CO/5941/2014

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

BETWEEN:

THE QUEEN
- on the application of -
LONDON CRIMINAL COURTS SOLICITORS ASSOCIATION
AND OTHERS

Claimants

- and -

THE LORD CHANCELLOR

Defendant

WRITTEN REPLY ON BEHALF OF THE LCCSA CLAIMANTS

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1. These written reply submissions supplement the oral opening submissions made by the LCCSA Claimants. They aim not to repeat the points already made by the Law Society in its oral and written reply; those submissions are adopted.

2. These submissions take eight parts:
   a. The Legal Test and the Context
   b. The Viability Challenge
   c. The Capacity Challenge
   d. Failure To Grapple with Consultation Responses
   e. The 50% OCW Assumption
   f. Testing the Sensitivities of the Model
   g. The Tender Timescale
   h. Article 1 of Protocol 1 ECHR

A. The Legal Test and the Context

3. The Lord Chancellor has emphasised the breadth of the discretion which (he says) he enjoyed in setting the number of DPW contracts ("**the Decision**"). He said that his statutory duty to secure the availability of legal aid services is framed in broad terms and

that the content of the Decision – a predictive judgment based on a financial model – is beyond the expertise of the court.

4. The LCCSA Claimants submit that the Lord Chancellor's discretion was nevertheless circumscribed by a number of significant constraints. First, and most pressing, the risk to access to justice if his Decision is wrong (recognised by Burnett J at §37; *"The impact…upon access to justice if the assumptions underlying the KPMG calculations are wrong would also be serious"* [CB1/C/1]). The LASPO duty to secure legal aid provision is an absolute one, not subject to financial constraints, and must be discharged in every area of the country, for every person who requires criminal legal aid services, in the (often very urgent) timeframe within which those services are needed (e.g. before the start of a police interview). Whether or not the duty will be discharged cannot be assessed on the basis of countrywide averages, but demands detailed and proper analysis of each individual area in which services will be required. Nor can the duty be discharged simply by sitting back and letting market forces decide (as was suggested in oral submissions might be an alternative course). Market forces are unlikely to ensure full coverage of criminal legal aid services, given the much greater difficulties of profitability in some areas.

5. The Lord Chancellor asserts that there is no risk of his LASPO duty being breached. But he simply does not know the true extent of this risk, because he has not enquired into highly relevant matters which KPMG highlighted as requiring consideration. He has proceeded on the basis that (a) DPW contracts will be viable without quantifying or taking account of significant costs (of finance and of delivery partnerships) and (b) firms will be able to meet the "capacity challenge", to scale up sufficiently to take on DPW contracts, without any enquiry into whether the consolidation rates assumed by KPMG are achievable in practice. He has also failed to assess the risks inherent in KPMG's assumptions by taking the obvious practical step of running the model with different variables. At the very least, the Lord Chancellor's submission invites the Court to assume the very thing that it falls to the Court to decide, namely whether he has indeed diligently assessed the risk to the performance of his LASPO duty before taking the decision here under challenge.

6. Therefore, it is submitted that the Court should proceed, with Burnett J, on the basis that there is at least a significant (albeit unquantified) risk to access to justice, and should constrain the discretion of the Lord Chancellor accordingly.

7. Second, the Decision will inevitably cause solicitors' firms to close. This also warrants the Court adopting a high intensity of review in this case (see Burnett J at §35 [CB1/C/1]). This is a significant factor: the economic interests of individuals who have provided valuable service over many years for modest reward will be destroyed. Moreover the impact on individual solicitors is inseparable from, and the basis of, the impact on access to justice. The large numbers of small firms who will cease to exist as a result of this decision are crucial to the current functioning of the criminal justice system: the greater the impact on the economic interests of individual firms, the greater the risk to access to justice.

8. These factors fall squarely within the analysis of the Divisional Court and Court of Appeal in *Lumsdon* [Auth2/52] as justifying a heightened *Wednesbury* standard. Two separate factors – institutional competence and constitutional legitimacy – both led to the conclusion that a heightened standard was appropriate.

