



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.

