**CO/ 2426/2014**

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

**BETWEEN:**

**THE QUEEN**

**(on the application of**

**(1) LONDON CRIMINAL COURTS SOLICITORS ASSOCIATION**
**(2) CRIMINAL LAW SOLICITORS ASSOCIATION)**

**Claimants**

**-and-**

**LORD CHANCELLOR**

**Defendant**

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# CLAIMANTS' SKELETON ARGUMENT
**For hearing, 8-9 September 2014**

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*This is an updated skeleton argument to include references to the hearing bundles.*
*The Court should have a Core Bundle, 3 volumes of the Trial Bundle and 1 volume of authorities.*

*References to the Core Bundle are in the form CB/ x]/ p y, where x is the Tab number and y is the page number. References to the Trial Bundle are in the form TB/[x]/[y]/p z, where [x] is the volume number, y is the tab number and z is the page number.*
*(Page references in the Core Bundle use the number on the top corner of each page).*

*A List of Essential Reading is in the front of the Core Bundle, CB/A1/p 1*

**The Claim**

1. This claim for judicial review is brought by the London Criminal Courts Solicitors Association ("**LCCSA**") and the Criminal Law Solicitors Association ("**CLSA**") to challenge the most recent decisions of the Lord Chancellor and Secretary of State for Justice ("**the Lord Chancellor**") to "reform" the system of criminal legal aid. The Lord Chancellor's decisions were announced on 27 February 2014 in a document entitled "Transforming Legal Aid – Next Steps: Government Response" ("**the Response**") **[CB/C6/p 423].**

2. The relevant decisions were, in particular: (a) to reduce fees for significant categories of criminal legal aid work by 8.75% on average immediately (implemented through a statutory instrument which took effect on 20 March 2014: the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014 (SI 2014/415)), and a further 8.75% on average in 2015 (to be implemented through new contracts); and (b) to hold tender processes in which legal aid firms could be awarded unlimited numbers of "own client" contracts but only 525 "Duty Provider" contracts, whereby they would be able to gain new clients through acting as the duty solicitor in a police station or magistrates' court setting (as compared with approximately 1600 contracts permitting duty work at the present time) ("**the decisions**").

3. The Claimants and their members disagree profoundly with the merits of the decisions and firmly believe that they will lead inexorably to very serious harm to the criminal legal aid system and to the criminal justice system more generally, both of which this country should be proud of and should seek to maintain. However, this Claim is not about the merits of the decisions but rather about the process which was adopted by the Lord Chancellor before taking them.

4. It is common ground that the decisions attracted a common law duty of procedural fairness. That duty was heightened by the context for the decisions and by their likely effects. The decisions have serious implications for access to

criminal justice in England and Wales; and so for the rule of law. If predictions are inaccurate or mistakes are made, the consequence will be "advice deserts", gaps in the availability of advice and representation for persons accused of crimes. Also, the decisions had the avowed intention of achieving "consolidation" of the market for criminal legal aid services, meaning the closure of smaller firms, which proliferate in this area. That is, the Lord Chancellor intends by his decisions to bring about the closure of (at least) hundreds of businesses which have been built up through conscientious public service over many years in order, he says, to create larger firms which can sustain lower legal aid fees by achieving economies of scale. The fact that many of the Claimants' members, and many other criminal legal aid solicitors besides, stand to lose their current livelihoods as a result of the decisions made the Lord Chancellor's duty of procedural fairness a particularly onerous one.

5. In fact, the process adopted by the Lord Chancellor fell well short of even a "normal" standard of procedural fairness. In particular, the Lord Chancellor based his decisions upon two reports by independent experts which were commissioned with the specific intention of providing the evidence base for the decisions. Yet he refused to disclose the two reports before taking his decisions, thereby denying the Claimants and other interested parties any opportunity of commenting upon their contents, or the specific matters which they considered, or of utilising the evidence contained in the reports to inform their consultation responses.

6. When taking the decisions, the Lord Chancellor ignored most of the contents of one of the reports, by Otterburn and Ling Consulting ("**Otterburn**"), in the face of an express commitment made by him in person to the Claimants amongst others that he would adopt the findings of that report and without any attempt to explain why he was not adopting those findings. The other report, a financial analysis by KPMG, was critical to the final decisions: the final figure of 525 Duty Provider contracts was in fact produced by KPMG. The commissioning of that report was not even revealed to the Claimants prior to the end of the consultation period. When KPMG was eventually published, it turned out to have been based upon highly controversial assumptions which had never before been publicised by the Lord Chancellor.

7. In the case of both reports, consultees were denied the opportunity to make pertinent comments on the analysis which they contained, which comments would have been material to the Lord Chancellor's decisions and so would have added significantly to the evidence base which he considered prior to taking the decisions. The Lord Chancellor accepts that relevant comments could have been made if the reports had been provided to consultees. The Claimants therefore submit that the Lord Chancellor breached his duty of procedural fairness and that the decisions should be quashed.

**Relevant facts**

*The economic and financial context*

8. The macro-economic background to the Government's various measures to reduce spending on legal aid is well-known. However, the relevant background to the most recent decisions includes:

   (1) That rates of pay for criminal legal aid work have not increased since the mid-1990s. Mr Waddington recites an example of a complex affray case which was remunerated at £470 in 1978, and would attract a fee of £258.71 under the current proposals (§9) **[CB/B1/p 54]**.

   (2) That there has in fact been a succession of reductions in the payments available for criminal legal aid work, including several reductions in recent years the effects of which have yet to be fully felt (Waddington 1st, §10 **[CB/B1/p 54]**; Otterburn, p. 7 **[CB/C7/ p 523]**.

   (3) That notwithstanding those cuts, the most serious problem facing criminal legal aid solicitors is a reduction in the amount of work available, due to falling rates of crime and of prosecutions being commenced by the Crown Prosecution Service (Otterburn, p. 33 **[CB/C7/p 549]**).

These factors have also contributed to the Ministry of Justice significantly *over-estimating* spending on criminal legal aid in 2012/13, by £50m or 5% (see Waddington 1st, §77) **[CB/B1/p 80]**.

9. As a result of these factors, the profitability of criminal legal aid work is already precarious. Otterburn concluded *inter alia*:

> Margins in crime are very tight, especially in London and the effects of previous reductions in crown court work have yet to be fully felt. The survey strongly suggests that the supplier base is not financially robust and is very vulnerable to any destabilising events ..
>
> There are very few firms which can sustain the overall reduction in fees set out in the Next Steps document, which would be very much greater than 17.5% in some parts of the country, particularly in London and the South East but also in rural areas which had higher fees due to higher costs of travel and waiting. (p. 7) **[CB/C7/p 523]**

The experience of the Claimants' members reflects and supports Otterburn's pessimistic assessment: see Burrough, §§7 and 18 **[CB/B4/p 135]**; Bird, §§57-62 **[CB/B5/p 141]**; Russell, §§5-6 **[CB/B6/p 159]**.

*The two-stage consultation process*

10. The decisions were the culmination of a decision-making process which was in two stages. A first consultation paper, issued in April 2013, proposed a system of Price Competitive Tendering ("**PCT**") for criminal legal aid services, whereby firms meeting minimum quality standards would be awarded contracts for criminal legal aid work based on who tendered the lowest price to perform the relevant services (see *Transforming Legal Aid: delivering a more credible and efficient system* ("**the first consultation document**"), chapter 4 **[CB/C1/p 227, 247]**).

