Neutral Citation Number: [2014] EWHC 3020 (Admin)

Case No: CO/2426/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/09/2014

Before :

THE HON MR JUSTICE BURNETT

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Between :

The Queen on the application of London Criminal Courts Solicitors Association and Criminal Law Solicitors Association	**Claimants**
- and -	
The Lord Chancellor	**Defendant**

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- -

Jason Coppel QC and Joanne Clement (instructed by **Kingsley Napley**) for the **Claimants**
James Eadie QC, Richard O'Brien and Fraser Campbell (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 8 & 9 September 2014

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Approved Judgment

The Hon Mr Justice Burnett:

Introduction

1. The issue in this claim is whether procedural fairness associated with a consultation process on new criminal legal aid arrangements required the Lord Chancellor to disclose for comment the contents of two independent expert reports. They provided the foundation for the assumptions made in deciding how many contracts for advisory work in police stations and associated work, known as Duty Provider Work contracts, would be available to solicitors. There are currently about 1,600 firms of solicitors undertaking duty solicitor work in police stations and Magistrates' Courts in England and Wales. As part of a series of decisions relating to criminal legal aid issued on 27 February 2014 the Lord Chancellor announced that under the new arrangements there would be 525 contracts available for such work. They would cover all criminal legal aid advice, litigation and magistrates' court advocacy services provided to clients who choose the Duty Provider at the first point of request. An average immediate reduction of 8.75% in criminal legal aid fees was also announced. That was implemented by The Criminal Legal Aid (Remuneration)(Amendment) Regulations 2014 (SI 2014 No. 415) laid before Parliament on the same day. They came into force on 20 March 2014. The reduction applies to new cases from that date. The Lord Chancellor had proposed a further cut of 8.75% from the spring of 2015. The possibility of that reduction of 8.75% remains hanging over the profession. The position now is that it would not be implemented before the summer of 2015 and would depend upon the impact of the other changes being made as a result of these decisions, and reviews being conducted to find alternative savings.

2. In arriving at the figure of 525 Duty Provider Work contracts the Lord Chancellor made a number of assumptions relating to the likely behaviour of firms of solicitors when adapting to the proposed new world of legal aid. Those assumptions were developed by the Ministry of Justice following receipt by them of a report from Otterburn Legal Consulting LLP ["Otterburn"] in discussion with officials of the Law Society and KPMG LLP ["KPMG"]. KPMG had been engaged to undertake financial modelling based on those assumptions to inform the question of how many Duty Provider Work contracts should be made available. KPMG also produced a report. The series of assumptions they applied is controversial. They identified various factors which they had left out of account on which there was little information. It is common ground that if the assumptions underlying KPMG's modelling had been different the numerical range of contracts they identified as appropriate would also have been different. Reduced to basics, the position is that if the criticisms of the assumptions made by the claimants were reflected in appropriate adjustments, a larger number of contracts would have been likely to be made available.

3. The claimants' case is that in the context of a long-running consultation exercise, the outcome of which would transform the criminal legal aid landscape and have an impact on access to justice, it was incumbent upon the Lord Chancellor to consult on the assumptions underlying the financial modelling undertaken by KPMG. The reality, they suggest, is that many firms of solicitors will go out of business thus depriving individuals of their current livelihoods. In practical terms the claimants say that the Lord Chancellor should have disclosed the Otterburn and KPMG reports

before he made his decisions and consulted on their content. His failure to do so was procedurally unfair. They have a discrete argument that the Lord Chancellor in terms promised "to follow the recommendations" of Otterburn, but failed to do so. Mr Coppel Q.C., on behalf of the claimants, submits that promise gave rise to a procedural legitimate expectation at least that he should consult if he were contemplating changing his mind.

4. There is no alternative challenge advanced on the merits of either the decision relating to the number of contracts or the reduction in fees. The claimants wish to have the opportunity to persuade the Lord Chancellor to increase the number of Duty Provider Work contracts by making good their contention that the assumptions underlying the consultation are flawed and by providing further information to fill the gaps identified by KPMG.

5. The claimants seek an order quashing the decision on the number of Duty Provider Work contracts, to enable consultation on the two reports to take place. They also seek an order quashing the reduction in rates of remuneration introduced by the 2014 rules on the ground that the two decisions were inextricably linked.

6. For the Lord Chancellor, Mr Eadie Q.C. submits that the claimants and their individual members had every opportunity to place before the Ministry of Justice any material and comments they wished, to inform the decision on the number of Duty Provider Work contracts. Furthermore, every firm of solicitors in England and Wales was invited to provide information to Otterburn for the purposes of the research. In the result there was no procedural unfairness. Any argument based upon legitimate expectation and the Otterburn report fails because there was no unequivocal promise of the sort the claimants suggest.

The Underlying Facts

7. A very large volume of material was placed before the court, both in witness statements and exhibits, tracing the evolution of the Lord Chancellor's proposals for reforming criminal legal aid. There was an initial consultation paper with proposals some of which were, in the event, abandoned. A second consultation paper followed before the decisions under challenge were made. For the purposes of the argument relating to consultation that evolution can be traced relatively briefly.

8. Following the financial difficulties that engulfed the world towards the end of the last decade the legal aid budget was not protected from scrutiny and the need to find savings. The cost and efficiency of the delivery of criminal legal aid services had been under consideration even before, in particular in the review conducted by Lord Carter of legal aid procurement in 2006. On 9 April 2013 the Lord Chancellor issued the first consultation paper entitled "Transforming legal aid: delivering a more credible and efficient system". Its scope was wider than criminal legal aid. It encompassed proposed reforms to civil and family legal aid in addition, although its focus was criminal legal aid.

