-being of its area. The power may be exercised in relation to, or for the benefit of, the whole or part of the local authority's area, or all or any persons resident or present in that area. A local authority may act outside its own boundaries provided the intention is to benefit its own area. The two limitations on the section 2 power set out in section 3 do not apply as there is no legal prohibition, restriction or limitation preventing the establishment of the Mutual, and the authorities are not establishing the Mutual to raise Money (whether by precepts, borrowing or otherwise). Counsel has advised that "person" includes the authority itself and that the promotion of the economic well being of the authority (through a reduction in the cost of insurance premiums which frees up council money to be spent for other purposes) is sufficient for the section 2 power to be available. This is a very broad interpretation of the section and is not based on any decided cases. The Borough Solicitor is seeking a further opinion on whether section 2 can be relied upon in these circumstances. It is anticipated that this further advice will be obtained on a joint basis with some other of the London Boroughs.

6.5 This authority therefore needs to satisfy itself that the anticipated financial and risk management benefits from participation in the Mutual are likely to achieve the promotion or improvement of the well-being of the authority, and, from the application of savings to other services or to a reduction in local taxation, the economic, social and/or environmental well-being of the area or of the persons resident or present in it.

23. The relevant part of the minutes of the meeting of the Executive of 9 October 2007 is as follows:

14. London Authorities Mutual Insurance and Procurement of Insurance Services

This report described the proposal to establish a "Mutual" insurance company controlled by, and run for the benefit of, participating London authorities. They would pool their risks and the costs of administration, whilst retaining the current levels of self-insurance. The Mutual will reinsure high-level risk and issue policies to its members annually. It would register with the Financial Services Authority as an insurance company and it will need to capitalise (by guarantees from member authorities) and appoint experienced non-executive directors as well as London Finance Directors to ensure it was run properly. The report asked for approval to explore further the option of joining the proposed Mutual. Officers would report back to the executive once the options have been explored further and legal advice has been obtained. It also asked for approval for the carrying out of a tender process in parallel with examination of the Mutual, should the Mutual proposal not proceed or not be ready to issue insurance contracts by 1st April 2007.

The Borough Solicitor referred to an addendum, circulated at the meeting, which amended section 5 of the report relating to the procurement timetable so that the process commences following the submission of a further report requesting final approval to be presented to the November meeting of the executive.

RESOLVED:

- (i) That approval be given in principle to participating in the Mutual but subject to receiving a further report back from officers once they have fully explored this option and once external legal advice is obtained;
- (ii) That it be noted that the proposal is that the Council would become a full member of the company and would agree to the purchase of Brent's corporate Property, Liability and Motor insurance requirements

for a minimum period of one year through the Mutual with effect from 1st April 2007. In the event that the Mutual is unable to assume risk by that date the Council would obtain interim cover through the tendering process as described below;

(iii) That it be further noted that the proposal also is that the Council would participate in capitalising the company by way of a financial guarantee of no more than £1m;

(iv) That approval be given to officers to inviting tenders for insurance services as an alternative to joining the London Authorities Mutual on the basis of the pre-tender considerations set out in sections 3-5 of the report from the Director of Finance and Corporate Resources and approval be also given to officers to evaluating tenders on the basis of the evaluation criteria set out in section 5 of the report.

24. The Executive met again on 13 November 2006. Mr McLeod's report recommended that the Executive agree to participate in establishing LAML provided the Borough Solicitor confirmed that satisfactory amendments to its constitutional documents had been agreed, as set out in the section of the report on legal implications. Paragraphs 3.3 and 3.4, under the heading "Capitalisation" and paragraph 4.1, under "Financial Implications", stated:

The premium payment to Zurich in 2006/7 for the coverage that will be provided by the Mutual is £932k. A Minimum saving of 15% of this sum will accrue in 2007/8 under the terms of the Mutual. The amounts to £140k and the financial modelling assumes this will also occur in future years. The reduction can be utilised within the 2007/8 budget and beyond to fund priority growth, as agreed in the Corporate Strategy, or reduce overall expenditure and hence the level of Council Tax. It is hoped and expected that as underwriting profits are retained for the benefit of Members through lower premiums the savings will increase. This arrangement will therefore be of general benefit to Brent residents and link to the key objectives in the Community Strategy.