11. Following a campaign by the legal profession, the Lord Chancellor accepted that PCT was not an appropriate way of awarding contracts for criminal legal aid work and proposed instead a dual contract model whereby any firm meeting minimum quality standards would be awarded a contract for "own client" work but would have to tender for a limited number of Duty Provider

contracts (*Transforming Legal Aid: Next Steps*, 5 September 2013 ("**the second consultation document**"), chapter 3, esp. §§3.4-3.55 **[CB/C3/ p360-372]**). Duty Provider work is criminal legal aid advice, litigation (except Very High Cost Cases) and magistrates' court advocacy services delivered to clients who choose the Duty Provider – the solicitor on call at the relevant police station or magistrates court - at the first point of request. Own client work is all those services delivered to clients who choose their own provider at the first point of request (see Waddington 1st, §35); **[CB/B1/p 64]**.

12. Currently, virtually all criminal legal aid firms do both Duty Provider and own client work. Acting as a duty solicitor is an unpredictable source of income, as there is no guarantee as to how much a solicitor will be needed during a duty "slot" or as to whether initial advice at a police station or magistrates' court will lead to further work on a case. But acting as a duty solicitor is a vital source of clients in the future, as clients met for the first time in the police station or magistrates' court will, if satisfied with the service they have received, return to the firm in the future as "own clients". Own client work meanwhile represents a stable and relatively predictable source of income, but only if the stock of "own clients" can be replenished through duty work.[1] Otterburn found (p. 6 **CB/C7/p 522]**):

> Most firms are dependent on duty contracts for generating fresh work and few would be sustainable without it in the medium term.

Hence, a firm's failure to win a Duty Provider contract would be likely to be fatal (see also Waddington 1st, §§61(a) and 67 **[CB/B1/p 74]**).

13. The dual contract model was presented by the Lord Chancellor as having been agreed with the Law Society (see the foreword to the second consultation document **[CB/C3/p 338]**), issued on 5 September 2013. There is a dispute between Mr Hudson the then Chief Executive of the Law Society and Dr Gibby for the Lord Chancellor as whether the Law Society had in fact agreed to the dual contract model (see Waddington 1st, §85 **[CB/B1/p 84]**; Gibby, §194

[1] See Burrough, §9: "Even for a firm such as mine with a well-regarded reputation both amongst the police, the Court staff and clients .. I have grave concerns for the future viability of the firm if it were only to achieve an own client contract". **[CB/B4/p 137]**

**[CB/B8/p 219];** Waddington 2nd, §40 **[CB/B2/p 118]**). It is not in dispute (a) that the Law Society informed the Lord Chancellor in early August 2013 that it did not support the dual contract model (see Gibby, §40 **[CB/B8/p 179]**), but (b) was threatened by the Lord Chancellor himself, on 27 August 2013, that PCT would be retained instead if the Law Society did not support the dual contract model (Waddington 1st, §48 **[CB/B1/p 70]**). That threat appears to have been made after the Ministry of Justice had concluded internally, on 20 August, that PCT should not be retained: (see §152 of the ministerial submission of 19 August 2013 **[TB/2/D15/p 1177]**.

14. Even if there was agreement with the Law Society, it had been reached (a) without consulting with the Claimants or other associations representing criminal legal aid solicitors, and (b) against the wishes of the Chairs of the Law Society's own Criminal Law and Access to Justice Committees whom the Law Society had agreed would speak for criminal practitioners in its dealings with the Lord Chancellor and (c) against the wishes of criminal practitioners generally (Waddington 1st, §§47-52 **[CB/B1/p 70]**).

15. The second consultation document also maintained a proposal which had been made in the first consultation document, that fees for criminal legal aid work be reduced by 17.5% on average. As Otterburn pointed out in the passage quoted in §9 above, the actual proposed reduction is very much greater than 17.5% in some areas.[2]

16. A crucial decision for the Lord Chancellor in the second stage consultation was how many Duty Provider contracts would be awarded in each procurement area. This decision was crucial because, in particular:

    (1) It would be a key determinant of the character and workings of the market under a revised criminal legal aid scheme. Given that every firm meeting quality standards could have an own client contract, the number of Duty Provider contracts would determine the extent of the change

[2] For example, the actual cuts will be up to 33% for some work in London (Bird, §23); and more than 40% in some parts of Essex and Surrey (Waddington 2nd, §79 **[CB/B2/p 130]**).

from the present system under which all firms doing own client work can also do Duty Provider work.

(2) Looked at from the point of view of individual firms, the number of Duty Provider contracts would be a key determinant of whether many firms would be able to continue in existence. As already noted, without a Duty Provider contract to replenish their own client base, most criminal firms will be unable to survive more than a year or two and whilst it will in theory be possible for contract-holders to use delivery partners,[3] the majority of firms which do not win a Duty Provider contract will not be able to survive.

(3) The number of Duty Provider contracts available, and therefore the likely size/value of each contract, would determine the extent to which firms would have to grow in size in order to handle a Duty Provider contract. The weak finances of existing firms and the rarity of the necessary management skills present significant obstacles to growth (see Otterburn, pp. 7-8 **[CB/C7/p 523]**). If the required "scaling-up" was too great, there would not be sufficient bidders for the Duty Provider contracts and the system would fail.

(4) The number of Duty Provider contracts was also intimately linked to the proposed fee reduction. The number and therefore size/value of Duty Provider contract which was necessary to ensure that each contract was sustainable depended upon the fees which would be paid under the contract (the lower the fees, the larger the contract must be). If an appropriate balance could not be struck between ensuring sustainability whilst requiring only manageable firm growth, the obvious solution would lie in reducing fees by a lesser percentage.

17. The second consultation document set out four factors which would determine the number of contracts in each procurement area (§3.31 **[CB/C3/p 453]**). These were: "sufficient supply to deal with conflict of interests" (enough providers in an area to cover most, if not all, cases in which a conflict arises); "sufficient case

[3] In practice, this is unworkable: see Waddington 2nd, §§13-15 **[CB/B2/p 108]**.

volume to allow fixed fee schemes to work" (case volume is needed to ensure a balance between loss making and profit making fixed fee cases); "market agility" (extent to which current providers would need to scale up in order to take on increased volumes of work); and "sustainable procurement" (the need to ensure the market would be competitive in future tendering rounds).

18. The second consultation document went on to inform consultees that the governing consideration when applying these factors was that Duty Provider contracts must be large enough to be sustainable in their own right, that is, without a firm doing other work, including own client criminal legal aid work (§3.32 **[CB/C3/p 368]**):

> In addition to these factors, our intention is to ensure that the contracts to deliver Duty Provider Work are large enough in volume and value to be sustainable in their own right after the cumulative reduction in fees by 17.5%, so far as is possible. We clearly must ensure that a minimum number of providers continue to operate in each area and that a service is provided to all who need it. We think the best way to do that would be to ensure that Duty Provider Work is sustainable on its own.