9. In his ministerial foreword, the Lord Chancellor summarised the proposals. The Government proposed that the provision of criminal legal aid should be subject to price competitive tendering ["PCT"] between firms of solicitors. There was a need for more efficiency in the system. The result would be that successful firms would

grow and that mergers would be required to achieve economies of scale. The consultation paper later explained that there would be a consolidation of the market

> "with fewer and more efficient providers accessing greater volumes of work, whether delivered directly by providers accessing greater volumes of work, whether delivered directly by providers or through some other business structure, for example a joint venture."

Contracts would be available in a series of procurement areas. In deciding on the number of contracts that would be available, the consultation paper identified four broad factors which would be taken into account:

i) Sufficient supply within each procurement area to deal with potential conflicts of interest in multi-handed cases;

ii) Sufficient volume of work to enable the fixed fee scheme to work. This was a feature of the proposals which assumed that some cases would be profitable and some not. A sufficient number of cases should be available to each successful bidder so that the risk of loss on some cases could be managed;

iii) Market agility, a shorthand term to reflect the ability of providers in each procurement area to deal with the additional volumes of work, including by growing or developing new business structures;

iv) Sustainable procurement, a shorthand term for ensuring that there would be competition in future tendering rounds. The proposal was for three year contracts with the possibility of extension for a further two years. The expectation underlying the proposal was that "most successful applicants will be joint ventures or a legal entity using agents".

10. This consultation paper envisaged a total number of about 400 contracts. The consequence recognised in the consultation paper would be that to secure a contract existing providers would on average need to grow by 250% or join other providers to bid.

11. One of the consequences of the Lord Chancellor's proposals was that "clients would generally have no choice in the representation allocated to them at the outset": consultation question 17.

12. Immediate savings of 17.5% in criminal legal aid spending through fee cuts formed part of the proposals. Changes in the remuneration of "Very High Cost Cases" were also proposed as were changes to the way in which the Bar was to be remunerated. All of the proposals were highly controversial and led to a sustained and public discussion involving the professions about whether each aspect was appropriate. The consultation period closed on 4 June 2013. There were responses from over 16,000 consultees. Amongst the responses were representations relating to the adverse consequences of PCT upon access to justice and the viability of many firms of solicitors. There was objection to the loss of client choice which the proposals entailed.

13. The Government considered the responses, which it should be emphasised covered every aspect of the new arrangements being proposed, and decided that it would not press ahead with the proposals for PCT for solicitors or with the immediate cut of 17.5% in the criminal legal aid budget. The Ministry of Justice then worked up new proposals.

14. In this they worked closely with the Law Society. I should record that the two professional bodies who are claimants in these proceedings, and many individual solicitors working in publicly funded criminal law, became dissatisfied with the way in which the Law Society dealt with the Government on this issue. It is well known that divisions developed as the months went by and culminated in a vote of no confidence by Law Society members in the President and Chief Executive on 17 December 2013. The ins and outs of the disagreements within the profession are not material to the arguments which have been developed in these proceedings. Putting it as neutrally as I can the two positions might be expressed in this way. The Law Society felt it in the best interests of its criminal practitioner members to work with the Ministry of Justice to achieve the least bad result, accepting that fundamental change would be imposed come what may. Many of its members believed that the Law Society should have resisted the changes more vigorously and not become party to their development.

15. As a result of the work undertaken over the summer of 2013 a second consultation paper was issued on 5 September 2013 entitled "Transforming Legal Aid: Next Steps".

16. In the context of this claim, two significant changes to the original proposals were set out in this paper. The first was that the Government would not seek to impose a cut of 17.5% in criminal legal aid fees in one go. Instead, it was proposed to reduce fees by an average of 8.75% in the spring of 2014 and then again by 8.75% a year later (paragraph 2.37). The second related to the contractual arrangements with solicitors for the provision of criminal legal aid. Rather than a single contract, there would be a dual contract arrangement. Duty Provider Work would be covered by one series of contracts. What was described as "Own Client Work" would be covered by another series of contracts. Own Client Work describes cases that come to a solicitor because a client has positively chosen to use a particular firm. The proposal was that the number of Own Client Work contracts would be unlimited, but Duty Provider Work contracts would be limited in number. The consultation paper mooted 570 as a possible number. The rates of remuneration under the contract would be fixed, and not part of the award criteria; in that way PCT went. The proposal gave rise to entirely understandable commercial concerns for solicitors, quite apart from those around access to justice. The view of the profession is that Own Client Work is dependent upon being replenished by encountering new clients as duty solicitor. Criminal solicitors are doubtful that any business could continue to prosper if reliant only on Own Client Work. Similarly, the collective view of criminal solicitors is that any firm losing the ability to undertake Duty Provider Work would be vulnerable to failure. The evidence provided by the claimants speaks in fairly apocalyptic terms of firms closing and individual livelihoods being lost. The evidence filed on behalf of the Lord Chancellor indicates that the overall quantity of work will remain the same whatever the contractual arrangements (indeed that is not in dispute) and speaks of

consolidation of the market, restructuring of firms and increases in efficiency. Although the language is very different, each side is describing the same thing.

17. The Government restated its conviction that the re-structuring and consolidation of the market in criminal legal services was necessary and that it should be encouraged by introducing an element of competition into the procurement process (paragraph 2.29). It then described the dual model and that there would be unlimited numbers of Own Client Work contracts available (subject to quality assurance) but that the position for Duty Provider Work contracts would be different. The four factors previously identified as informing contract numbers in the earlier consultation process were readopted. However, the Government added a further factor, namely an aim to make the Duty Provider Work contracts large enough in volume and value to be "sustainable in their own right" (paragraph 2.31). That meant that the aim was to let contracts which were large enough to enable bidders to abandon own client work if they chose. It was not a prediction of what would in fact happen. The consultation paper continued:

> "In order to help inform our 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 exploring the size of contract necessary for it to be sustainable."

