

Legal Update

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Overview

1. Round up of my favourite cases from the year
2. What lessons can we take from the cases?

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Risk Management Partners v LB Brent (the LAML case)

1. Mutual Insurance Arrangement Ruled *Ultra Vires*
2. Mutual Arrangement in this case did not satisfy *Teckal* Exemption
3. Couldn't justify the arrangement using "Wellbeing Powers"

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Teckal – Reminder of Rules

1. Service provider carries out bulk of its activities with the Authority
2. Authority exercises control over provider as if it were part of authority
3. No private sector ownership of service provider

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Risk Management Partners and Teckal

1. The *Teckal* in-house exemption is available in English Law
2. A number of authorities working together can take advantage of the *Teckal* exemption
3. *Teckal* argument failed in Risk Management Partners v LB Brent because a private company had been appointed to run the day to day activities and the local authorities did not have total control

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Risk Management Partners v LB Brent

1. Wellbeing powers – restrictive interpretation by the court
2. Courts disregarded government guidance on the use of the powers saying it is for the Courts, not the Executive, to interpret legislation
3. Risky activity, not the kind of thing local authorities were established to do, and no direct social, economic or environmental wellbeing to local residents
4. Result – considerable uncertainty over wellbeing powers

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PressetText Case

1. Amendment of contract is material and requires new tender exercise where:

Introduces conditions which might have resulted in different outcome when originally tendered

It extends the scope of the services covered considerably

It changes the economic balance in favour of the contractor in away that wasn't originally envisaged

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Lettings International Ltd v LB Newham

1. Must disclose “all elements” of award criteria
2. This includes method statements and all the sub criteria to be used in the marking scheme
3. Newham failed to apply the criteria correctly – said 40% available for “compliance with specification” – but only gave 3 out of 5 for compliance reserving other 32 marks for exceeding the specification
4. Court not impressed by Newham's argument that this approach will restrict creativity and innovation and by tenderers

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McLaughlin & Harvey v Dept. of Finance and Personnel

1. Damages not considered an appropriate remedy in relation to a Framework agreement
2. Not an appropriate remedy to add the aggrieved party to the Framework
3. Framework set aside and new tender exercise restricted to the tenderers who participated originally
4. *Henry Brothers* case - a Framework agreement can be set aside even where call-off contracts have been awarded under it (only remedy for those contracts would be damages)

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Procurement Lessons

1. Considerable uncertainty regarding extent of wellbeing powers – discourages innovation?
2. LAML/Pressetext/Teckal/Newham – rules must be followed rigidly, again reduces scope for flexibility and Innovation
3. Role of lawyers - change in role – early involvement rather than contract draftsmen

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Case References

1. Risk Management Partners v London Borough of Brent
2. Case C-107/98 Teckal Srl v Comune di Viano [1999] ECR I-812.
3. Presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS (C-454/06)
4. Lettings International Limited v London Borough of Newham [2008] EWHC 1583 (QB)
5. McLaughlin & Harvey v Department of Finance and Personnel [2008] NIQB 122
6. Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland [2008] NIQB 153

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