*The independent research*

19. Such was the significance, and difficulty, of these issues that the Lord Chancellor stated that he would commission, jointly with the Law Society, a further piece of research to provide the supporting evidence for his considerations:

> 3.33 In order to help inform our analysis of sustainability and the final decision on the number of contracts for Duty Provider Work, we intend to jointly commission with the Law Society a further piece of research to get more detailed information for this purpose. ..
>
> 3.34 Therefore, we propose to determine the appropriate number of contracts for Duty Provider work on the basis of the four factors set out above and the outcomes of the further research. We would welcome consultees' views on these factors and whether there are any others that we should consider. **[CB/C3/p 368]**

20. In fact, two pieces of independent research were commissioned, from Otterburn and from KPMG. The intention was that Otterburn's conclusions should be applied by KPMG in a financial model which would give rise to a

recommended number of Duty Provider contracts (see, for example, KPMG's contract with the Ministry of Justice **[TB/2/D20/p 1231]**). However, the commissioning of KPMG, and the relationship between its work and that of Otterburn, was not disclosed to consultees. The Claimants were unaware that anyone other than Otterburn would be conducting the independent research until 25 November 2013, after consultation had closed (see Waddington 1st, §73 **[CB/B1/p 79]**) and so were not aware that a financial model would be constructed by expert consultants.[4]

21. Indeed, the belief that the relevant recommendations would be made to the Lord Chancellor by Otterburn based upon his firm's survey of criminal legal aid solicitors was encouraged by the Lord Chancellor himself. When rejecting Mr Waddington's request that consultation remain open until the independent research had been made available to consultees (see Waddington 1st, §§54-55 **[CB/B1/p 72]**), the Lord Chancellor stated (letter of 8 October 2014 **[TB/1/B/pg 1064]**):

> As you refer to in your letter, we have also commissioned further research with the Law Society to explore the size of contract necessary for the market to be sustainable. …
>
> We will of course carefully consider all of the responses we receive (including any views or evidence on sustainability) as well as the independent research being conducted by Otterburn to help inform our assessment of the number and size of Duty Provider Work contracts that would be awarded. [emphasis added]

A further call for disclosure of the "independent research" was made after the fact of the KPMG research became known and was also refused: Waddington 1st, §82 **[CB/B1/p 82]**.

22. The Law Society was aware of KPMGs involvement, and appears to have been involved in providing information to KPMG, but had been required by the Lord Chancellor to enter into confidentiality agreements which prevented any details of the KPMG work (and indeed of the Otterburn work) from being shared with the Claimants or any other interested parties.

[4] See also Bird, §73: "At the time of responding to the last consultation, I had no idea that the KMPG report had been commissioned by the MoJ". **[CB/B5/p 155]**

23. However, although he would not disclose Otterburn or KPMG so as to allow for consultees to comment upon their conclusions, the Lord Chancellor did give a personal commitment to follow Otterburn's recommendations, at a roundtable meeting attended by the Claimants amongst others on 13 November 2013 (see Waddington 1st, §71 **[CB/B1/p 78]**; and the notes of the meeting **[CB/C4/p 382]**).

24. The Otterburn and KPMG reports were published alongside the Response, on 27 February 2014. It transpired that Otterburn had reached a number of conclusions which were highly critical of the proposals set out in the second consultation paper. These included (pp. 7-8, **[CB/C7/p 523]**):

(1) Any fee reduction should not take place immediately but should be delayed to allow time for market consolidation;

(2) Few firms could sustain the overall fee reduction of 17.5% on average, which would be very much greater in some parts of the country.

(3) Given their weak financial position, few firms would be able to invest in the structural changes needed for a larger duty contract and to recruit new fee earners.

(4) The Criminal Justice System areas were not suitable as a basis for Duty Provider contract procurement areas without amendment.

(5) The dual contract approach should not be adopted in rural areas, where circumstances were different, and in particular the market was already consolidated and where there was insufficient volume to allow firms to generate the necessary efficiencies.

(6) The number of firms which could grow reasonably rapidly to meet the requirements of a large Duty Provider contract was limited, and their ability to grow was restricted by financial constraints.

(7) Few firms could survive in the medium term without a Duty Provider contract.

25. As for the KMPG report, this turned out to contain analysis and modelling which sought to estimate the financial value of Duty Provider contract which would be required to make such contracts sustainable in urban, rural and London areas, and thereby the number of such contracts which should be tendered. However, the process of compilation of the KPMG report was very far from "independent" and the analysis had been premised upon a number of assumptions which had been provided to KPMG by the Ministry of Justice and which were highly contentious.[5]

26. As Mr Waddington explains (1st statement, §§105-143 **[CB/B1/p 91]**), KPMG's analysis was dependent upon a range of assumptions which formed the basis for their financial model, for example, that:

(1) Volumes of legal aid work would continue at the level of 2012/13 remain constant (based on spend in 2012/13, and therefore – subject only to the proposed fee reduction – spend on criminal legal aid. This assumption was contrary to Otterburn's finding of a marked downward trend in volumes.

(2) Firms would give up 50% of their own client work in order to take on Duty Provider work, and so would carry on doing 50% of that work alongside Duty Provider work, earning fees accordingly.[6] This was – to quote the Response (§27 **CB/C6/p 434]**) - a "key departure" from the position set out in the second consultation document whereby decisions would be taken on the basis that Duty Provider work would be sustainable in its own right.

[5] Although Dr Gibby cavils at the suggestion that assumptions were "provided" by the Ministry of Justice (§212), it is clear that the Ministry did direct KPMG to adopt certain assumptions (for example, that 50% of own client work would be given up) and a wide range of other assumptions are stated by KPMG to have been derived from "discussions with MoJ".
[6] Consequently, firms would have to grow less quickly to cope with a Duty Provider contract because existing resources used to service own clients could and would be diverted. Also, viable Duty Provider contracts could be smaller in size (as it was assumed that income from Duty Provider fees would be supplemented by own client income).

(3) Firms were carrying significant levels of latent staff capacity, with the result that they could take on 15% more work without recruiting additional staff. This was said to be achievable through the unevidenced, and hotly disputed, view that existing staff could work harder and the reallocation of staff from other areas of the firm to work on criminal legal aid work (p. 32 **[CB/C8/p 651]**. Otterburn had in fact found that firms would not in general permit other more profitable departments to assist their criminal legal aid practice (p. 6 **[CB/C7/p 522]**).

(4) Firms could take on 20% more staff through organic recruitment (that is, without mergers or other more fundamental change). Again, Otterburn had disagreed, concluding that few firms would be able to invest what was needed to recruit new fee earners (p. 7 **[CB/C7/p 523]**).

(5) Firms could substantially "improve" staff cost efficiency by an average of 20% (that is, for example, a firm with staff costs at 70% of revenue could "improve" that to 56%). This assumption was premised on firms using unqualified paralegals for a wider range of work (see p. 35 of the KPMG report **[CB/C8/p 654]**) and ran contrary to the Lord Chancellor's evidence to the Justice Select Committee that "I want a quality service delivered by experienced and qualified solicitors and barristers".

(6) A Duty Provider contract would be viable if it was capable of producing a 0.1% profit. This was also contrary to Otterburn's conclusions, which adopted a 5% margin as "a minimum definition of a viable practice" (p. 23 **[CB/C7/p 539]**.

27. These assumptions, which played a crucial role in the out-turn of KPMG's analysis are not only hotly disputed by the Claimants, they are – as indicated - also in most cases inconsistent with the findings of Otterburn. Those findings were provided to KPMG and indeed the basis for commissioning KPMG was that it would use Otterburn's findings in its financial model.

28. The KPMG report highlighted a number of areas where it could not provide sufficiently certain answers and where further work would require to be done (Waddington 1st, §§105-106 **[CB/B1/p 91]**). These matters related to the application of the general model, based on its generalised assumptions, to real life circumstances and included: the capability of incumbent Duty Provider contract-holders to grow; the likelihood of future procurements attracting out of area providers to enter the market; the real scope for staff efficiency improvements in each local market given local circumstances; the proportion of market consolidation achievable; the special position of London; and the issues with firms (especially in London) bidding across areas (see p. 12 **[CB/C8/p 631]**).