18. The details of the approach to determining the number of contracts was spelt out in Chapter 3 of the consultation paper. Procurement areas were proposed which mirrored the Criminal Justice Areas in England and Wales with separate consideration for London. A section was devoted to expanding upon the way in which the number of Duty Provider Work contracts would be determined. Relying upon recent data relating to the numbers of defendants in multi-handed trials, the indication was that conflict of interest concerns would be met if there was a minimum of four contracts in each area. The approach to whether a sufficient number of cases would be on offer for each contract would take account of the proposed new fixed fee scheme (i.e. a 17.5% reduction on average, albeit over two years) and the need to enable those doing Duty Provider Work to abandon Own Client Work if they chose. The approach to market agility referred again to the need for existing organisations to expand to take on Duty Provider Work but added that the views of firms who may have to scale down their businesses would be taken into account, with consideration being given to the extent to which Own Client Work would mitigate that impact. Sustainable procurement for future rounds remained an objective.

19. Paragraph 3.32 made clear that the objective of making Duty Provider Work sustainable in its own right was to be judged on the assumption that the full 17.5% reduction in fees overall was achieved. The consultation paper continued:

> "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 work to get more detailed information for this purpose. It would be necessary for this work to take into account the proposed size of procurement area.

> 3.34 Therefore, we propose to determine the appropriate number of contracts for Duty Provider Work on the basis of the four factors … and outcomes of the further research. We would welcome consultees' views on these factors and whether there are any others that we should consider.
>
> 3.35 We note that an indicative analysis set out in a report by Otterburn and Ling, supplied by the Law Society in response to the previous consultation, suggested that three hypothetical organisations operating across the proposed CJS procurement areas would have a better chance of sustaining their business after a 17.5% reduction in fees, if they have an annual turnover of around £1m (including VAT). Taking the estimated spend on criminal legal aid services in scope of the proposed new contract after the proposed 17.5% reduction in fees … this would suggest that we should offer, no more than, 570 contracts for Duty Provider Work. Whilst this is a useful starting point, this number does not take account of the other factors set out above, and also presupposes that the providers with Duty Provider Work contract would need to absorb all Own Client Work available in the market during the contract term in order for the contracts to be sustainable. As indicated above, our aim is that Duty Provider Work contracts should be large enough to be sustainable in their own right after the cumulative reduction in fees by 17.5%. We would have regard to all the factors set out above, including further research described at paragraph 3.33 above, in determining the final contract numbers for this work."

The consultation questions asked whether consultees agreed with the model, the proposed procurement areas and the methodology for determining the number of contracts.

20. The consultation period was due to end on 1 November 2013. On 23 September 2013 William Waddington, chair of the Criminal Law Solicitors Association (the second claimant) wrote to the Lord Chancellor inviting him to delay the close of the consultation period until after the independent research had become available. That would be "for a few weeks". In summary his point was that the exercise in determining numbers of contracts was complex on questions of capability and capacity. Any firm responding to the consultation without the fruits of the jointly commissioned research would be "working very much in the dark". The Lord Chancellor refused the request in his reply of 8 October in these terms:

> "Your letter questions whether the response to the current consultation … should be delayed until the outcome of the research previously mentioned. We do not believe that it is necessary to do so. The consultation paper clearly sets out the factors that we propose to use to determine the number of contracts for Duty Provider Work and invites views on those factors. One of those factors is the sustainability of the Duty Provider Work contracts. We will of course carefully consider

> all 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 the Duty Provider Work contracts that would be awarded."

21. It was the intention of the Law Society and the Ministry of Justice to commission Otterburn to conduct further research into the finances of criminal legal aid firms and questions relating to the viability of the proposals. What was envisaged was a data collection exercise. However, the Otterburn research was commissioned by the Law Society and not jointly with the Ministry of Justice because for the Ministry unilaterally to have entered into a contract with Otterburn would apparently have breached procurement rules. Otterburn would not be able to do the number crunching required to deliver an indicative range of Duty Provider Work contracts. To undertake that work the Ministry of Justice entered into a contract with KPMG on 30 October 2013 (after an appropriate procurement exercise). It was in that way that the single piece of research referred to in the consultation paper became two, with the Ministry of Justice and Law Society each paying for one part.

22. The terms of reference for Otterburn were agreed between the Law Society and the Ministry of Justice as were the questionnaires to be sent to all criminal legal aid solicitors. It was also envisaged that interviews would be conducted with about 25 firms to explore the issues in more detail. Notes for the interviewers were agreed. The surveys were sent out in late September with a request that they be returned by 25 October 2013. The user notes explained that the Ministry of Justice would be appointing independent financial consultants to undertake modelling using the aggregate information provided through the survey. The survey asked for an estimate of the current split between Own Client and Duty Provider work. It sought a breakdown of current fees from crime and details of income from other areas of activity. It invited respondents to provide detailed information about staffing at every level within the firm together with financial information relating to salaries and overheads. A section dealt with questions of funding. It sought further information on the assumption that the firm concerned would undertake Own Client Work and Duty Provider Work, and then moved to what would happen if the firm failed to secure a Duty Provider Work contract and was left only with Own Client Work. It concluded with a number of general inquires and asked whether the respondent would be willing to take part in an interview.