25. The paragraphs of the report on the legal implications of the proposal that are relevant to the present issues were the following:

6.1 The external legal advice referred to at the October Executive meeting has now been obtained in the form of two Counsel's Opinion. One Opinion was from Nigel Giffin QC, on the subject of local authority powers to participate in the Mutual and the application of the EU Public Procurements rules, while the other was from Stephen Kenny QC, who specialised in insurance.

...

6.3 Nigel Giffin identified two separate legal powers as authorising participation in the Mutual. The first is section 111 of the Local Government Act 1972, which empowers a local authority to do any thing “which is calculated to facilitate, or is conducive or incidental to, the discharge of any of” its functions. Counsel considers that this power is firstly available to permit the arrangement of insurance against those losses and liabilities arising in the discharge of any local authority function, using a conventional insurer. He then concludes that section 111 also permits insurance through a mutual.

6.6 The second power identified is section 2 of the Local Government Act 2000, otherwise known as the well-being power. It allows a local authority to do any thing which the authority considers is likely to achieve the promotion of improvement of the economic, social or environmental well-being of its area. It is a very widely stated power. Clearly insuring against liability does not in itself promote or further well-being, but as it is hoped there will be around 15% savings in premiums, there will arguably be indirect promotion of well-being in the form of additional resources available for existing or new services. Paragraph 4.1 above indicates how indirect benefit will accrue to residents.

6.7 In conclusion ... Nigel Giffin considered that section 111 was a better power to rely on than the well-being power, but that both could be relied upon (though not clear cut). In relying on the well-being power, the legislation states that it is necessary to have regard to government guidance on the exercise of the well-being power, and to Brent’s own community strategy. In relation to the guidance, it is noted that this refers to the power as “encouraging innovation” and also refers to the well-being power being used to allow the establishment of companies. There is nothing else in the guidance that renders doubtful reliance on this power. In relation to the community strategy, while the proposed Mutual does not specifically link in with any Key Objective, it does not undermine or contradict any part of it.

26. The meeting of the Executive on 13 November 2006 began at 7.00 pm and ended at 9.00 pm. The minutes show that 24 items were considered: an average of 5 minutes per item. In relation to LAML, the resolutions passed by the Exec, as recorded in the minutes, were as follows:

15. London Authorities Mutual Insurance

At the Executive meeting on 9th October a report entitled London Authorities Mutual Insurance and Procurement of Insurance Services was considered. This report gave further

legal advice and sets out more information on the commercial terms. As a result of this updated information the report recommended the Council participate in establishing London Authorities Mutual Limited as a full member.

The Director of Finance and Corporate Resources advised that since the last meeting further legal advice had been received and that some further drafting changes may be required.

RESOLVED:-

- i) That approval be given to participate in establishing London Authorities Mutual Limited as a mutual insurance company provided that the Borough Solicitor confirms that satisfactory amendments to its constitutional documents have been agreed as set out in the legal implications;
- ii) That approval be given to purchase Corporate property, liability and motor insurance requirements for a minimum period of one year through the Mutual with effect from 1st April 2007 and that an exemption to the tendering requirements of the Council's contract standing orders be authorised for good operational and/or financial reasons as set out in paragraphs 3.1.2 – 3.1.3 and 4.1 -4.3 of the report from the Director of Finance and Corporate Resources;
- iii) That the Director of Finance and Corporate Resources be appointed as Brent's member representative and be empowered to represent the interest of Brent at general meetings of the Mutual and to vote on behalf of Brent;
- iv) That approval be given to participate in capitalising the company by way of a financial guarantee of no more than £1m and the Director of Finance and Corporate Resource be authorised to take all necessary steps to achieve this;
- v) That the possibility of the Mutual not being operational in readiness to issue contracts for 1st April 2007 be noted, and that a further report may be submitted to the February meeting to award a contract for insurance following a tender exercise that will run in parallel with the start-up and registration of the Mutual.

This minute was with minor changes copied from Mr McLeod's second report. The minutes do not record how long was the discussion of this item; nor do Mr McLeod's witness statements.

27. It was as a result of the decision of the Executive on 13 November 2006 that on 18 January 2007 Mr McLeod signed the Memorandum and Articles of Association of LAML. Brent thereby became a Member, but not yet a Participating Member, of LAML.