29. Also, KPMG highlighted that certain issues were entirely outside the scope of its work and would require separate consideration (see p. 11 **[CB/C8/p 630]**). KPMG emphasised that its analysis of viability was focused purely on profitability and did not take account of variations in geography and travel time, which would serve to increase costs or reduce the potential for efficiencies (although it is not clear to the Claimants how it could be concluded that a contract would be profitable without taking those factors into account) or case mix variability. Nor did KPMG take account of the possibility (the certainty, according to Otterburn) of firms which did not win a Duty Provider contract being unable to survive.

30. KPMG concluded that there should be between 432-525 Duty Provider contracts, on the basis that London would be procured on a 32 area rather than 9 area basis (p. 10 **[CB/C8/p 629]**).

31. Dr Gibby explains that the Ministry of Justice then undertook "stress testing" of KPMG's findings (§119) (or what the Response describes as "a sense check": §34) **[CB/B8/p 196]**. As a result of this analysis, the Ministry reassured itself that KPMG's analysis would not require bidding firms to take on excessive numbers of fee earners (only one additional fee earner, but premised on the assumption that only the largest firms would bid); that there was no risk of excessively large Duty Provider contracts caused by the abandoned 50% of own client work; that it would be reasonable to expect firms to bear plus or

minus 3% variations in fees from year to year (notwithstanding that KPMG had defined viability based on 0.1% profit); and that the growth required of firms to achieve the levels of income they required to remain viable was realistic (see Gibby, §§120-131 **[CB/B8/p 196]**). The latter two conclusions were reached on the basis of Legal Aid Agency claim data which was not publicly available.

*The Response*

32. As already noted, the Response revealed that the Lord Chancellor had decided to press ahead with a 17.5% average fee cut, 8.75% of which would take effect almost immediately, and with a dual contract system, with 525 Duty Provider contracts, as recommended by KPMG. Contrary to the Lord Chancellor's personal commitment, the Response did not adopt Otterburn's conclusions. Indeed, the vast majority of Otterburn's conclusions, both conclusions of fact and his expert opinions, were not even acknowledged in the Response and there was no attempt to explain why the Lord Chancellor had seen fit not to adopt those conclusions.

33. The Response confirmed the importance of the Otterburn and KPMG reports to the Lord Chancellor's decisions. As well as adopting a number of Duty Provider contracts which had been suggested by KPMG:

    (1) The Response stated that the number of duty contracts being offered had been informed by the independent research jointly commissioned with the Law Society (§9) **[CB/C6/p 431]**.

    (2) The Response set out the five factors which were to be considered in determining the number of Duty Provider contracts, the fifth being the intention to deliver Duty Provider contracts which were large enough in volume and value to be sustainable in their own right (§§20-21). The Otterburn and KPMG reports had been commissioned jointly with the Law Society in order to inform consideration of the five factors,

assessment of the market, and to assist in determining the number of Duty Provider contracts to offer (§22) **[CB/C6/p 433]**.

(3) However, the Response explained that there had been "a key departure" from the factors originally set out in the second consultation document, as it was no longer intended and assumed that Duty Provider contracts had to be large enough in value to be sustainable in their own right. The Government now proceeded on the basis that providers would wish to retain some of their Own Client Work, and had asked KPMG to model on the basis that providers would give up 50% of their Own Client Work. It was stated that this figure "best represents how providers are most likely to react in the new market" (§27) **[CB/C6/p 434]**.

(4) The Response confirmed that the independent research provided "an important evidence base" for determining an appropriate range of Duty Provider contracts to offer in each procurement area (§33) **[CBC6/p 435]**.

(5) The Response explained that the Lord Chancellor had "weighed up all of the analysis, the independent research, the consultation responses and key risks" and had decided to proceed with the model suggested by KPMG whereby 525 Duty Provider contracts would be offered, alongside an unlimited number of own client contracts (§37) **[CB/C6/p 438]**.

*The objective of market consolidation*

34. The Lord Chancellor has emphasised throughout the two-stage consultation process his belief that the market for criminal legal aid services requires substantial "consolidation". The successive consultation papers and the Response made clear that the Government's aim is to change the structure of the market so that there is a smaller number of larger firms, in the expectation – unevidenced so far as the Claimants are concerned – that larger firms can perform the requisite services at lower cost (Waddington 1st, §11 **[CB/B1/p 55]**; Gibby, §38 recounts specific instructions given by the Lord Chancellor to that effect **[CB/B8/p 178]**). The Lord Chancellor himself stated in evidence to the Justice Select Committee:

> We and the Law Society think there are too many organisations out there to sustain the kind of financial challenges we have.
>
> "It will be different if we have a sector with fewer, stronger, organisations .. I am simply looking to get medium-sized decent law firms, delivering a service at a price that we can afford, around the country. The acceptance from the Law Society is that some consolidation will have to take place to achieve that. **[CB/C2/p 307]**

35. Dr Gibby and the Detailed Grounds seek to resile from the Lord Chancellor's evidence – apparently in order to minimise the extent of the procedural duties to which he was subject - contending that it is not, after all, intended to reduce the overall number of criminal legal aid solicitors (Detailed Grounds, §32 **[CB/A5/p 37]**; Gibby, §§141, 143 **[CB/B8/p 202]**). That misses the point: the Lord Chancellor may or may not intend for the overall number of solicitors to remain the same, but he wants those solicitors working in larger organisations, with the result that small firms will close. In fact, it would appear that he also intends a reduction in the number of criminal legal aid solicitors since KMPG's analysis, which he has adopted, proceeds on the basis that firms will in the future make greater use of unqualified staff to do work which is currently done by solicitors (see §26(5) above).

36. The further argument that the Lord Chancellor would be content for all existing firms to remain in the market, bidding for Duty Provider contracts as consortia or delivery partners (Detailed Grounds, §32) is (a) inconsistent with the Lord Chancellor's evidence to the Select Committee, (b) totally unrealistic in practical terms (see Waddington 2nd, §§13-18 **[CB/B2/p 108]**), (c) contrary to the express findings of Otterburn, which rejected the proposition that consortia could provide the necessary financial efficiencies,[7] and (d) contrary to the analysis which Otterburn and KPMG were commissioned to perform, which focused upon the size/value of Duty Provider contract which would be viable

[7] "Some firms may achieve critical mass through the creation of consortia however these are unlikely to create the more efficient financial structures required. They will be unable to re-structure the balance between equity and other fee earners, will not benefit from one set of systems and will have added an administrative task in liaising with the other firms in the consortium, and guaranteeing consistent performance, that someone will need to manage": p. 45 **[CB/C7/p 561]**.

for a single firm to perform (not a number of different firms together).[8] The latter point is potentially significant. If it genuinely was the intention or expectation of the Lord Chancellor that existing small providers should remain in the market by forming consortia then his decisions would be flawed in substance because the evidence on which they were based simply did not address the issue of the necessary size/value of a Duty Provider contract when performed by a number of firms together.

37. Of course, whether or not it was the intention of the Lord Chancellor to put large numbers of criminal legal aid firms out of business, that is very likely to be the consequence of his decisions. The final internal advice given to the Lord Chancellor before he took the decisions recognised that it was "unlikely" that the same numbers of firms would remain in the market after the procurement of the dual contracts (Submission dated 14 February 2014, §61 **[CB/C5/p 396]**).