23. The response rate was low. 167 firms provided information. For one reason or another, the input from ten fell to be discarded. The size of firms was broken down into four categories: (a) 1 – 5 solicitors; (b) 6 – 12 solicitors; (c) 13 – 40 solicitors; and (d) 40+ solicitors. It was originally expected that the work of both Otterburn and KPMG would be completed by mid-November 2013. Finalising their respective reports took much longer than expected and each went through various drafts as their content was the subject of discussion with officials at the Ministry of Justice and officials from the Law Society. The Law Society remained engaged throughout this process with detailed input from a small number of its officials. However, they were subject to duties of confidence which precluded them from discussing the research or evolving views with any outside their number. That included the elected officers of the Law Society and its various specialist committees. There was an exception,

namely on the question whether a firm of solicitors which secured a Duty Provider Work contract would be likely to give up Own Client Work. The strong view of a very small number in the Law Society asked (and a view shared by the officials) was that they would not.

24. The Otterburn report was published at the same time as the Lord Chancellor announced his decisions in February 2014. Otterburn identified the scope of the task undertaken by the firm:

> "We were asked to research:
>
> - The current financial position of criminal defence firms;
> - Firms' views on the size of the contract they would need to deliver a viable duty and own client contract;
> - The impact of the proposals on firms that just have an own client contract.
>
> In order to consider these particular issues:
>
> - The volume and value of contract needed to ensure viability and thus the number of contracts that can be awarded;
> - The size of the procurement areas and the impact that has on the costs firms incur;
> - The ability of firms to expand and to do so quickly enough to the scale that would be required to deliver the contracts."

25. Otterburn summarised their findings in an Executive Summary and then set out their conclusions. The material findings recorded that the key issue facing criminal legal aid firms was a reduction in work levels. In recent years there had been a fall off in work passing through the criminal courts. Average profit margins were 5% with the biggest firms achieving lower margins, which was described as counter-intuitive, and London firms being the least profitable. Profit was calculated as income less overheads, together with a notional salary for equity partners and notional interest on partners' capital. Finances of many firms were fragile. Problems were identified by respondents relating to fee reductions and to procurement areas with particular concerns reported about the impact in rural areas. Most firms were dependent on duty work for generating new work. Few would be sustainable in the medium term without it. The bigger firms would be able to expand reasonably rapidly, others not. It would be difficult for firms to reduce costs quickly and few had an appetite for merger or an interest in bidding for contracts outside their own procurement area.

26. These findings fed into Otterburn's conclusions (which were based also on their deep experience of the market). They may be summarised as follows:

(i) All firms surveyed had experienced significant falls in volumes in recent years;

(ii) Margins in crime are tight and the effect of previous fee reductions had not yet been fully felt. The supplier base is not financially robust and it is very vulnerable;

(iii) The fee reductions should take place after, and not before, the market had a chance to consolidate;

(iv) Very few firms could sustain a reduction in fee levels of 17.5%;

(v) A number of the proposed procurement areas were too large;

(vi) There should not be a single national contract size across the country;

(vii) The mid-size players in the market were likely to be key to the new system;

(viii) The approach should be different in rural areas where the market was already well consolidated;

(ix) Some firms have the ability to grow rapidly, but the number is limited and their ability to do so is subject to financial constraints.

(x) A 5% profit margin was the minimum needed for financial viability.

27. The Otterburn report went through many iterations before its final version. In the course of that process, Otterburn had recommended a number for Duty Provider Work contracts, although it had not been part of the brief to do so. No such recommendation appeared in its final report.

28. The evolution of the KPMG report is traced in the witness statement on behalf of the Lord Chancellor of Dr Elizabeth Gibby, which also sets out the complete history of the reforms process. KPMG had payment data from the Legal Aid Agency relating to all criminal legal aid firms. Otterburn provided financial information in aggregate form which came from the survey. The aim was to run models for each firm based upon these data. To produce a range of numbers for Duty Provider Work contracts a series of assumptions about the behaviour of the market was needed. Initially, KPMG indicated that one of the assumptions they believed should underlie any calculation was that a firm which secured a Duty Provider Work contract would give up Own Client Work altogether. That was because the Duty Provider Work contract would provide greater volume and more certainty. That was known by the Ministry of Justice to be highly controversial. Intense discussion continued involving the two sets of consultants, the Ministry of Justice and the Law Society officials concerning all the assumptions that should underlie the modelling. The question of what percentage of Own Client Work a successful bidder for Duty Provider Work would give up was compromised, for the sake of the modelling, at 50%. This remains one of the most contentious aspects of the modelling. In the course of the process, the Lord Chancellor was involved personally in discussions with KPMG concerning the approach they proposed to take and the assumptions on which they would base their calculations.

29. KPMG identify the assumptions they worked on, and their source, in the final report dated 25 February 2014, also published with the decision. Those which have formed the subject matter of debate in these proceedings are:

    (i) volumes of work would remain constant at 2012/13 levels. Source - MoJ;

    (ii) Successful bidders could achieve a 15% improvement in capacity due to latent capacity within firms and/or reallocation of staff to crime from other areas of work. Source – MoJ;

    (iii) Successful bidders could achieve organic growth of 20% through recruitment. Source - MoJ;

    (iv) It was assumed that only 75% of incumbent bidders (i.e. existing firms) were to be 'of scale' to bid for Duty Provider Work contracts and that two new entrants to the market would bid for each contract. Source -MoJ;

    (v) Successful bidders could reduce staff costs by 20% of revenue. Source – analysis of differences in staff cost ratios across the sector;

    (vi) A firm making any level of profit, however small, was considered viable. Source – (by inference) KPMG judgement.

