



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