28. However, because it was uncertain whether LAML would be able to provide cover from the expiration of Brent's current insurance policies, Brent issued the tender invitations referred to below, to which RMP responded.
29. As has been seen, the authority conferred by the executive of Brent related to the giving of a guarantee (in effect a binding financial undertaking) of £1 million; it did not authorise any payment by Brent to LAML by way of provision of capital (although of course if a call was made under the guarantee Brent would be obliged to pay it). However, on 14 March 2007, Mr McLeod requested the Chief Executive to authorise payment of the sum of £160,500 "on grounds of extreme urgency", on the basis that Croydon, as lead borough, required that sum, as capital for LAML, in cleared funds by 16 March in order to complete the FSA registration process and to enable the company to place reinsurance and to issue insurance policies to Brent. The Chief Executive, in the exercise of his delegated powers, authorised that payment, and on 16 March 2007, after LAML had obtained the necessary authorisation from the Financial Services Authority, Brent paid the sum of £160,500, which Mr McLeod describes as "the capitalisation amount", to LAML.
30. By a guarantee dated 27 March 2007, Brent undertook to pay sums on demand to LAML up to an aggregate amount of £609,500. On 30 March 2007, Brent paid four premiums totalling £520,328.14 for terrorism, liability, property and contents insurance. Brent, and Harrow, became Participating Members of LAML as of 1 April 2007.
31. On 9 April 2007, Brent issued a press notice announcing that LAML had opened for business. The only benefit it identified from Brent's and Harrow's placing business with the company was the reduction in premiums and therefore value for money.
32. Ten other authorities did not immediately become Participating Members, but they became Members; and they provided the capital contribution and the guaranteed capital contribution that enabled LAML to satisfy the capital requirements and to obtain the necessary authorisation of the Financial Services Authority to commence carrying on its insurance business.

The tender invitations and RMP's response

33. On 7 November 2006, a pre-tender meeting was held between RMP and Marsh, who were Brent's insurance brokers. RMP was advised that Brent "had committed to going into the Mutual", but that there were hurdles to be overcome in relation to its formation, that in addition there was uncertainty as to whether LAML would be able to provide cover from 1 April 2007, and that there were certain insurance services that would not be covered by it in any event. For those reasons, a full tender exercise would be held.
34. In December 2006, Brent invited tenders for the provision of insurance cover from 1 April 2006. However, that tender exercise was abandoned by Brent because Marsh had used incorrect documentation.
35. On 1 February 2007, a replacement invitation to tender was issued. It was received by RMP on 21 February 2007. It required tenders by 23 February. RMP duly submitted its tender on that date. LAML did not participate in the tenders.

36. On 7 March 2007, Lynne Thorne of Marsh told Pam Saville of RMP, informally, that Brent would be awarding the insurance contract to LAML. As a result, Mr Janowicz of RMP searched Brent's website, and learnt of the meeting of 13 November 2006. By letter sent on 19 March 2007, (but misdated 19 April 2007) RMP sought confirmation of the position. In her reply dated 27 March 2007, Candace Bloomfield of Brent stated, so far as relevant to the present issues:

I confirm that the contract award procedure for lots 1, 2, 3, 4, 6 and 7 as set out in the contract notice 2007/S 24-028970 has now been abandoned. The reason for this is that the Council are in the process of awarding these insurances to the London Authorities Mutual Limited (LAML), a mutual insurance company set up by a number of London local authorities. The one exemption to this is Lot 1, which the Council has decided to self-insure.

...

You were advised at our open day in November of the Council's position in relation to the Mutual and of the possibility of some lots not being awarded as a result of the tender process.

37. There is no evidence that Brent ever compared RMP's tender with the premiums required by LAML, and therefore no evidence that it considered the differences between the total actual and contingent financial exposure (by way of premium and the other liabilities referred to in paragraph 12 above) of Brent to LAML and the premiums required by RMP. This is, perhaps, because Brent regarded itself as committed to LAML by the decisions made on 13 November 2006.
38. By letter dated 4 May 2007, RMP's solicitors raised the question of Brent's breach of the Public Contracts Regulations 2006; they did not make any allegation of *ultra vires*. The Council's reply, dated 23 May 2007, was similarly restricted. The issue of *ultra vires* was first raised in RMP's solicitors' detailed letter before claim dated 5 June 2007.
39. Both the judicial review claim and the Queen's Bench Division claim were commenced on 6 June 2007.

The principal statutory provisions applicable to the *ultra vires* claim

40. Section 111 of the Local Government Act 1972 bears the side note "Subsidiary powers of local authorities" and is as follows:
- (1) Without prejudice to any other powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or

rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

(2) ...