*The justification for withholding the two reports*

38. It is striking that at no stage has the Lord Chancellor ever put forward a positive justification for withholding the Otterburn and KPMG reports. His letter of 8 October 2013 declined disclosure on the grounds that it was "not necessary", although it is difficult to understand how that judgment could have been made in advance of any knowledge of the contents of the reports. The Detailed Grounds hint (in §40) at an argument that disclosure of the reports would have unjustifiably delayed the consultation process and so the implementation of reforms. If that is to be the Lord Chancellor's case, the Claimants would point out that under the contractual arrangements with KPMG, its report was due for publication on 15 November 2013 **[TB/2/D20/p 1232]**, only two weeks after the scheduled close of the second consultation period on 1 November. Otterburn was also to be complete by then (since KPMG's report was supposed to be based on the findings of Otterburn). Moreover, the second consultation period was artificially short: only eight weeks, as compared with the 12 weeks usually recommended by the Cabinet

[8] It is notable also that the KPMG research and subsequent analysis by the Ministry of Justice expressly assumed that the bidders for Duty Provider contracts would be the largest firms in each procurement area (see, eg, Gibby, §§120, 125 **[CB/C8/p 196]**).

Office.[9] If 12 weeks had been allowed, the reports could have been disclosed and commented upon within the scheduled consultation period.

39. In the event, the completion of the reports was delayed, principally because of additional time taken by the Ministry of Justice to negotiate their contents (as Dr Gibby explains in §§74-116). But even then there was no pressing urgency which would have prevented a short further period of consultation after the reports were ready to the Lord Chancellor's satisfaction. As of today, six months after the decisions, the tender procedure for Duty Provider contracts has yet to commence and the start of the dual contract system remains a long way off.

**Relevant legal principles**

40. The Claimants rely upon a line of cases which establish a common law duty on the part of a decision-maker to disclose relevant evidence to consultees. This duty is an aspect of the well-known *Gunning* criterion that sufficient reasons must be provided for particular proposals so as to permit those consulted to give an intelligent consideration and response:

> It is important that any consultee should be aware of the basis on which a proposal put forward for the basis of consultation has been considered and will thereafter be considered by the decision-maker as otherwise the consultee would be unable to give, in Lord Woolf's words in *Coughlan*, either "intelligent consideration" to the proposals or to make an "intelligent response" to it. This requirement means that the person consulted was entitled to be informed or had to be made aware of what criterion would be adopted by the decision-maker and what factors would be considered decisive or of substantial importance by the decision-maker in making his decision at the end of the consultation process. (*R (Capenhurst) v Leicester City Council* (2004) 7 C.C.L. Rep. 557, §46)

41. In *R v Secretary of State for Health ex parte United States Tobacco* [1992] 1 QB 353, the claimant, having received encouragement from the Government, had opened a factory in Scotland (in 1985) to manufacture oral snuff. The Government announced in February 1988 a proposal to make regulations to ban oral snuff on health grounds. The Government had relied upon scientific

[9] https://www.gov.uk/government/publications/consultation-principles-guidance

advice given to it by an independent committee in 1986 and refused to disclose that advice when requested to do so by the claimant, which wanted to make representations about the advice when responding to a public consultation about the proposal to ban oral snuff. When regulations were made in December 1989, the Divisional Court held that that refusal was unfair and unlawful and quashed the regulations.

42. The Divisional Court noted that "a high degree of fairness and candour" was required of the Secretary of State, *inter alia*, because the banning of oral snuff was likely to be catastrophic for the claimant's business in the UK.

> It is well established that the claims of natural justice are particularly strong where a party is being deprived of a right previously enjoyed, especially if it involves loss of livelihood: see *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520 and *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052 . For these reasons it was important that the Secretary of State, when he eventually decided to propose the Regulations, should give the applicants a full opportunity to know and respond to the material and evaluations which led him to such a striking change of policy. (per Taylor LJ at 370) [emphasis added]

43. There was no sufficient reason for not disclosing the Secretary of State's external scientific advice:

> One cannot help feeling that the denial of the applicants' request was due to an inbuilt reluctance to give reasons or disclose advice lest it give opponents fuel for argument. One can understand and respect the need for ministers to preserve confidentiality as to the in-house advice they receive on administrative and political issues from their civil service staff. But here, the advice was from a body of independent experts set up to advise the Secretary of State on scientific matters. I can see no ground in logic or reason for declining to show the applicants the text of the advice. In view of the total change of policy the Regulations would bring about and its unique impact on the applicants, fairness demanded that they should be treated with candour. To conceal from them the scientific advice which directly led to the ban was, in my judgment, unfair and unlawful. (per Taylor LJ at 371)

44. Although the Divisional Court drew a distinction between external expert advice and internal advice from civil servants, the Court of Appeal in *Edwards v Environment Agency* [2006] EWCA Civ 877; [2007] Env LR 9 applied the principles set out in *United States Tobacco* to the issue of fairness of withholding

from consultees two technical reports which had been compiled internally by the Agency. The consultation at issue in that case had concerned the issue of a Pollution Prevention and Control permit for the burning of tyres in a cement kiln. A local resident challenged the grant of the permit, *inter alia*, on grounds that the Agency had breached its common law duty of fairness by not providing consultees with two relevant reports which had been produced by its Air Quality Monitoring and Assessment Unit (AQMAU).

45. Lindsay J upheld that claim, for reasons which were later endorsed by the Court of Appeal (§63, cited in §97 of the judgment of Auld LJ):

> The reports broke new ground; they were not merely verifying or testing material in the application itself or material already received from consultees, objectors or the public generally. Were they not to be disclosed others would not know either that they existed or that they or either of them were to be taken into account by the Agency. They raised subjects important to an adequate assessment of the application and which, unprompted by either the knowledge that the Agency was investigating the subjects or of what the reports said, were subjects which the consultees and objectors could well fail to examine for themselves, deterred, perhaps, by the probable expense of themselves investigating them. Nor were the conclusions in the Reports so clear and categoric, so incontestably right, that consulting upon the reports was plainly redundant in the sense that consultation could usefully add nothing to them nor subtract anything from them. Moreover, apart from added delay to a process that was already extensive, it is difficult to see what prejudice could be suffered by the Agency or (delay apart) by the Site Operator were there to be disclosure.

46. Auld LJ, with whom the other members of the Court agreed, endorsed those findings in §105 of his judgment and summarised his views in §106. Notably, he held in that paragraph that disclosure had been required because the reports were "potentially material" to the Agency's decision:

> In short, the non-disclosure of the AQMAU Reports left the public in ignorance, until the Agency's grant of the permit, of the only full information as to the extent of the low level emissions of dust and the only information at all on their possible impact on the environment. I agree with the Judge that such information was potentially material to the Agency's decision and to the members of the public who were seeking to influence it, and that failure by the Agency to disclose it at the time was a breach of its common law duty of fairness to disclose it.

