



LAML – an assessment of the judgement

This is a briefing paper on the issues that have arisen in the recent Court of Appeal judgement in the case of the Local Authorities Mutual Limited and is provided to local authority chief executives, council leaders and APSE contacts.

Key issues

This briefing has been prepared with Eversheds LLP and is circulated to APSE member authorities for information. It covers the Court of Appeal judgement in the case involving the London Authorities Mutual Limited (LAML), providing an analysis on the impact of the case for other local authorities.

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1. Introduction

On 9 June 2009 the judgment was handed down by the Court of Appeal in the case involving the London Authorities Mutual Limited (LAML). The case has been widely reported in the local government press and has important implications for in-house service delivery and also for trading type activity.

2. Background

The Court of Appeal's judgment had been eagerly awaited by those in local government, because there was widespread hope that the appeal court would overturn the disappointing ruling at first instance and support the activities of

the London Boroughs. At first instance, the local authorities had lost on both the powers (“vires”) point (ie whether the councils did have the power to set the mutual insurance company up in the first place); and on the EU Public Procurement Regime (ie that the Teckal exemption did not apply, thereby meaning that a full procurement exercise was required before awarding a contract to that in-house company). It came as quite a shock to many in local government that the Court of Appeal refused to support the councils in their appeal when the court of appeal unanimously agreed that the Administrative Court had come to the right decision.

The background to the case is, of course, the ever changing circumstances within local government. In recent years the government has introduced the efficiency agenda, and placed additional responsibilities on local authorities and latterly since the credit crunch, finances have become extremely tight. In these circumstances, shared services and opportunities for local authorities to undertake work together became more attractive.

The LAML arrangement was intended to both improve efficiency and also save money. On the efficiency front, the intention was to reduce the number of claims and improve risk management; on the cost saving front, by pooling money and re-insuring catastrophic risks, significant savings could be made on current insurance costs. It is a point of some note, however, that it was the financial savings that appeared to garner the most publicity and attention, and this played a part in the judgment.

Therefore whilst the LAML arrangements appear to ‘tick all the boxes’ in terms of Best Value, Gershon efficiency, shared services, transformational government and so on, the Courts have nevertheless held it to be unlawful?

3. Details of the case

The case has two parts: the first is the powers and vires issues and the second part is the EU Public Procurement issues.

Turning to the vires issues first, the complainant Risk Management Partners argued that the local authorities involved did not have the power to set up the LAML company using the powers that they had sought to rely upon, namely the wellbeing powers under s2 of the Local Government Act 2000 and also incidental powers under s111 of the Local Government Act 1972.

Wellbeing powers have now been in force for some time and Government commissioned reports have recently indicated that its take-up has not been as wide as intended. It will therefore come as a considerable blow to the Government that the first major case on the powers led to a decision that they did not provide the legal authority required. This is surprising, bearing in mind the fact that the wellbeing powers had been trumpeted as general powers of “first resort”, available for a whole range of activities where legal uncertainty had previously prevailed. This was made perfectly clear in the Government’s guidance, published shortly after the Act came into force.

However, the Court of Appeal reminded everyone that it is the role of the Courts to construe legislation, not the role of the Executive. Statutory construction is an age old art, involving an analysis of the words used and a determination of their intended meaning. Whilst guidance might be useful in assisting the Court with this process, it was made clear that ultimately it is the Court’s view that prevails. In this case, the local authority side had argued that s2 of the Local Government Act 2000 was effectively a power to do “anything” unless prohibited by either s3 of the Act (prohibitions, restrictions or limitations on the use of the power); or whether the Secretary of State had exercised his own powers to prevent an activity being covered. However, the Court did not accept this view and in the leading judgment, Lord Justice Pill said: “While the setting up of a company may, subject to limitations, come within the wellbeing power, I doubt whether participation in an insurance company with a view to seeking cheaper insurance premiums, circumscribed as it would be by those limitations, does so ...” In other words, they thought that the wording of the wellbeing power was too general to cover the very specific facts in issue, whereby a company would be set up, would offer insurance to its local authority members and would require guarantees from those members and the covering of substantial liabilities in order to do business.

The other power relied upon by the local authority side was s111 of the Local Government Act 1972. Whilst incidental powers are always secondary powers in local government law, s111 has over the years been extremely valuable in filling in some of the gaps left by specific powers. Here, though, the Court held that “there is a fundamental difference between using a power to authorise the entering into a contract and setting up an insurance company of which the local authority is a member and by which insurance is obtained not only for itself but for other authorities as well”. Accordingly, s111 did not provide the legal authority.