30. In so far as figures used by KPMG derived from the Otterburn report, as they did for example on overheads and percentage of criminal turnover spent on salary costs, KPMG identified a caveat relating to the small sample size. They questioned the statistical significance of much of the sampling. By way of example, only three firms with 40 or more solicitors working in criminal legal aid provided data. KPMG noted the lack of data informing the question of the extent to which firms would consolidate, although Otterburn produced qualitative evidence suggesting that there were significant barriers. Information about the level and availability of funding necessary to expand so as to be able to service the new Duty Provider Work contracts was absent. KPMG did not quantify the investment needed but warned that the market believed that it would struggle to obtain funding. They cautioned about the possibility of unsuccessful bidders surviving until the next round (after four years) and stated that the impact of failing to secure a contract on unsuccessful bidders was not within the scope of their work. In their recommendations, KPMG advised the MoJ to takes these factors into account when deciding upon numbers for each procurement area.

31. On the basis of the assumptions applied (including a number not the subject of real criticism in these proceedings) and with the qualifications they had identified, KPMG's analysis produced a range of between 432 and 525 Duty Provider Work contracts. The modelling undertaken by KPMG was "stress tested" within Government by statisticians before the Lord Chancellor decided on the figure. Some progress has been made since February in implementing the new arrangements. The contracts for Own Contact Work have been let with a view to commencement in summer 2015. The tender process for Duty Provider Work contracts has not begun.

32. The evidence relating to the Lord Chancellor's suggested commitment to follow the recommendation of Otterburn falls within a very narrow compass. On 13 November

2013 a meeting took place at the Law Society with the Lord Chancellor. Representatives of both claimants were present together with the chairs of the Criminal Law and Access to Justice Committees of the Law Society, representatives of nine firms of solicitors, a representative of the Legal Aid Practitioners' Group and another from the Law Society Council. The evidence does not disclose the identities of the officials who accompanied the Lord Chancellor, beyond Dr Gibby. The meeting was subject to Chatham House Rules. What was said could be made public but not who said it. In conformity with that understanding, Paul Harris, a representative of the London Criminal Courts Solicitors Association (the first claimant), produced a note for wide circulation which identified 16 points that had 'came out of the meeting'. Amongst them was:

> "3) Will follow recommendation of Otterburn report"

Mr Eadie mused that an observation made in a meeting subject to Chatham House rules was a weak foundation for a legitimate expectation claim, given the need for a clear and unequivocal representation upon which the claimants were entitled to rely. How can one rely upon an unattributable observation? There is more evidence, however. Dr Gibby deals with the meeting:

> "In response to a question raised about the number of contracts to be determined, the Lord Chancellor did indeed confirm that "we will accept the Otterburn recommendations". However, this has to be understood in the context, as already explained, that Otterburn Legal Consulting provided one part of a piece of research, in the form of a survey, which was then taken into account by KPMG who were to construct a financial model to help determine the number of DPW contracts to offer in each procurement area. The Lord Chancellor referred to Otterburn as the shorthand for the research, the second part of which was to be undertaken by KPMG."

33. Dr Gibby says in her evidence that the involvement of KPMG was in the public domain before then, although through what mechanism it not disclosed. It may have been as a result of the procurement exercise, in which case it would be no surprise if criminal legal aid solicitors had not picked it up. Unfortunately, Mr Waddington was unaware of their involvement at that time although the fact that consultants were being engaged to run financial modelling was made clear in Otterburn's survey in September.

Applicable Legal Principles

34. There is no statutory duty to consult in connection with legal aid changes but a long-standing practice of doing so. The issue in this claim relates to the adequacy of the consultation and in particular whether the Lord Chancellor's failure to allow consultees to comment upon the Otterburn and KPMG reports resulted in unfairness tainting the resulting decision with illegality. The Courts have considered procedural fairness in the context of the adequacy of a consultation process on countless occasions. The decision in each of those cases is highly fact and context sensitive: see *R (Easyjet Airline Co. Ltd) v. Civil Aviation Authority* [2009] EWCA Civ 1361 per Dyson LJ at [51]. In *R v. Secretary of State for Education ex p M* [1996] ELR 162 at

206 – 207 Simon Brown LJ cautioned against applying a mechanistic approach to what was required in a consultation exercise. The essential features of an adequate consultation exercise were summarised by Lord Woolf MR [108] and [112] of the judgment of the Court of Appeal in *R v. North and East Devon Health Authority ex p Coughlan* [2001] Q.B. 213:

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be give for the purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v. Brent London Borough Council ex p Gunning* [1985] 84 LGR 168.
>
> 112. …It has to be remembered that consultation is not litigation; the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a personal interest in the subject matter know in clear terms what the proposal is and exactly why it is under active consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

In *Devon County Council v. Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) Ouseley J concluded that, whilst it was a matter for judgment for the person carrying out the consultation to decide what information should be contained with a consultation paper

> "…Sufficient information to enable an intelligent response requires the consultee to know not just what the proposal is in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision, or the basis on which the decision is likely to be taken."

However, the mere fact that information is 'significant' does not necessarily mean it must be disclosed: see *R (Eisai Ltd) v. National Institute for Clinical Excellence & others* [2008] EWCA Civ 438 per Richards LJ at [26].

