

FIRST SUPREME COURT DECISION ON EU PROCUREMENT

Brent London Borough Council and others (Harrow London Borough Council) v Risk Management Partners Limited

The Supreme Court has handed down its judgment in **Brent London Borough Council and Harrow London Borough Council v Risk Management Partners Limited** [2011] UKSC 7. Rhodri Williams QC, who represented the appellant Harrow throughout the litigation, appeared before the Supreme Court with Jonathan Sumption QC. Lord Hope and Lord Rodger both gave judgments.

The Supreme Court unanimously allowed the appeal by Harrow, holding that it is sufficient for the *Teckal* exemption to apply that control is exercised by contracting public authorities collectively, over the party to whom contracts are awarded.

BACKGROUND

The appeal concerned the award of contracts of insurance in 2006 and 2007 by local authorities to a mutual insurance company, the London Authorities Mutual Ltd (“LAML”), and whether the authorities were under an obligation to follow a tender process in the circumstances. The aim behind the establishment of LAML was to remove the commercial element usually present in an insurance premium, thereby reducing the costs incurred by the ten local authority participating members.

Ordinarily, a local authority who seeks offers in relation to the award of public works contracts, public supply contracts and public services contracts, must comply with the provisions of the Public Contracts Regulations 2006 (“the 2006 Regulations”) as to the correct tendering procedure to be followed. The 2006 Regulations implement EU Council Directive 2004/18/EC of 31 March 2004 (“the Directive”).

The European Court of Justice has established and developed an exception to the application of the Directive known as the *Teckal* exemption, following the leading decision of *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (Case C-107/98 [1999] ECR I-8121). Under the *Teckal* exemption, there are certain circumstances in which the award of a contract by a public body to another legal entity, will not amount to the award of a “public contract” within the meaning of the Directive, such that a tender process need not be followed. Essentially, the *Teckal* exemption applies where two tests are met. Firstly, the authority must exercise control over the party to whom the contract is awarded, similar to the control it exercises over its own departments. Secondly, the party to whom the contract is awarded must carry out the essential part of its activities with the controlling authority.

The central issue in this case was whether the *Teckal* principle applied to the contracts awarded to LAML, such that the local authorities were not obliged to follow the tender process required by the 2006 Regulations. Four crucial points were addressed:

- (1) Does the *Teckal* principle apply to the 2006 Regulations at all?
- (2) Does the *Teckal* principle apply to contracts of insurance?
- (3) Must the local authority exercise control individually over the party to whom the contract is to be awarded, or is it sufficient that control be exercised by a number of authorities collectively?
- (4) If it is sufficient that control be exercised by a number of authorities collectively, was that requirement met in the case of LAML?

The decision of the Court of Appeal

The Court of Appeal held that the *Teckal* exemption did apply to the 2006 Regulations, and did apply to contracts of insurance. However, it held that local authorities did not exercise sufficient control over LAML, which was intended to operate independently and to exercise its own discretion over the management of the company [at 20]. Consequently, the requirements for the *Teckal* exemption were not met on the facts, and failure to follow a tender process was a breach of the 2006 Regulations.

The London Borough of Harrow appealed to the Supreme Court.

The decision of the Supreme Court

The Supreme Court unanimously allowed the appeal, agreeing with the Court of Appeal that the *Teckal* principle applied to the 2006 Regulations, and to contracts of insurance, and overturning the finding that the *Teckal* requirements were not satisfied in the context of the contracts awarded to LAML.

The underlying purpose of the 2006 Regulations was to give effect to the Directive. The *Teckal* principle is “a significant and policy-based exemption” of EU law, which must apply equally in all member states. There is nothing contained in the 2006 Regulations to indicate that Parliament intended to depart from the jurisprudence of the European Court as to the scope of the Directive [at 22 and 24].

In rejecting the argument that the *Teckal* exemption could not apply to contracts of insurance, the Court found that it was immaterial that the contract was necessarily between two distinct bodies. The key issue,

rather, was whether the requisite degree of control was exercised over the party with whom the authority contracted [at 28 – 30].

The third issue of whether individual control by the contracting authority was necessary for *Teckal* to apply was crucial to the case. It was provided in LAML’s articles of association that a local authority member who made a claim would be excluded from the Board’s consideration of that claim. Further, the Board had the power to terminate the membership of an individual authority if the Board considered this desirable. The control exercised over LAML by the authorities, therefore, was truly collective, and not individual.

The Court examined ECJ authorities to ascertain the scope of control test. The relevant consideration is whether “*decisive influence*” is exercised by the authority over the contractor; that “*decisive influence*” may be exercised individually, or together with other public authorities, and it may be present even it is exercisable only in conjunction with those other authorities [per Lord Hope at 40, 41 and 45]. Specifically, the ECJ has recognised that authorities that elect to carry out services through a municipal concessionaire do not usually exercise decisive control over that body. To require individual control in that context would not be consistent with the Community procurement rules, which allow for public authorities to perform tasks in the public interest using their own resources [at 48].

Having concluded decisively that European jurisprudence has established that collective control is sufficient for *Teckal* to apply, the Court went on to find that, in LAML’s case, the local authority members did exercise the requisite collective control. No Board meeting was quorate unless the majority of directors present were directors representing a participating member, and the participating members had 100% of the voting rights [at 56 and 89]. The fact that a member who made a claim to the Board would be excluded from consideration of that claim, was “*a matter of detail*” [at 57].

The Court found that the *Teckal* requirements were met, and that Harrow (and other authorities) had not breached the 2006 Regulations in omitting to conduct a tender process prior to contracting with LAML under the mutual insurance scheme.

The future

The Supreme Court's clarification of the scope of the *Teckal* exemption in relation, firstly, to the 2006 Regulations and, secondly, to these type of contract entered into by local authorities under mutual schemes, is of considerable importance. Mutual insurance provides a means by which public bodies may make significant financial savings, as well as benefitting from other advantages, namely an enhanced standard of risk management. The decision of the Supreme Court is to be welcomed.

It was considered that no further guidance was needed as to the nature of the control test, or any other issue addressed in the judgments; consequently, no reference was made to the ECJ.

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