(3) A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.

41. In conjunction with section 111 it is necessary to consider section 1 of the Local Government (Contracts) Act 1997:

Contracts for provision of assets or services

1 Functions to include power to enter into contracts

(1) Every statutory provision conferring or imposing a function on a local authority confers power on the local authority to enter into a contract with another person for the provision or making available of assets or services, or both, (whether or not together with goods) for the purposes of, or in connection with, the discharge of the function by the local authority.

(2) Where—

(a) a local authority enters into a contract such as is mentioned in subsection (1) (“the provision contract”) under any statutory provision, and

(b) in connection with the provision contract, a person (“the financier”) makes a loan to, or provides any other form of finance for, a party to the provision contract other than the local authority,

the statutory provision also confers power on the local authority to enter into a contract with the financier, or any insurer of or trustee for the financier, in connection with the provision contract.

(3) ...

(4) In this Act “assets” means assets of any description (whether tangible or intangible), including (in particular) land, buildings, roads, works, plant, machinery, vehicles, vessels, apparatus, equipment and computer software.

(5) ...

42. Section 2 of the Local Government Act 2000 confers what is known as the “well-being” power:

2 Promotion of well-being

(1) Every local authority are (sic) to have power to do anything which they consider is likely to achieve any one or more of the following objects—

- (a) the promotion or improvement of the economic well-being of their area;
- (b) the promotion or improvement of the social well-being of their area, and
- (c) the promotion or improvement of the environmental well-being of their area.

(2) The power under subsection (1) may be exercised in relation to or for the benefit of—

- (a) the whole or any part of a local authority's area, or
- (b) all or any persons resident or present in a local authority's area.

(4) The power under subsection (1) includes power for a local authority to—

- (a) incur expenditure,
- (b) give financial assistance to any person,
- (c) enter into arrangements or agreements with any person,
- (d) co-operate with, or facilitate or co-ordinate the activities of, any person,
- (e) exercise on behalf of any person any functions of that person, and
- (f) provide staff, goods, services or accommodation to any person.

(5) The power under subsection (1) includes power for a local authority to do anything in relation to, or for the benefit of, any person or area situated outside their area if they consider that it is likely to achieve any one or more of the objects in that subsection.

(6) Nothing in subsection (4) or (5) affects the generality of the power under subsection (1).

43. Section 2 is subject to the provisions of section 3:

3 Limits on power to promote well-being

(1) The power under section 2(1) does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).

(2) The power under section 2(1) does not enable a local authority to raise money (whether by precepts, borrowing or otherwise).

(3) The Secretary of State may by order make provision preventing local authorities from doing, by virtue of section 2(1), anything which is specified, or is of a description specified, in the order.

(4) Before making an order under subsection (3), the Secretary of State must consult such representatives of local government and such other persons (if any) as he considers appropriate.

(5) Before exercising the power under section 2(1), a local authority must have regard to any guidance for the time being issued by the Secretary of State about the exercise of that power.

(6) Before issuing any guidance under subsection (5), the Secretary of State must consult such representatives of local government and such other persons (if any) as he considers appropriate.

(7) ...

(8) In this section "enactment" includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978).

44. Section 4 makes provision for the preparation by local authorities of their strategy for the exercise of their well-being power:

(1) Every local authority must prepare a strategy (referred to in this section as a community strategy) for promoting or improving the economic, social and environmental well-being of their area and contributing to the achievement of sustainable development in the United Kingdom.

(2) A local authority may from time to time modify their community strategy.

(3) In preparing or modifying their community strategy, a local authority—

(a) must consult and seek the participation of such persons as they consider appropriate, and

(b) must have regard to any guidance for the time being issued by the Secretary of State.

(4) ...

45. During the course of argument, reference was also made to section 151 of the Local Government Act 1972 Act. It is as follows:

Without prejudice to section 111 above, every local authority shall make arrangements for the proper administration of their financial affairs and shall secure that one of their officers has responsibility for the administration of those affairs.

46. This provision does not confer any powers on a local authority, but imposes a duty for the purpose of ensuring that its financial affairs are properly conducted. Any doubts as to the effect of section 151 are allayed by sections 113 and 114 of the Local Government Finance Act 1988. Section 113 requires the officer appointed for the purposes of section 151 to be a qualified accountant; section 114 imposes on him specific duties to report any unlawful expenditure. This view of the section is also confirmed by Lord Ackner's statement in *Hazell v Hammersmith LBC* [1992] 1 AC 1 at 47C:

Section 151 is ... concerned with administrative matters ... I am not persuaded it provides any "function" within the meaning of section 111.