35. The impact of a decision is a material factor in deciding what fairness demands or requires in any particular case. Thus in *R v. Health Secretary ex p US Tobacco International plc* [1992] 1 Q.B. 353 the regulations in question banned oral snuff and thus would have shut down the oral snuff manufacturing business of US Tobacco in Scotland only shortly after they had been encouraged to set up a factory. They were the only manufacturer in the United Kingdom. Taylor LJ considered that these factors led to the conclusion that a high degree of fairness was required in the consultation

that preceded the laying of the regulations. The objection was that the evidence upon which the Government relied to support the ban was withheld from US Tobacco. The court concluded that the Government had acted unfairly in failing to make it available. There was no dispute between Mr Coppel and Mr Eadie, although they expressed themselves in different language, that the context of the Lord Chancellor's decisions, namely their potential impact on the livelihoods of solicitors and access to justice, placed this case towards the upper end of the scale so far as the demands of fairness were concerned. Other factors which the authorities suggest fall into consideration include whether the material has been internally generated or is the product of external expertise and the reasons why disclosure of information has been refused: see *Eisai* at [32] and [65] respectively.

36. The question whether there has been procedural unfairness is one for the Court to determine. However, the consistent language of fairness 'demanding' or 'requiring' that a step be taken supports the formulation articulated by Sullivan J in *R (Greenpeace) v. Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) at [63] and explained by him as a Lord Justice sitting at first instance in *R (Baird) v. Environment Agency and Arun District Council* [2011] EWHC 939 (Admin):

> "50. In R (on the application of Greenpeace Limited) v the Secretary of State for Trade and Industry [2007] ELR 29, it was submitted on behalf of the defendant that the court should interfere with a consultation process "only if something has gone clearly and radically wrong." The claimant had submitted that there was no support for this proposition in the authorities. In paragraphs 62 and 63 of my judgment, I said:
>
> "62. This difference between the parties is one of semantics rather than substance. A consultation exercise which is flawed in one or even in a number of respects is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will always invariably be possible to suggests ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be recognised that a decision maker will usually have a broad discretion as to how a consultation exercise should be carried out. This applies with particular force to a consultation with the whole of the adult population of the United Kingdom. The defendant had a very broad discretion as to how best to carry out such a far reaching consultation exercise.
>
> 63. In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness would be based upon a finding by the court not merely that something was wrong but that something went "clearly and radically" wrong."
>
> 51. Ouseley J commented on this passage in the judgment in Greenpeace in Devon County Council and Norfolk County Council v the Secretary of State for Communities and Local Government [2011] EWHC 1465 (Admin). In paragraph 70, he

> accepted the submission of Leading Counsel for the defendant that a flawed consultation process is not always so procedurally unfair as to be unlawful. Having referred to paragraph 63 of Greenpeace, he said:
>
> "Valuable though that contrast is, I have a reservation about treating that contrast between something going merely wrong, which would not suffice to show an unfair and unlawful consultation process, and something going clearly and radically wrong, which would suffice to show such an error as the litmus test.
>
> Not all cases could readily be fitted into one or other category as if they were the only two categories of error available to be considered with no un-excluded middle. That phrase should not become the substitute for the true test, which is whether the consultation process was so unfair that it was unlawful."
>
> I respectfully agree with that observation. 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."

Discussion

37. A number of important contextual and factual matters provide the foundation for consideration of fairness in this case. First, the impact of the decisions upon any existing firm of solicitors which fails to secure a Duty Provider Work contract is likely to be very profound. It is questionable whether a criminal legal aid firm, or a department within a firm with a broader work base, could survive, or survive for long, on Own Client Work. The impact upon those who secure the contracts and upon access to justice if the assumptions underlying the KPMG calculations are wrong would also be serious. It was for these reasons that it became common ground that a high degree of fairness was required in these circumstances. Secondly, the statement by the Government in the consultation paper that it required further research to enable an informed decision to be made on contract numbers, suggests that the material set out in the consultation paper itself would not enable fully informed comment on the indicative proposal of 570 Duty Provider Work contracts. Thirdly, the continuing detailed engagement by the Ministry of Justice with a narrow band of Law Society officials showed at least the value of informed input on the details of the assumptions that should underlie the final calculation.

38. Mr Eadie relied upon the continuing involvement of Law Society officials as demonstrating that the Government was discussing and developing the assumptions with individuals with undoubted expertise in the criminal legal aid market. It was, he submitted, a matter for Government to decide with whom they continued to engage, so long as sufficient information had been given to the market in the consultation paper. He suggested that every firm of solicitors had been given the opportunity to

provide raw data to Otterburn, and thus to affect the outcome. If they failed to do so, as most did, that could not be laid at the door of the Government, but was a matter of choice. Any evaluation of fairness must take account of these features. Furthermore, this was an area in which the Ministry of Justice was engaged in an exercise of prediction and judgement in respect of a new world of criminal legal aid which made precision difficult. Last, from amongst the 2,317 responses to the second consultation paper some had provided information or comment which was relevant to the assumptions eventually adopted.

39. The claimants' essential argument is that in formulating the assumptions those with the best understanding of how criminal legal aid firms work, that is criminal legal aid solicitors themselves and their representative organisations, should have been given an opportunity to comment upon them. It was unfair not to do so given the contextual background.

40. I have noted the core of Mr Eadie's factual arguments at the outset because, to my mind, far from weakening the case advanced by the claimants they illuminate its essence.

41. The Law Society officials were deeply engaged in discussions relating to the assumptions. They appeared content with a number of those eventually adopted but remained concerned with others and also with the absence of information in important areas. It was clear that the assumptions were critical to the eventual determination of the contract numbers. However, the officials were not acting in a representative capacity, and were unable to consult within the Law Society generally or with the profession more widely for the purpose of determining their input into the evolving assumptions. That is an important factor because engagement with a representative body speaking on behalf of its members might well be sufficient in many circumstances. Mr Eadie submitted that the fact that the Ministry of Justice recognised the need to continue to engage with the Law Society should not lead to the conclusion that the claimants' case was made out. That is undoubtedly so; but nonetheless the deep engagement with the Law Society officials on the question of what assumptions should be applied, depending as they did on the future conduct of criminal legal aid solicitors, is a reflection of the importance of the issues which led to their adoption.