47. In *R (Eisai) v National Institute of Clinical Excellence* [2008] EWCA Civ 438, the claimant sought to challenge guidance issued by NICE which recommended that an anti-Alzheimers drug manufactured by the claimant should be prescribed in a narrower range of circumstances. NICE had based its recommendations on a technical analysis of the cost-effectiveness of the drug and had disclosed to the claimant – to permit representations to be made – the economic model which it would use for that analysis, but only in a non-executable form. The claimant complained that NICE should have disclosed a full-executable model which could be re-run with different assumptions and inputs. The Court of Appeal (Richards LJ, with whom Tuckey and Jacob LJJ agreed) upheld that complaint, notwithstanding that the claimant had been provided with extensive information and was in a position to make an intelligent response to the consultation:

> 49. I accept that Eisai was given a great deal of information and was able to make representations of substance. It knew the assumptions that were being applied and could comment on them. It knew what sensitivity analyses had been run and could make comments on those. It could and did make an intelligent response, as far as it went. In my judgment, however, none of that meets the point that it was limited in what it could do to check and comment on the reliability of the model itself.
>
> 66. The view I have come to is that, notwithstanding NICE's considered position to the contrary (to which in itself I am prepared to give some weight), procedural fairness does require release of the fully executable version of the model. It is true that there is already a remarkable degree of disclosure and of transparency in the consultation process; but that cuts both ways, because it also serves to underline the nature and importance of the exercise being carried out. The refusal to release the fully executable version of the model stands out as the one exception to the principle of openness and transparency that NICE has acknowledged as appropriate in this context. It does place consultees (or at least a sub-set of them, since it is mainly the pharmaceutical companies which are likely to be affected by this in practice) at a significant disadvantage in challenging the reliability of the model. In that respect it limits their ability to make an intelligent response on something that is central to the appraisal process. The reasons put forward for refusal to release the fully executable version are in part unsound and are in any event of insufficient weight to justify NICE's position. [emphasis added]

48. Richards LJ referred to the *United States Tobacco* case in §§29-30 of his judgment. There was no universal principle that information coming from an

independent expert should be disclosed. That was a relevant factor in favour of disclosure "but it was a combination of factors – including the requirement of a high degree of fairness, the crucial nature of the advice, the lack of good reason for non-disclosure, and the impact on the applicants – which led to what was on the facts a fairly obvious conclusion".

49. Most recently, in *R (Save our Surgery) v Joint Committee of Primary Care Trusts* [2013] EWHC 439 (Admin), the Administrative Court upheld a complaint of lack of procedural fairness in a consultation procedure preceding a decision as to consolidation of paediatric heart surgery centres in the NHS in England. The existing units had been assessed by an expert committee against various criteria and sub-criteria in order to produce an overall score for each unit. The total scores were made public but the defendant refused to disclose the breakdown of the criteria and sub-criteria scores which would have revealed exactly what the expert committee had thought of the quality of the services provided at each unit and so would have permitted more focused representations to be made on quality issues. The Court held that that refusal was unfair and justified quashing the ultimate decision. The sub-scores represented an expert evaluation which was highly relevant to the assessment exercise and their disclosure had been necessary to enable the Leeds unit "to provide a properly focused and meaningful response" (§§112, 117).

50. The Claimants also rely upon the principle that public bodies must respect legitimate expectations to which their conduct has given rise and must, at the very least, provide affected individuals with an opportunity to make representations before a different course is taken. A legitimate expectation, whether of a procedural or a substantive benefit, can only be resiled from where this is objectively justified as a proportionate measure in the circumstances (see *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, §§68-69; *Paponette and others v Attorney General of Trinidad* [2012] 1 AC 1, §38).

51. Ultimately, however, whether a consultation has been fair or not is a hard-edged question for the Court, rather than being subject to the discretionary

judgment of the consulting authority (*R (Islington LBC) v Mayor of London* [2013] EWHC 4142 (Admin), §305). Nor does a consulting authority have any licence to act unfairly provided that this does not amount to something going "clearly and radically wrong" (as contended in §31 of the Detailed Grounds). That submission relies upon a dictum of Sullivan J, as he then was, which he has himself made clear was not intended as a legal test:

> The test is whether the process was so unfair as to be unlawful. In *Greenpeace*, I was not seeking to put forward a different test, but merely indicating that in reality a conclusion that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong. (*R (Baird) v Environment Agency* [2011] EWHC 939 (Admin). §51)

**Grounds of Challenge**

52. The Claimants submit that fairness required that the Otterburn and KPMG reports were disclosed to them by the Lord Chancellor, so that they would have an opportunity to make representations about the contents of those reports before the decisions were taken:

    (1) Given that the avowed intention and inevitable effect of the decisions was the consolidation of the market, in other words to bring about the closure of many existing criminal legal aid practices with the consequent loss of their current livelihood for those concerned, the Lord Chancellor was required to act with a high degree of fairness (as in *United States Tobacco* and *Eisai*). Applying the test laid down in *United States Tobacco*, this is a case where many firms are to be deprived of rights they currently enjoy (namely the right to act as a duty solicitor) and many will lose their livelihoods as a result. The Lord Chancellor denies that there was a heightened procedural duty on the grounds that his intention to consolidate the market does not mean that he wishes to see a reduction in the number of firms (Detailed Grounds, §32). That point is addressed in §§34-37 above. Regardless of the issue of consolidation, there was also a heightened duty of fairness because of the very serious implications for the criminal justice system of the fixing of the number of Duty Provider

contracts and the imposition of the fee cut. If the number of contracts is too large or too small, having regard to the fees available, the consequence will be "advice deserts", or, put less colloquially, the inability of accused persons to have access to a solicitor in breach of the common law and Article 6 ECHR.[10]

(2) Fair consultation requires that consultees are made aware of the basis on which a proposal has been considered before being put out for consultation, "and will thereafter be considered by the decision-maker" (*Capenhurst*: see §36 above). The Otterburn and KPMG reports were a central part of the body of evidence which the Lord Chancellor would consider when making crucial decisions as to the sustainability of the dual contract approach and the numbers of Duty Provider contracts. They put the flesh on the bones of the five general factors for consideration which had been set out in the second consultation document. They comfortably satisfy the test applied in *Edwards* as being "potentially material" to the eventual decisions.

(3) The Otterburn report, which was based upon an extensive and up-to-date survey of firms, contained valuable information and important findings which would have materially informed and improved the responses to consultation which the Claimants (and other consultees) were able to make. Consultees should have been given the benefit of the best available evidence.

(4) The Claimants were unaware during the consultation period even of the intention to commission and rely upon financial modelling by KPMG (in part through being misled by the Lord Chancellor himself). They were deprived of the opportunity of formulating responses which were directed to that target, including financial modelling of their own. Like the consultees in *Edwards*, they were likely to be deterred from investigating these matters if not told that the Ministry of Justice would

[10] This risk was recognised in the final submission to the Lord Chancellor and was ranked as "high impact" with a "medium likelihood" of occurring (§§69-71): **[CB/C5/p 398]**.

be doing so, in part by the considerable cost of purchasing modelling expertise.

(5) Even if the Claimants had commissioned a financial model, it would have proceeded on a false basis because of the statement in the second consultation document that Duty Provider contracts would be sized on the basis that they must be sustainable in their own right (that is, regardless of additional income from own client work). The KPMG report revealed and built upon what the Lord Chancellor later described as a "key departure" from the second consultation document, namely that Duty Provider contracts would now be sized on the basis that a firm would also retain income from 50% of its own client work. The Claimants were unaware of that key departure until after the decisions had been taken.[11]

(6) The KPMG report contained analysis which was questionable, being based on hotly disputed assumptions, of which consultees were unaware, and which they would have sought to dispute and disprove if given the opportunity. The KPMG report also highlighted areas for further consideration upon which consultees would have been able to make a valuable contribution if they had had the opportunity to do so. Therefore, the impact of not disclosing the reports was significant: consultees were left in the dark as to important matters on which the Lord Chancellor's decisions were to be based and were unable to give a full and effective response to the second consultation document.