It therefore adds nothing to the question whether section 111 or section 2 conferred on Brent the power it sought to exercise.

The issues

47. I have had the benefit of substantial skeleton arguments on behalf of the Claimants, Brent and Harrow and LAML itself. Since I am probably no more than the *juge rapporteur* for the Court of Appeal, who will have both these skeleton arguments and additional skeleton arguments pointing out my errors, I hope I shall be forgiven if I do not set out in what will in any event be a long (and perhaps over-long) judgment every point that has been raised.
48. It is common ground that Brent, as a body constituted by statute, has only such powers as may be vested in it by enactment as a body owing its constitution to a statute which defines its objects and powers: see for the general principle *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87, 94 which was applied to the council of a London Borough in *Hazell v Hammersmith LBC* [1990] 2 QB 697 at 779. The municipal corporation of the borough similarly has only such powers as are vested in it by statute: see the decision of the House of Lords in *Hazell v Hammersmith LBC* [1992] 1 AC 1 at 39c-43d.

49. It is also common ground that it is for the Council to show affirmatively that its acts in issue are authorised: *Attorney-General v Fulham Corporation* [1921] 1 Ch 441 at 450.
50. On behalf of Brent, Mr Giffin QC relied first on section 111 of the Local Government Act 1972, and secondly on section 2 of the Local Government Act 2000. Perhaps more logically, Mr Goudie QC put section 2, which confers substantive powers, first, and section 111, which confers incidental or subsidiary powers, second. (Section 111 is declaratory of the common law, but it is convenient, if somewhat inaccurate, to refer to its conferring powers rather than confirming that local authorities have such powers.) Mr Giffin's and Mr Goudie's different orders reflected, I think, their different views as to the respective strengths of their cases under those provisions. Initially only Mr Giffin relied on section 1 of the Local Government (Contracts) Act 1997, but Mr Goudie subsequently supported his submissions on it.
51. At a high level, the issues before me are:
- (a) Should permission to apply for judicial review be refused on account of delay?
 - (b) Was Brent's participation in LAML within the powers conferred by section 111 of the Local Government Act 1972 or by section 1 of the Local Government (Contracts) Act 1997?
 - (c) Was Brent's participation in LAML authorised by section 2 of the of the Local Government Act 2000?
 - (d) If the answers to all of these questions are negative, what if any remedy should be granted to RMP?
52. There is a significant difference between section 111 and section 1 of the 1997 Act on the one hand and section 2 on the other. The powers conferred by section 111 and section 1 are generally independent of the intentions of the local authority. The local authority either has, or has not, the power in question. The test for the existence of the power is objective: in section 111 the statutory wording is "calculated to facilitate ...", not whether it is intended to facilitate etc.. The power may be incidental to a substantive function that can only be exercised if the local authority has a particular intention or opinion, but that complication is irrelevant in this case.
53. The power conferred by section 2, on the other hand, is dependent on the local authority considering that the exercise of the power in question "is likely to achieve" one or more of the objects specified in subsection (1). In relation to section 2, therefore, two subsidiary questions arise:
- (a) Is section 2 capable of conferring the power in question?
 - (b) If so, did Brent consider its exercise to be likely to achieve one or more of the statutory purposes?
- The answer to (b) is fact-sensitive.
54. In their skeleton argument, counsel for Brent stated the general issue to be whether Brent has the *vires* to participate in the *establishment* of LAML. While it may not

affect the outcome of the present claims, I think that this formulation overstates the issue. As a matter of fact, Brent was one of the founding members, and one of the first two Participating Members, of LAML, and therefore it is right to say that it participated in its establishment. However, it seems to me that the questions of vires I have to consider apply equally to a decision to become a Participating Member of a company such as LAML that has already been established.