Whilst other powers had been mooted to justify the LAML arrangements, the local authorities had been advised by leading Counsel that a combination of s2 and s111 would be sufficient. Once these had been disposed of by the Court of Appeal, the stark conclusion that the arrangements were *ultra vires* was unavoidable.

Turning to the procurement point, here the authorities had relied upon the Teckal exemption, namely that an in house company can be used to undertake services without competition, where the local authority exercises over the company a control, which is similar to that which it exercises over its own departments; and at the same time, the company carries out the essential part of its activities with the controlling local authority or authorities.

The Court examined the two limbs of the Teckal exemption in detail and confirmed it did exist in English law and would be available in those cases where the two limbs were satisfied. However, in this case, the authorities had failed to satisfy the Court of Appeal that the test in the first limb of Teckal was met. This means that the judges considered that the control that the various local authority members of LAML had over the company was insufficient to meet this test. Whilst there were in place requirements to call general meetings and to pass resolutions, the Court seemed swayed by the fact that the Board of Directors contained two independent members, had extensive powers of its own and Charles Taylor Consulting Limited had been taken on to provide management expertise.

This is a real predicament, as LAML also had to comply with the Financial Services Act requirements and these insist upon independent people sitting on the Board. This seems to rule out local authorities setting up companies which would have to be regulated by the FSA ; because its requirements for “independence” would seem to be inconsistent with the Teckal exemption’s requirement for “control”; but perhaps this is something that may be able to be resolved in due course. Had the first limb of Teckal been satisfied (which it was not), then the Court indicated that it would have accepted the second limb was passed, namely that the essential part of the activities of the company were with the authorities themselves, as opposed to other incidental bodies such as schools and a small number of other public bodies within the areas of the authorities concerned.

4. Implications of the judgment for local authorities

So where does this leave us? Despite claims by some to the contrary, all is not lost following the LAML judgment. Yes, it was disappointing that in the first major case on wellbeing, it was held not to apply. However, the circumstances of LAML were genuinely unusual and there is no need for concern to be expressed in relation to other more mainstream activities that currently rely upon those powers. In LAML much was made of the savings that would accrue to the authorities themselves, and this well-being benefit was held to be too indirect from the people the authorities served. In future much more attention will need to be paid to whether or not there is a direct linkage to the well-being of the local citizens and whether they can be said to benefit directly.

The same could be said about s111, where the Court’s view that there is a fundamental difference between entering into a contract of insurance (for which there is power) and setting up a company to provide insurance, which is more indirect and for which there is no power. Authorities will need to be careful when undertaking any exercise which is not “mainstream” and which relies heavily on incidental powers.

On Teckal, the Court confirmed the existence of the law and helpfully summarised the findings of a number of important cases in the European Court of Justice. It was only the Court's finding on the facts that the LAML arrangements did not come under the exemption that was the problem, rather than anything the Court said about the Teckal exemption itself.

A movement has arisen to put pressure on the new Secretary of State, John Denham, to repair the damage done by LAML and to clarify the law. There is also the latest pledge by the Conservative Party to introduce a power of general competence, should it gain power at the next election. Whilst these initiatives might be welcome, it should not be considered that they are essential for the wheels of local government to keep turning.

We understand that the authorities concerned have now decided to appeal the judgment to the House of Lords and this being the case, the matter will be in abeyance until next year at the earliest. We will need to see what the House of Lords makes of these matters before determining what needs to happen next. It is extremely unlikely that the government will take any action in advance of any Appeal being heard and it may, of course, be overtaken by the General Election.

There is no doubt, however, that there are lessons to be learned from the LAML case, such as better reporting to members and clearer determination of what the purposes of any particular project are. Here the focus must be on direct benefit to the citizens an authority serves, not indirect benefits to the authority itself. It might be helpful to bear in mind that just because the government has introduced a policy, does not make it *legal* as such; how you do it will be absolutely key; and the more complex and *risky* an arrangement is, the harder it will be to do it properly and therefore the more in depth legal advice is likely to be required.

5. APSE comment

It is of vital importance with the on-going efficiency agenda that councils are not deterred from utilising innovative solutions to develop outcomes that meet the needs of local citizens. Whilst the court of appeal felt that the money saving elements within the LAML case were 'indirect' any savings produced by councils

which help to contain costs , and or redirect savings into front line services for citizens, would not , to the person in the street , be considered as 'too remote'. Within a recessionary environment APSE would urge councils to continue to consider how best to develop service improvements and maximize the use of all powers available to them. However the LAML case is a timely reminder of the need to ensure appropriate and proportionate use of the powers available.

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