(7) Failure to disclose the KPMG report also meant that consultees were unable to consider for themselves and comment upon the practical implications of the out-turn of the mathematical model (as the Ministry of Justice did with its "stress-testing") and unable to comment upon the implications for KPMG's findings of the important matters which KPMG

[11] The Detailed Grounds suggest that the Claimants were aware of this "key departure" (§38) but the point made is misdirected. The Claimants do not accept that any firm will in fact give up 50% of its own client work but that belief as to the facts did not negate the position stated in the second consultation document that the number of Duty Provider contracts would be fixed on the basis that such contracts must be sustainable in their own right.

expressly left out of account (see §28 above). Nor could consultees test and assess the extent of the risk which the Lord Chancellor would take in adopting the results of the model, by substituting different assumptions: what would be the effect on the calculations if, in fact, legal aid volumes continued to fall? What if firms could only achieve organic growth of 10% rather than 20% etc. The analogy with the executable model in *Eisai* is a close one.

(8) Overall, the (deeply unfair) result was that the fate of the Claimants' members has been determined by a mathematical calculation in circumstances where consultees were not informed (a) that the calculation was going to be performed at all, (b) of what assumptions would be used in the calculation and (c) of the data which would be relied upon when performing the calculation.

(9) There was no sensible reason why the two reports could not have been disclosed to the Claimants. In the absence of any such reason, it must be inferred that this was a case, like *United States Tobacco*, where "the denial of the [Claimants'] request was due to an inbuilt reluctance to give reasons or disclose advice lest it give opponents fuel for argument".

53. That the Lord Chancellor also reneged upon his personal commitment to adopt the conclusions of Otterburn (in favour of adopting KPMG's conclusions) heightens still further the duty of fairness with reference to the disclosure of the reports. On the test set out in §68 of *Nadarajah*, a legitimate expectation was created by that personal commitment: his statement was made directly and in person to representatives of the Claimants amongst others, in circumstances where they were entitled to rely upon it.

54. The Claimants do not seek to challenge the merits of the Lord Chancellor's decisions and do not therefore suggest that he was legally required to adopt Otterburn's conclusions in the Response. They do however contend that he was required as a matter of fairness to notify the Claimants if he was no longer regarding himself as bound to follow Otterburn and to give them the opportunity of making representations as to whether or not he should do so.

Of course, such representations could only have been made once Otterburn (and KPMG, which applied some but only some of Otterburn's conclusions) had been disclosed. That procedural expectation could only be frustrated if there were a proportionate justification for doing so; but since the Lord Chancellor has not asserted any positive justification for withholding the reports he could not possibly succeed with such a defence.

**The Lord Chancellor's defence**

55. The Lord Chancellor required more than five weeks to formulate a response to the Claimants' Pre-Action Protocol letter (letter dated 16 May 2014) **[TB/1/C/p 118]**. Following that lengthy consideration, three reasons were given as to why he did not act unlawfully in deciding not to consult publicly on what he termed "the detail which underlay the complex financial modelling advice provided by KPMG". First, it was said that it was "inappropriate" to consult publicly on "a matter so detailed and complex". That (somewhat patronising) submission is not maintained in the Detailed Grounds.

56. Then it was said that it had been unnecessary for the Lord Chancellor to consult the profession and the public on the Otterburn and KPMG reports because he had liaised closely with the Law Society about the contents of those reports. That argument also appears to have been abandoned by the Detailed Grounds,[12] unsurprisingly since (a) there had been a serious and very public rift between the Law Society and criminal legal aid lawyers (Waddington 1st, §§74-80 **[CB/B1/p 80]**) and the Lord Chancellor could not reasonably have thought that the Law Society was representative of the profession on these issues, (b) the Lord Chancellor had taken positive steps to prevent the Law Society from sharing information about the two reports beyond a small group

[12] A hint of the argument remains, in §29 of the Detailed Grounds, in the citation of *R (Milton Keynes Council) v Secretary of State for the Environment* [2011] EWCA Civ 1575. But contrary to §29 that case does not establish that it is legitimate for important information to be confined to a small number of interested parties rather than circulated to consultees more generally. *Milton Keynes* was not concerned with undisclosed information at all, but with whether the Secretary of State was bound to hold a further public consultation on a matter which had recently been subject to a full public consultation, when he wished to revisit the decision taken at the end of the initial consultation.

of Law Society officials, by requiring the signature of confidentiality agreements, and (c) consultation with a few employees of one organisation – to be clear, the Law Society as a whole was not consulted - could not cure defects in what was a very important *public* consultation.

57. The only submission which remains from the Pre-Action response letter is that consultation on Otterburn and KPMG was unnecessary because the Lord Chancellor had set out in the second consultation document the factors which would be considered when deciding upon numbers of Duty Provider contracts (§35 of the Detailed Grounds **[CB/A5/p 44]**). That is incorrect as a matter of fact, not least because the KPMG report revealed a "key departure" from the factors which had been set out in the second consultation document. Although the Lord Chancellor submits (in §13 of the Detailed Grounds) that the "substitution issue" – whether and to what extent firms would give up own client work – was canvassed extensively during the consultation process that submission is misdirected (see fn 10) and factually wrong, as illustrated by the matters relied upon in §§a-e of §13: a-c occurred at a time before the dual contract model had even been proposed; as for d, Dr Gibby can point only to a tiny number of consultation responses which inadvertently happened upon this issue; and by the time of the roundtable meeting mentioned in e, the profession was unaware of KPMG's involvement. The submission that there was, on the substitution issue, "a wide variety of representations which been made by practitioners and their representative bodies" is a breathtaking exaggeration.

58. The submission that it was sufficient to tell consultees in general terms about the factors which would be considered (or some of them at any rate) and not disclose the research itself is also incorrect in principle, as the authorities demonstrate. It was equally the case in *Eisai* that the claimant knew, broadly, that NICE would be deciding on the cost-effectiveness of Aricept, and could have made representations accordingly. In *Edwards*, it was argued and rejected it had in any event been open to consultees to make representations on the air quality issues which were canvassed in the undisclosed reports. In *Save our Surgery*, it was known that the Joint Committee would be deciding on the

respective merits of pediatric heart surgery units so each unit could make representations as to its own merits; that was not sufficient. In each case the Court ruled that more detailed information had to be disclosed because of its potential significance to the ultimate decision and the contestable nature of that information. The same applies here, in particular given the centrality to the ultimate decisions of the two reports and the high standard of fairness which applies. Just as in *Edwards*, the analysis in the KPMG report at least was not "so clear and categoric, so incontestably right, that consulting upon the reports was plainly redundant in the sense that consultation could usefully add nothing to them nor subtract anything from them".

59. As to the legitimate expectations claim, founded on the Lord Chancellor's personal assurance that he would accept the recommendations of Otterburn:

(1) It is argued that when he said that he would accept "Otterburn" he should be taken to have meant that he would accept "KPMG" (Gibby, §195 **[CB/B8/p 219]**; Detailed Grounds, §41(b) **[CB/A5/p 47]**). But that is not what he said and not what the Claimants understood, or could have understood, by his statement, since they were at that stage unaware that there would be a KPMG report.

(2) It is argued that the Lord Chancellor should only be understood to have meant that he would adopt the factual findings of the Otterburn report as to the state of the market, which would be used to inform the KPMG analysis (Detailed Grounds, §41a). Again, however, that is not what he said and not what he could reasonably have been understood to mean by representees who had not been told about the KPMG report. In any event, all of Otterburn's conclusions fell squarely within his remit, and within the range of likely outcomes of truly independent research. Most of those conclusions, including many of those which were rejected by the Lord Chancellor, had appeared in a draft of his report of 4 November which was with the Lord Chancellor well before he gave his assurance.