42. Otterburn did not ask questions directly relating to the assumptions. There was no question about how much Own Client Work a successful bidder for Duty Provider Work would give up; about the extent of spare capacity within the firm; about capability for organic growth through recruitment; about capability to reduce staff costs; about current capacity to manage a contract of any given size; or about profit margins necessary to stay in business. The data collected by Otterburn was capable of informing those issues and thus contributing to the decision on the assumptions. The collection process did not enable solicitors directly to comment upon the eventual assumptions.

43. It is right that Otterburn did not ask about current experience of falling volumes of work or expectations for the future. However, I do not consider that this aspect advances the claimants' case. An assessment of the overall volume of work likely to enter the criminal justice system is a critical component in determining public spending on all its aspects. However, whether the Ministry of Justice assumes rising

crime, falling crime or static crime for its projections is not something upon which consultation with the legal profession was likely to have any bearing. Solicitors are in a position to report on the historical pattern of numbers of criminal cases. The trend in the years leading to 2013 was not in doubt. It was reflected in the figures available to the Ministry of Justice from a multitude of sources. The number of cases entering the criminal justice system is determined by a range of factors including the number of crimes committed, the number of crimes reported and the number of culprits, or suspected culprits, apprehended. Criminal legal aid income will be further affected by the nature of decisions relating to out of court disposals, decisions whether to prosecute (and for what) and the willingness of the prosecution to accept pleas. The funding of the criminal justice system as a whole, not just criminal legal aid, is predicated upon estimates of the number of cases entering the system. It is, of course, reasonable to point out that if the future turns out to be different from that expected, either because the flow of work is significantly greater of less than predicted, the impact on all funding calculations could be profound. However, that is a different point from the raw question of what, over the next four years, the overall picture is likely to be.

44. The fact that the assumptions, other than on the flow of criminal work into the system, amounted to an uncertain judgemental prediction of future behaviour of those likely to be most directly affected by the decisions would, to my mind, tend to suggest not only that those very people should be asked, but also that any resulting decision would be better informed if they were.

45. Mr Coppel characterised the fact that some consultation responses included comments which were germane to the assumptions eventually chosen as no more than as example of an unseen target being struck inadvertently in any bombardment. That is apt. But on analysis the information provided in this way was scant. The Ministry of Justice has helpfully produced a chart. It shows ten responses relevant to the assumption that solicitors would give up 50% Own Client Work if awarded a Duty Provider Work contract; and a handful relevant to the assumptions relating to 20% growth through recruitment expansion, new entrants to the market and profitability. The responses were tangential on these issues, rather than direct. The Ministry of Justice has been unable to locate any which touched on the assumption that there was 15% spare capacity in the system or that 20% improvement in staff cost efficiency was achievable. The overall paucity of responses which dealt with the assumptions as they eventually emerged demonstrates that the consultation process did not alert the claimants, the criminal legal aid firms or those more generally with an interest, to the factors which would turn out to be critical in determining the number of Duty Provider Work contracts.

46. The claimants have produced evidence from Mr Waddington and also from Nicola Hill of Kingsley Napley (President of the first claimant), Tobias Burrough (the senior partner of Burrough's Solicitors, Maidstone), Hester Russell (a partner in Harthills Solicitors) and Steven Bird (managing director of Bird's Solicitors Ltd) which between them give a strong flavour of the points which would have been made had the consultation extended to inviting comments on the assumptions to be used in KPMG's model and on the gaps identified by KPMG. Dr Gibby has considered all the points made and explained in her evidence that they would have made no difference to the decision on what assumptions should be adopted. The prominence

in Dr Gibby's evidence of the argument why the points which the claimants wished to advance on the assumptions would have made no difference resulted in its being necessary to pin down precisely what reliance was placed on this part of the evidence. On instructions, Mr Eadie confirmed that this represented Dr Gibby's opinion and was not to be taken as an assertion that, had he considered the representations foreshadowed in the claimants' evidence, the Lord Chancellor necessarily would have sanctioned the adoption of the same assumptions or that the eventual decision would have been the same.

47. The four broad factors identified in the first consultation paper and carried over into the second (subject to the modification that Duty Provider Work contracts should be self-sufficient if solicitors chose) provided no insight into the detailed assumptions relating to the future behaviour of solicitors firms which would be applied to determine contract numbers. The Ministry of Justice recognised the need for further work and also the need to engage with Law Society officials before determining what the assumptions should be. The nature of the decision on contract numbers was such that the continued existence of firms of solicitors (and departments within firms) depended upon it. It is little consolation to know that the overall volume of work would not be affected. The reality, recognised by the Ministry of Justice, is that the current organisation of the market in criminal legal aid would be profoundly altered.

48. The assumptions are recognised to be controversial and determinative of the range from which the final number of contracts would be taken. The assumptions relating to the balance between Duty Provider Work and Own Client Work, spare capacity within firms, the scope for growth, the scope of savings in staff costs, the likelihood of tempting new entrants into the market and the ability to operate on a wafer-thin margin were all matters upon which wide consultation, and particularly with the solicitors' profession, might have provided significant illumination. Solicitors would also be well-placed to fill the gaps identified by KPMG, that is on the question of the ability for current providers to combine, the ability to survive in the absence of a Duty Provider Work contract, to bid in four years' time and the funding implications of the proposed changes.