Delay

55. Very sensibly, neither Mr Giffin nor Mr Goudie pressed me to refuse permission on the ground of delay on the question of *vires*. Now that the *vires* of a local authority to become a Participating Member of LAML has been questioned, it is essential to those concerned in its management and the local authorities insured by it, as well as the PSA, to have the matter settled one way or another. No one has suggested that RMP's case is unarguable: after four days of serious submissions, no one could make that suggestion. Moreover, the implication of RMP's case is that public moneys (i.e., the payment of £160,500 on 16 March 2007) have been misapplied and contingent liabilities unlawfully, and invalidly, incurred. It would not be appropriate for the Court, by refusing permission, to close its eyes to a possible misapplication of public funds.
56. However, Mr Giffin submitted that it would be inappropriate to grant any extension of time to RMP if its case ultimately depended on whether Brent had formed the requisite opinion to enable it to rely on the well-being power. In that event, Brent's participation in LAML would not be outside the powers available to it; there would have been only a defect in the steps required validly to exercise those powers.
57. I do not think that there has been delay on the part of RMP such as should debar it from obtaining permission. Brent contends that time began to run on 9 November 2006, when its Executive gave approval to participation in establishing LAML subject to satisfactory amendments to its constitutional documents and to participation in capitalising the company by way of a financial guarantee of no more than £1million. It is true that proceedings for declaratory or prohibitory relief could have been commenced immediately after that decision, or indeed immediately after the pre-tender meeting of 7 November 2006. However, I accept Mr Howell's submission that the date from which time starts to run for the purposes of CPR Part 54 is the date of the unlawful act, not from a resolution to do it, particularly if it is (as this one was) subject to conditions: see *R (Burkett) v Hammersmith and Fulham LBC* [2002] UKHL 23, [2002] 1 WLR 1593. It was unclear whether in practice LAML would be effective until it received authorisation from the Financial Services Authority (which it did not receive in writing until March 28 2007): hence the tender process. RMP were not kept informed of what was happening in respect of LAML, and the fact that it was asked to tender again in February 2007 suggested that Brent would place its insurance on the basis of the tenders received. RMP did not receive formal notice that the contract award procedure had been abandoned and that Brent was progressing arrangements for insurance with LAML until it received Brent's letter dated 27 March 2007. It is not surprising or excessive that, in a case raising issues as substantial as the present, proceedings were not commenced until June 2007.
58. For these reasons, I grant permission to RMP to apply for judicial review on the ground that Brent did not have the power, whether under section 111 or section 2 or

otherwise, to become a Participating Member of LAML. What relief is appropriate in the light of my judgment will be determined after the parties have had an opportunity to consider it and to make their submissions on the question of relief.

The contentions of the parties in summary

59. Although Mr Howell went first, it is more convenient to summarise the contentions of Brent and the Interested Parties first, since the burden of showing *vires* is on them.
60. For Brent, Mr Giffin's principal submissions were as follows:
- (a) Arranging insurance is a normal incident of the substantive functions of a local authority, and is conducive to or calculated to facilitate the discharge of those functions. Participation in mutual insurance arrangements is simply one means by which insurance may be arranged. Local authorities participated in a mutual insurance company, Municipal Mutual Insurance Ltd, between 1903 and 1992, when it ceased to trade because of its inability to satisfy statutory solvency margins, without any suggestion that they acted *ultra vires*. Hence participation in LAML is authorised by section 111.
 - (b) An activity that is normal and is to be expected of someone carrying out an expressly authorised activity should be regarded as authorised by section 111.
 - (c) In applying section 111, it is necessary to consider the challenged activity as a whole. It is incorrect to divide it up, or "atomise", it into separate transactions which may be the subject of different decisions on the application of section 111.
 - (d) In practical terms, it matters not that Brent has incurred contingent liabilities to LAML. It can choose not to insure at all (save where statute has made insurance compulsory), and if it does so it is exposed in theory to the possibility of enormous losses. Even if it insures, it may choose to accept an excess, and a limit of insurer's liability, that exposes it to the possibility of such losses. Even where insurance is taken with a commercial insurer, in the long term the price of that insurance reflects the general claims experience of the insurer, and premiums will be increased if claims generally are high; and every insured's premiums go to meet the claims of other insureds.
 - (e) The liabilities undertaken to LAML are the price of Brent's insurance: effectively, the insurance premiums. Whether a premium is acceptable is a commercial decision for Brent, and in the absence of an allegation of *Wednesbury* unreasonableness is not open to challenge.
 - (f) Section 111 should be interpreted and applied broadly. There was originally a tendency to apply it only to activities that were necessary if an express function was to be carried out; the modern tendency is for a liberal approach.
 - (g) Cases in which activities have been held to be outside the scope of section 111 have almost all been ones in which the authority was attempting to use s 111 to circumvent restrictions elsewhere in the legislation, or to enlarge its powers substantially in an area where Parliament had already laid down what was, on

a true reading, intended to constitute a comprehensive legislative code. *Hazell and Crédit Suisse v Allerdale BC* [1997] QB 306 are examples of such cases. Where there is no such detailed code or comprehensive regime, and the local authority is not attempting to circumvent some limitation upon its powers, a more generous ambit may properly be allowed to s 111.