(3) Following on from that point, it is argued that the Lord Chancellor did in fact adopt Otterburn's factual findings on the state of the market but that

is not correct, as demonstrated by §26 above (and see also Waddington 2nd, §45 **[CB/B2/p 119]**). KPMG, on instructions from the Ministry of Justice, adopted a range of inputs and assumptions which were totally inconsistent with Otterburn's findings.

60. The principal line of defence now pursued by the Lord Chancellor is a "no difference" argument: that there was no breach of the common law duty of fairness because "re-opening the consultation would not have made any difference to the decision ultimately reached or the basis on which it was reached" (Detailed Grounds, §40 **[CB/A5/p 46]**). It is said that re-opening consultation would simply have given the Claimants "the opportunity to reiterate arguments that they had already the opportunity to make, this time by reference to the specific views in the reports" and that the Lord Chancellor was already aware of all of these points through consultation responses and his discussions with the Law Society.

61. It is important to appreciate, however, that the Lord Chancellor does not contend that public consultation on the Otterburn and KPMG reports would have been pointless and/or that the ultimate decisions would inevitably have been the same even if such public consultation had occurred. Although this is not obvious from §40 of the Detailed Grounds, a close reading of §159 of Dr Gibby's evidence (on which §40 relies) reveals that the submission is a more limited one:

> It would have made no difference to the assumptions used for the final modelling of the KPMG report had we consulted on the KPMG and Otterburn reports, and respondents raised the views as expressed in William Waddington's witness statement and the Claimants' other supporting evidence. [emphasis added] **[CB/B8/p 208]**

62. The submission is limited both in the scope of the points which are said to be incapable of making any difference (those in the evidence filed with the Claim); and in what they are said to be incapable of making a difference to (that is, to the assumptions in the KPMG's report, rather than to the ultimate decisions of the Lord Chancellor). The Lord Chancellor therefore accepts:

(1) That consultation on Otterburn and KPMG could have resulted in relevant contributions by the Claimants (going beyond their first round of evidence in these proceedings) which could have made a difference to the assumptions used in KPMG's analysis.

(2) That consultation on Otterburn and KPMG could have resulted in relevant contributions by other consultees (going beyond the points made in the Claimants' first round of evidence in these proceedings) which could have made a difference to the assumptions used in KPMG's analysis.

(3) That consultation on Otterburn and KPMG could have resulted in relevant contributions by the Claimants and other consultees which could have made a difference to the Lord Chancellor's decision whether or not to adopt the conclusions set out in KPMG's report.

The Lord Chancellor has confirmed in correspondence that his "no difference" argument is indeed put on the more limited basis set out in Dr Gibby's evidence.[13]

63. When the strictly limited basis of the "no difference" argument is understood, it loses all possible force. The point is put as a substantive defence to the consultation challenge rather than as a justification for withholding relief in the event that the claim is successful. But it cannot possibly be an exception to the *Gunning* principles which govern public consultation that information which would otherwise fall to be disclosed to consultees need not be disclosed where it is possible, or even likely, that certain consultees would respond by making points which are already known to, and have been considered by, the decision-making authority (and no authority has been cited by the Lord Chancellor to that effect). A conscientious authority must take account of representations made on relevant information, even if they happen to repeat points already known to it, not least because conscientious consideration of the product of

[13] Letter dated 27 August 2014 from Kingsley Napley to the Treasury Solicitor; email dated 28 August 2014 from the Treasury Solicitor to Kingsley Napley **[CB/D/p 683]**

consultation involves having regard not only to which points are raised but also to the weight of responses raising those points. In any event, as the Lord Chancellor recognises by the limited basis of his submission, it simply cannot be known what points will be raised by each and every potential respondent to the consultation and it cannot therefore be ruled out that something relevant and potentially determinative might be said.

64. A "no difference" argument could only sensibly be put on the basis that no relief should be granted to the Claimants consequent upon an unfair failure to consult upon the two reports because the ultimate decision would inevitably have been the same (inevitability being the litmus test). That was the submission made, and rejected, in, for example, *R v Secretary of State for the Environment ex p Brent London Borough Council* [1982] QB 593 and *R (Smith) v North East Derbyshire PCT* [2006] 1 WLR 3315. Hence, in *Brent*, Ackner LJ held (p. 646):

> .. it would of course have been unrealistic not to accept that it is certainly probable that, if the representations had been listened to by the Secretary of State, he would have nevertheless have adhered to his policy. However, we are not satisfied that such a result must inevitably have followed …. It would in our view be wrong for this court to speculate as to how the Secretary of State would have exercised his discretion if he had heard the representations. We respectfully adopt the words of Megarry J in *John v Rees* [1970] Ch 345, when he said, at p. 402:
>
> > "As everybody who has anything to do with the law well knows, the path is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."
>
> As Professor Wade points out in his *Administrative Law* (4th ed., p. 455), the report of *Ridge v. Baldwin* [1964] A.C. 40 , 47, records that the hearing later given to the Chief Constable's solicitor at least induced three members of the Watch Committee to change their mind. Thus, even if the ultimate outcome of our decision were to be that the Secretary of State, having fairly considered the applicants' representations, nevertheless decides to abate their rate support grants, we are not prepared to hold that it would have been a useless formality for the Secretary of State to have listened to the representations. The importance of the principles to which we have referred to above far transcend the significance of this case. If our decision is inconvenient, it cannot be helped. Convenience and

> justice are often not on speaking terms: per Lord Atkin in *General Medical Council v. Spackman* [1943] A.C. 627 , 638.

Applying those factors, the inevitability argument could not succeed in this case and it is unsurprising that the Lord Chancellor does not rely upon any such argument.

65. Even if it were in principle open to the Lord Chancellor to run his "no difference" argument as a substantive defence to the consultation challenge, that argument would be bound to fail on the facts. For reasons given by Mr Waddington (1st statement, §§105-148 **[CB/B1/p 91]**; 2nd statement, §§50-75 **[CB/B2/p 121]**), there is a wide range of matters arising out of the two reports on which the Claimants and the profession and the public more generally would have wished to comment, whether by way of challenging assumptions, adding to the analysis on issues which KPMG did not consider or assessing the practical implications of the answers generated by KPMG's financial model. There is no evidence that all, or even a substantial proportion, of the likely comments were in fact considered by the Lord Chancellor. The comments of the Claimants, and those of the wider body of consultees, on these issues could not fairly be said to be a "useless formality" (cf *Brent*).

**Relief**

66. The Lord Chancellor submits that if the Claimants' legal arguments are accepted, the consequence should be only that the decision as to the number of Duty Provider contracts is quashed, with the decision as to the 17.5% fee cut, and the implementation of the first stage of that cut, remaining untouched. That submission is misconceived. Dr Gibby herself recognises the very close inter-relationship between the number of contracts and the fees paid under those contracts (see §14 of her statement). See also see §16(4) above. Therefore the Claimants seek orders quashing the linked decisions as to the number of contracts and the 17.5% cut. Since an aspect of the decision to introduce a fee cut with almost immediate effect was a decision to make regulations to that effect, it is anticipated that the Lord Chancellor would proceed to withdraw

those regulations if this Claim is successful. If not, those regulations should also be quashed.

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~~**27 August 2014**~~

**29 August 2014**