49. The question is not whether the Ministry of Justice would have been better informed had it chosen to consult on these issues, but whether its decision not to do so was so unfair as to be unlawful. No issue arises on the nature of the material (the internal/external dichotomy referred to in the authorities). The reason given for refusing to consult on the research was that it was not necessary to do so. That was said to be because the factors which would inform the decision on contract numbers were set out in the consultation paper, including on sustainability. Mr Eadie constructed an argument that the reason for refusing included a concern about delay. It flowed from the use of the word 'delayed' in the Lord Chancellor's letter to Mr Waddington. However, that merely picked up on his request that the close of the consultation period be delayed to enable comments to be made upon the research. There is no evidence to support a submission that extending the consultation period by 'a few weeks', as Mr Waddington asked, would have caused any particular time-related difficulties.

50. I have set out in the preceding paragraphs the factors which collectively tend to show that the failure to consult was unfair. In the context, in particular, of a decision which would so profoundly affect the way in which the market in criminal legal aid operates,

indeed pose a threat to the continued existence of many practices, in my judgment it was indeed unfair to refuse to allow those engaged in the consultation process to comment upon the two reports, which included the assumptions applied by KPMG, and which in turn determined the number of contracts for Duty Provider Work. The consultation paper did not identify the assumptions, or even the nature of the assumptions, that would lead to the decision on numbers. The broad indications given in the consultation paper of the considerations which would determine the outcome did not, in my judgment, enable consultees meaningfully to respond. Something clearly did go wrong. The failure was so unfair as to result in illegality.

51. In coming to this conclusion I have left to one side the legitimate expectation argument. That has arisen in an unusual way. No substantive legitimate expectation argument is advanced. The claimants recognise that there would be insuperable difficulties in getting an argument home that the Lord Chancellor bound himself to follow the "recommendations of the Otterburn" report, whatever they might have been. The procedural legitimate expectation argument is also unusual because it is not put forward as the freestanding springboard for a duty to consult. There was already a consultation process underway. The argument is that it was inadequate. Were the legitimate expectation argument a freestanding one it would fail. I have the greatest difficulty in accepting that an observation made under Chatham House rules could be relied upon as the basis of a legitimate expectation argument. Furthermore, by the time the Lord Chancellor made the observation, the research he was referring to had two facets and it was that to which he was referring. He did follow the overall recommendation and chose the figure at the top end of the range produced by KPMG. It is unfortunate that those to whom he was speaking at the meeting had not noticed the reference to the role of a second consultant in the Otterburn survey, or picked up that KPMG had been retained for the purpose of financial modelling. Otterburn itself was, in any event, light on recommendations. It is true that one of the conclusions advised a delay in the implementation of the first 8.75% cut in fees. But that was not strictly within Otterburn's remit and did not relate to the number of contracts which would be let.

52. That said, I do not accept Mr Eadie's submission that the Lord Chancellor's observations made at the meeting of 13 November 2013 are entirely irrelevant. The authorities on the adequacy of consultation emphasise the fact sensitive contextual exercise that must be undertaken in reviewing what has occurred. The remarks form part of the factual background. There is one particular conclusion of Otterburn which did not find its way into the assumptions applied by KPMG which to my mind resonates in the fairness argument. Otterburn considered that a 5% margin should be taken as the minimum necessary to sustain the business. KPMG took a bare profit of any sort, however small. Having heard the Lord Chancellor say that he would follow the recommendations of Otterburn and then to discover that on this important aspect, Otterburn was superseded by KPMG, the claimants and their members would reasonably have felt that the general unfairness to which I have referred had been compounded.

Relief

53. Mr Coppel submitted that the decision relating to the number of contracts together with the 8.75% reduction in average fees should both be quashed. Mr Eadie submitted that even if a legal failing in the consultation process were identified it

would be appropriate to grant no relief, save perhaps a declaration to that effect, and let the current process continue. The 'no difference' argument lost its potency when it was clarified. He pointed to the fact that the Government is committed to keeping the process under review. If it turns out that too few contracts are let, with damage in particular to the availability of advice and representation for defendants in criminal proceedings, the problem can be put right in the next contract round.

54. That would be at least four years away and so provide no comfort for solicitors who in the meantime had seen their firms close, had lost their jobs altogether or been forced to look for new work. The decision to let 525 Duty Provider Work contracts will be quashed. There is no need for an additional mandatory order requiring the Lord Chancellor to consult on the Otterburn and KPMG reports because that follows from the terms of this judgment. Mr Waddington recognised when he asked on behalf of his members last September for an opportunity to comment upon the research that it would delay the process for no more than a few weeks. A relatively short re-consultation period would be sufficient, not least because those most concerned to comment on the research have had some time to think about it.

55. Mr Eadie resists the submission that the regulations, so far as they implement the 8.75% reduction, should be quashed, essentially on the ground that there is not a sufficient connection between the flaws identified in the consultation process and the decision to reduce fees. I agree. It is unrealistic to suppose that the question over the contract numbers, if consulted upon in the way that it should have been, would have led to a different decision on the phased reduction in criminal legal aid fees. That was driven by an immediate financial imperative. No criticism is advanced to suggest that consultees were unable to deal fairly with the fee reduction issue; and a fee reduction was a premise upon which the new Own Client Work and Duty Provider Work contracts would be let.

Conclusion

56. In the light of my conclusions I grant permission to apply for judicial review. This claim succeeds. The decision of 27 February 2014 that 525 Duty Provider Work contracts would be available under the new arrangements being put in place for criminal legal aid will be quashed. Any ancillary matters arising will be dealt with in the first instance on written submissions from the parties.