- (h) In the present context there is no suggestion that participation in LAML tends to subvert provisions elsewhere in local government legislation, or that there is a comprehensive statutory code governing the manner in which local authorities are to meet their requirements for insurance and which does not include participation in a mutual.
61. Mr Giffin's submission on section 1 of the Local Government (Contracts) Act 1997 as summarised in his skeleton argument is as follows:

In any case, whilst Brent's preferred analysis is that the entirety of its arrangements with LAML should be considered as a whole, and are together authorised by s 111 of the 1972 Act, it would not assist RMP even if the contract of insurance itself were to be treated as a distinct and discrete element of the arrangements. That is because the contract of insurance would be a contract for the provision of (insurance) services, entered into for the purposes of, or in connection with, Brent's discharge of its functions. As such, it would now be expressly authorised by s 1(1) of the Local Government (Contracts) Act 1997. Applying the approach of Lord Templeman in *Hazell* (that is, that the word "functions" embraces all the duties and powers of a local authority – "the sum total of the activities Parliament has entrusted to it"), entering such a contract with LAML under s 1 of the 1997 Act would itself be a "function" of the authority for the purposes of s 111. It then follows that the other steps which Brent had to take in order to become a Member of LAML, and to allow LAML to do business, were steps which were incidental or conducive to, or calculated to facilitate, Brent's function of entering that contract.

62. Mr Giffin's submissions were adopted by the Interested Parties. In addition, in their detailed grounds the Interested Parties relied on section 151 of the Local Government Act 1972. This provision was not relied upon in oral submissions.
63. Mr Howell's principal submissions were the following:
- (a) Establishing or participating in a mutual insurance company in circumstances which involve the investment and liabilities required of Participating Members of LAML is not an incident of the obtaining of insurance, but something that goes beyond that.
- (b) In any event, the taking of insurance is, in general, not a function of a local authority for the purposes of section 111 but a function incidental to other functions. Participation in LAML is an incidental to the incidental, which is not authorised by section 111.

- (c) The powers of a local authority to give a financial guarantee are substantially circumscribed, and the limitations are not to be avoided by a transaction such as participation in LAML.
 - (d) The separation of the taking of insurance and participation in LAML for the purposes of determining the application of section 111 is not illegitimate atomising but a necessary analysis.
64. On section 2, Mr Goudie submitted:
- (a) The power conferred by section 2 is in wide terms. The section was clearly drafted to add to the powers of local authorities.
 - (b) It is for a local authority to determine whether its actions will constitute the promotion of economic, social or environmental well-being of its area.
 - (c) A decision of a local authority to insure with LAML because it offered comparable insurance to that available on the commercial insurance market at a lower cost is within the power conferred by section 2.
 - (d) The Guidance issued by the Secretary of State pursuant to section 3(5) made it clear that section 2 authorises local authorities to collaborate with each other and to establish joint venture companies, such as LAML.
 - (e) Thus local authorities have power to organise their insurance cover jointly and/or mutually.
 - (f) The potential and substantial economic benefits arising from participation in LAML would be invested in the local authority's area, for the benefit of its economic, social and/or environmental well-being.
 - (g) A local authority that participates in LAML is a legal person present in the local authority's area, so that the power can properly be exercised in its own favour pursuant to section 2(2).
 - (h) There is no relevant statutory prohibition, restriction or limitation affecting the well-being power in this case.
 - (i) The reports and resolutions referred to above demonstrate that Brent exercised the section 2 power.
65. Mr Giffin's submissions on section 2 were broadly similar. However, he understandably placed emphasis on the rationale for the establishment of LAML and for Brent's decision to participate in its establishment, being that they would bring about both cost savings and better risk management practices which Brent considered would lead to direct and indirect benefits to its area. Better risk management would benefit the area economically, both by reducing the cost of insurance to Brent and thereby enabling it to spend more on local services, and also by reducing losses and accidents, to the benefit of its area and persons in it. Hence its participation was authorised by section 2.
66. For RMP, Mr Howell submitted:

