



PRESS SUMMARY

9 February 2011

Brent London Borough Council and others (Harrow London Borough Council) (Appellant) v Risk Management Partners Limited (Respondent) [2011] UKSC 7

JUSTICES: Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lord Brown, Lord Dyson

BACKGROUND TO THE APPEAL

This appeal considers the scope of what is known in public procurement law as the *Teckal* exemption. It considers whether a local authority was entitled to enter into contracts of insurance with a mutual insurer, established in co-operation with other local authorities, without first putting those contracts out to tender in accordance with the Public Contracts Regulations 2006 ('the UK Regulations')

In 2006 and 2007 various London local authorities co-operated and entered arrangements for mutual insurance. The aim was to reduce the cost of insurance premiums, by removing the element of profit built in to an ordinary commercial insurance premium, and to increase the standard of risk management. London Authorities Mutual Limited (LAML) was established in order to provide insurance to participating London authorities and their affiliates. Brent London Borough Council (Brent) was one of ten authorities involved. It became a member of LAML, made a payment in order to capitalise LAML and also provided a guarantee, undertaking to pay further sums to LAML on demand. Once LAML was established, it contracted to provide Brent with insurance. Brent did not conduct a tendering process for the award of the contract of insurance which it entered into with LAML. Risk Management Partners (RMP), a commercial insurer, claimed that there should have been a tendering process complying with the UK Regulations and that, had one been carried out, it might have obtained the insurance which was placed with LAML. RMP claimed damages from Brent. Although that claim has now been settled, the Court's decision will determine other damages claims against various other London authorities and will clarify for the future whether the UK Regulations apply to contracts which a public body proposes to award to an organisation such as LAML.

The UK Regulations apply whenever a contracting authority seeks offers in relation to the award of certain public contracts. They give effect in domestic law to an EU Directive, Council Directive 2004/18/EC on the co-ordination of procedures for the award of public work contracts, public supply contracts and public service contracts ('the Directive'). It applies to the award of public contracts. Case law of the European Court of Justice has developed an exception, known as the *Teckal* exemption. It provides that, in certain circumstances, the award of a contract by one public body to another separate legal person will not fall within the definition of 'public contract' in the Directive, with the result that the Directive will not apply to it and EU law will not require the contract to be put out to tender. The *Teckal* exemption comprises both a 'control test' and a 'function test'. (1) The local authority must exercise over the person to whom the contract is proposed to be awarded a control which is similar to that which it exercises over its own departments, and (2) that person must carry out the essential part of its activities with the controlling local authority or authorities.

This appeal concerned three questions of principle. (1) Does the *Teckal* exemption apply to the UK Regulations at all? (2) Does the *Teckal* exemption apply to contracts of insurance? (3) In order for the *Teckal* exemption to apply, must the control which the contracting authority exercises over the contractor be exercised by that authority individually or is it sufficient that it could be exercised collectively, together with other local authorities?

The High Court and the Court of Appeal held that the *Teckal* exemption did apply to the UK Regulations and that it was available in respect of contracts of insurance. However, they concluded that the control test was not satisfied because LAML was too independent from the local authorities which made up its membership. The claim between RMP and Brent having settled, Harrow was given permission to continue the appeal so as to have the issues of principle decided.

JUDGMENT

The Supreme Court unanimously allows the appeal. It holds that the *Teckal* exemption does apply to the UK Regulations, that it is available in respect of insurance contracts and that it is sufficient for it to apply that the co-operating public authorities together exercise collective control over the party to whom contracts are awarded. The requirements of the *Teckal* exemption were satisfied. Lord Hope and Lord Rodger both give judgments; Lord Walker, Lord Brown and Lord Dyson agree with both.

REASONS FOR THE JUDGMENT

The *Teckal* exemption applies to the UK Regulations. Although the definitions in the UK Regulations differ in some respects from the Directive, the purpose of the UK Regulations was to give effect in domestic law to the Directive. There is nothing to indicate that the UK Regulations intended to depart from the European Court of Justice's case law: [22] – [26], [92].

The *Teckal* exemption is available in respect of contracts of insurance. It did not matter that insurance was not a service that the local authority could provide for itself. What matters is whether the arrangement satisfies the control test: [27] - [30].

Both Lord Hope and Lord Rodger review the ECJ case law to consider the purpose and scope of the *Teckal* exemption. The Directive is not intended to protect the commercial sector by forcing public authorities to obtain the services which they need on the commercial market. Rather, its purpose is to ensure that, if public authorities do decide to obtain the services which they need from outside bodies, proper procedures are followed to ensure that potential providers have an opportunity to compete for the work. The Directive therefore does not apply where a public authority obtains the product or services from its own resources. Nor, in light of *Teckal*, does it apply where an authority obtains services from a separate body which is so closely connected with it that the authority should still be regarded as, in substance, obtaining the services in house. There is no reason in principle to distinguish between a situation where the body from which services are obtained exists to serve the interests of a single local authority and where it exists to serve the interests of several local authorities: [67] – [73].

The *Teckal* 'control' test requires that the public authority exercise a power of decisive influence over both the strategic objectives and significant decisions of the other body: [40]. That need not be exercised individually. It is sufficient that the public authority could exercise control over the contractor alone or together with other public authorities: [41], [45], [47] – [49], [52], [80] – [85]. There must be no private investment in the contractor: [53] & [75]. No injury will be caused to the policy objectives of the Directive if public authorities are allowed to participate in the collective procurement of goods and services, so long as no private interests are involved and they are acting solely in the public interest in the carrying out of their public service tasks: [53]. The argument that individual control is necessary is simply inconsistent with European Court of Justice's thinking: [80].

Here, the participating local authorities did exercise collective control over LAML. Meetings of LAML's board were not validly constituted unless a majority of those present were directors representing a participating member. Participating local authorities each had one vote at general meetings and retained a power to direct the board by special resolution. The fact that a director could not participate in a board meeting which considered a claim by a member which he or she represented was a matter of detail: [57]. No private interests were involved. The function test was also satisfied. LAML existed only in order to serve the insurance needs of its members: [59]

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html