9. The Lord Chancellor submitted, in effect, that if there is economics involved, the Court has no institutional competence and therefore no constitutional legitimacy, and that that is sufficient to obviate a heightened standard. Contracts for criminal legal aid services are, in his view, no different from contracts for GP services. This is both surprising and wrong; as the Law Society pointed out, where the Court has constitutional legitimacy arising from the nature of the impact of a decision (here, on the integrity of the criminal justice system) then it is entitled to, and should, carefully scrutinise the decision. That is true even if the context is otherwise an institutionally complicated one: the rule of law demands no less.

10. In any event, as Laws LJ pointed in argument, none of the grounds advanced by the Claimants require the Court to prescribe outcomes to the Lord Chancellor. The Lord Chancellor, rightly, did not dispute that a "careful investigation" was required in this case (as in *Refugee Action* at §121 [Auth2/49]). In the particular context of this case, sufficient (and sufficiently careful) investigation has yet to be carried out.

11. Third, when deciding what factors and information were relevant to the Lord Chancellor's decision, the Court has the considerable benefit of knowing the policy objectives which the Lord Chancellor intended to achieve by the decision. These were (a) to preserve client choice, (b) to ensure a viable provider base [CB2/10/p4], (c) to restructure the market and (d) to do what the independent research recommended (Burnett J at §§32, 52 [CB1/C/1]).

12. Given (a), (b) and (c), it was incumbent upon the Lord Chancellor to consider all information which was likely to be significant in ensuring provider viability under the new contracts, since failure to do so could prejudice client choice, viability and market restructuring. Given (d), it was incumbent upon the Lord Chancellor to consider carefully and - in the absence of good reason for not doing so - to adopt the recommendations made by KPMG.

13. But, importantly, the Lord Chancellor has misunderstood KPMG's recommendations. They did not recommend that he adopt a particular number or range of contracts. They proposed a range which, in a minority of areas, satisfied the criteria they had identified at the outset (25% market consolidation, 20% staff cost improvement, 3 incumbents of scale), and in the majority of areas required drastic modification of those criteria. Their *recommendation* was that a wide range of further matters be considered prior to any decision on contract numbers [CB1/C/2/p12].

14. Fourth, although the Lord Chancellor submitted that it was "not clear" what useful further information he was required to obtain, KPMG had given consideration to that very question. They stated their recommendations in clear terms [CB1/C/2/pp11-12]. In the context of the Lord Chancellor's wholesale adoption of the KPMG report, those matters are mandatory relevant considerations. It is irrelevant whether or not KPMG used the word "investigate" rather than "consider". What KPMG did was to highlight the important gaps which the modelling did not and could not address. It was incumbent upon anyone relying on the modelling to seek to fill those gaps. The Court is invited to consider the checklist of necessary further enquiries which is set out on KPMG p.12 and assess whether the Lord Chancellor has dealt with that list. It is submitted that the evidence clearly shows that he has not.

15. By contrast, the contextual points made by the Lord Chancellor do not establish that a bare rationality standard is appropriate in this case. Four factors were relied upon:

(1) The Decision is a matter of predictive judgment. There is no dispute that a modelling exercise involves predictive judgment. But the Lord Chancellor was not the only one with expertise as to how the market might respond in the future to his proposed changes (nor even the person best-placed to make a prediction). He had the advantage of seeing expert reports on that market, from Deloitte [TB2/30], PA Consulting [CB1/C/4], Otterburn [CB1/C/3] and KPMG [CB1/C/2], and had access also to the market itself as the constituency "*well-placed to fill the gaps identified*": Burnett J at §48 [CB1/C/1].

(2) The evidence to date does not show that the Decision will turn out to be wrong. The reality is that there is no evidence, at this stage, which materially contributes towards proving the 'correctness' of the Decision. The Lord Chancellor cannot, for example, say that on the one hand the award of 1808 OCW contracts suggests that firms believe OCW alone to be "*viable and attractive*" (Decision, §2.11 [CB2/10/p12]), whilst on the other hand rely upon the same award as evidence that firms are "*willing to, and consider that they can, deliver criminal litigation services under the conditions proposed*": Massey, §177 [CB1/B/11]. As his evidence recognises, firms had no real choice but to seek an OCW contract simply to leave the door open to criminal legal aid practice in the future; the pure number of OCW contracts is "*not reflective of that actual number of organisations intending to tender for a DPW contract*" because a small number of firms have acquired multiple contracts (16 in one case: Crowther, §114); and the fact that only half the OCW holders had looked at the tender documents before the injunction was granted says nothing whatsoever about likely bids. The Court will also recall that the Lord Chancellor has chosen not to seek necessary evidence which were directly relevant to the risk of error, such as from lenders and insurance providers.

(3) A decision to delay for further information would itself carry risks.[1] Yet:

a. Whenever a decision-maker has acted unlawfully, has lost a judicial review, and yet wishes to pursue the decision impugned, it inevitably takes time for them to do so. That delay results from their failure to comply with the law. There has already been delay in this case owing to illegality on the part of the Lord Chancellor.

b. It was no part of the reasoning in the Decision that time pressure required the Lord Chancellor to proceed on the basis of incomplete information. The reasoning was premised on the sufficiency of his information. The Lord Chancellor's litigation position is at odds with the Decision.

c. Any additional delay need only have been (and need only be) modest, and there is no evidence to establish otherwise. The only suggestion to the contrary is an unexplained assertion in a submission of 22 September 2014 [SB/20/§9] stating that KPMG would require 3-4 months to re-model. This is particularly surprising given that KPMG took only three weeks to deliver a first draft model from scratch (Gibby, §§69-75 [CB2/14]). In any event, it is some way short of the 9-12 months suggested by Mr Chamberlain orally.

d. Civil servants' considerations of timing appear to have been concerned with avoiding criticism of the LC during the run-up to the General Election (see 22 September submission [SB/20/§13]).

(4) Plans had been made to safeguard against partial or total systemic failure. The LCCSA Claimants rely upon the Law Society's forceful criticisms made of the very limited contingency planning evidenced on behalf of the Lord Chancellor. The premise for those plans is that the reforms are "sustainable": 21 November 2014 submission at §107 [CB2/19]. Plans were not made on the basis that the new contracts are, or may be, unviable and thereby may produce widespread market failure; the worst case scenario envisaged is that bidders fail in <u>one</u> procurement area [SB/14]. The contingency plans are beset by the same flaws which undermine the Decision– a failure to investigate, quantify and take account of highly significant factors which affect firms' ability to grow and the viability of

[1] It is not entirely clear how this factor properly goes to the intensity of review, but it is dealt with here in any event.

the contracts. If the Decision is flawed in that regard then contingency planning, such as it is, cannot save it.

16. Finally, and contrary to the oral submissions for the Lord Chancellor, the decision in *Kennedy* cannot simply be dismissed as a procedural challenge which warranted a hard-edged standard of review for that reason alone [Auth2/50]. It was a substantive appeal under the Freedom of Information Act 2000. The comments of the majority of their Lordships on the intensity of review related to how information could be acquired at common law, if exempt under FOIA, by way of judicial review. The leading judgment of Lord Mance, at §§51-55, discusses in terms of general application the variable intensity of rationality review and its increasing identity with proportionality review. Lord Mance considered a challenge to a (putative) decision not to disclose information to be one governed by the "public interest" (at §49), not as a procedural challenge. Lord Toulson's additional reasoning at §132 does not undermine the fuller reasoning of Lord Mance, with which Lords Neuberger, Clarke and Sumption agreed; it merely provides a further justification for a heightened standard of review. Moreover, there is no suggestion in *Lumsdon* that the Court of Appeal viewed *Kennedy* as restricted to procedural challenges: §§78-86 [Auth2/52].[2]

B. The Viability Challenge

17. It is important to focus upon how the viability challenge - can firms be expected to survive when performing DPW contracts of the size decided upon? - is dealt with in the Decision. The Lord Chancellor cannot be permitted to rely upon *ex post facto* reasoning which is, in any event, manifestly insufficient to justify the Decision.

18. In the Decision [CB2/10], the viability challenge is dealt with in two ways. First, the Decision lists the measures which are considered to assist firms in obtaining finance (such as the business partnering support network, the British Business Bank and interim payments: Decision, §§2.19-2.21, 2.87-2.88). Secondly, it adopts the approach to the 0.1% profit assumption that 'a profit is profit', because *"bearing in mind all staff had been paid*

[2] The particular relevance of *Sandiford* [Auth2/51] to this point is less its particular factual context, and more that the approach of Lord Mance in *Kennedy* was cited with approval by the joint judgment of Lords Mance and Carnwath at §66, the latter of whom had dissented in *Kennedy*.

and costs met the organisation would not become unviable simply by virtue of only having broken even" (emphasis added; Decision, §2.55).

19. The latter point is truly irrational in the classic *Balchin* sense: *"an error of reasoning which robs the decision of its logic"* [Auth1/8/p927]. It is common ground that the costs of increased working capital, investing in efficient working practices and scaling-up were not included in the break-even assumption (and not disputed by the Lord Chancellor that such costs would arise in most cases). It also seriously undermines the claim made by the Lord Chancellor's officials that he was fully aware that those costs were not included. If he was aware, it is hard to see how §2.55 of the Decision could have been so formulated. That paragraph of the Decision is taken verbatim from the advice given to the Lord Chancellor in the November submission [CB2/19/§56]. The Lord Chancellor's personal awareness of this glaring inconsistency is not established by the email seeking further advice on finance [SB/25]: (a) because it addresses a different point (the availability of finance, rather than its inclusion in the modelling), and (b) because, as the Law Society has pointed out, the enquiry was made after the decision on the number of contracts had been taken (as is clear from the terms of the email) and related to communications strategy rather than the merits of the Decision.

20. As to the first point mentioned in §18 above, the list of measures:

    (1) The LAA's "network", including its ridiculous "guidance" [CB1/B/4], and the British Business Bank/Enterprise Finance Guarantee were aptly described by Mr Chamberlain as "non-financial measures". They are non-financial in the true sense that they are most unlikely to give rise to a penny of additional finance.

    (2) The Lord Chancellor provided no answer to Waddington 1st, §89 [CB1/B/1]: the problem with the Enterprise Finance Guarantee is that (a) commercial lenders need not just security (which many firms have) but proof of likely profit to pay off the interest and capital, including an additional 2% fee to the Government, and (b) that profit cannot be demonstrated in relation to a contract which requires substantial growth and substantial efficiencies before breakeven can be reached, and is constructed through a process that models breakeven as a viable return.

(3) The Lord Chancellor provided no answer to the point that these measures are entirely theoretical: the MoJ has never asked the Bank (or any commercial lender) whether finance would in practice be available nor whether, by the end of November 2014, finance had in fact been made available via the Enterprise Finance Guarantee to firms hoping to bid for DPW contracts. Yet on the Lord Chancellor's justification of the tender timescale, substantial market consolidation/scaling-up should already have taken place by that time.

(4) Here, as elsewhere, the Lord Chancellor has sought to defend the indefensible by blaming the Law Society (see Massey §143 [CB1/B/11]). The criticisms are unfounded (see Miller [CB1/B/9, §§66-72]) and moreover irrelevant - the statutory and constitutional responsibility lies with the Lord Chancellor.

(5) As for interim payments, the detailed submissions of the Law Society are adopted. In addition:

a. It is of no assistance to the Lord Chancellor to say that the effect of interim payments was not modelled in the KPMG report. He could have procured further modelling, but chose not to do so. Moreover since interim payments are not new money, but just bring forward money to which firms are already entitled, they are unlikely to have affected the annual income figures used by KPMG (and derived from Otterburn).

b. Whatever they may do for firms after the contracts have started, the effect of interim payments is minimal in the pre-tender and later pre-contract period, when many firms will have to invest in order to acquire capacity so as to bid (see Nelson [CB1/B/2]) or to alter their working practices so that they are in a position to break even from day 1 of the contract. Only £3.5m is to be brought forward in the period to April 2015, and the Decision itself assumes that firms will be suffering a 5% loss in income [CB2/10/§31.0], even after interim payments.

c. The interim payment policy comes nowhere near to satisfying the further enquiries which KPMG said were necessary. In particular, (a) the

amounts to be brought forward have not been fixed with a view to meeting firms' investment requirements (as the Lord Chancellor has not sought to quantify the latter); (b) interim payments are not directed at bidders for DPW contracts and it will be entirely fortuitous whether a winning bidder which requires investment finance will be able to obtain any of it from interim payments;[3] and most importantly (c) firms cannot invest in new premises, new fee earners and working practice efficiencies out of cashflow required for everyday fixed overheads. This is a simple point, but an important one. If a firm breaking even receives £500 for a case, it makes no difference whether it receives it in one tranche or several: it is equally unable to spend that money on additional investment. It is most unlikely that KPMG – had they been asked – would have regarded interim payments as any solution at all to the problems they had identified.

21. As for the *ex post facto* reasoning on firm viability, two principal points have been made, neither of which stand up to scrutiny:

    (1) Firms which win DPW contracts will be in a strong position to obtain finance. This point was made in the Detailed Grounds of Resistance at §89 [CB1/A/7] but does not appear in the extensive evidence filed by the Lord Chancellor. This is unsurprising given the Lord Chancellor's failure to conduct any investigations into the true position regarding availability of finance and the fact that the point is inherently implausible. It is hard to see why lending entities, in the current financial climate, should regard as attractive a criminal firm which has obtained a contract (a) modelled on a 0.1% profit margin, which (b) provides no guarantee of revenue, (c) requires that firm to service a large geographical area and (d) requires that firm to scale up significantly and achieve substantial staff cost efficiencies before breakeven can be reached. In any event, the assertion goes nowhere to meet the clear evidence (Nelson 2 §§11-16) that firms require investment not from contract award (July 2015), but <u>now</u>: in order to perform the

[3] For a good example of the vagaries of the system, see the statement of Mr Cox, who explains that his firm only has any financial reserves because it carefully saved the money made from one big murder trial two years previously: Cox, §21 [CB1/B/4]. It cannot be assumed that all winning bidders, let alone all firms, will be similarly fortunate in their workload.

scaling up and consolidation that, on the Lord Chancellor's own evidence, is what DPW contracts are modelled to require.

(2) It is too difficult to model investment requirements. Again, the submissions of the Law Society are adopted. The LCCSA Claimants emphasise only that:

a. The argument is unsupported by any evidence (notwithstanding, again, the very extensive evidence filed by the LC in this case). KPMG were not asked about this and nor, apparently, were the MoJ's internal statistical experts. The Lord Chancellor simply did not consider, prior to the decision, what difficulties might arise in seeking to model or otherwise take account of investment costs. The Court should not accept the *ex post facto* assertions of Counsel as to those difficulties.

b. The evidence from Otterburn filed by the Law Society is compelling and doubtless reflects what the Lord Chancellor would have been told, had he enquired before the Decision as to how investment costs might be modelled.

c. In fact, Otterburn suggested prior to the decision how the issue of investment costs might be deal with within the model, namely by making provision in the model for a 5% profit. One reason for modelling a modest profit was to reflect the need for capital [CB2/9/p2]:

> *"This profit is needed to provide working capital and the cash needed to run a contract. Without this firms would be highly vulnerable to any cash flow issues, and in particular would not be able to survive any delays in payments by the LAA, which, for various reasons can occur. We do not believe that a break-even figure would enable firms to remain in the market when developments in IT and changes introduced by the new contracts themselves will require increased investment. They would not be able to generate the working capital and reserves essential to run any business and would be highly likely to fail. We do not believe they would be viable businesses and may have difficulty obtaining bank finance as their business case would be so weak."*

d. The Lord Chancellor's submission is founded upon an irrational inconsistency of approach: the KPMG model itself, on which his Decision is based, seeks to predict firm behaviour which (the Lord Chancellor

himself asserts) is uncertain and will vary widely between firms. A number of elements within the model (e.g. latent capacity, organic growth, OCW substitution) are open to exactly the same objections of uncertainty and variations between firms. The Lord Chancellor accepted, and defends, those elements of KPMG, yet refuses (*ex post facto*) to apply the same reasoning to the important factor of investment costs.

e. The effect of excluding investment costs is not neutral. It has the effect of assessing those costs at zero. That is not a rational assumption (especially in the light of KPMG's advice as to the significance of such costs). Contrary to the express terms of the Decision, a profit is not a profit where investments costs have not been reckoned.

22. The Lord Chancellor provided no answer to the challenge that he has never considered the costs of forming or running a Delivery Partnership. This is surprising, since the availability of Delivery Partnerships formed the Lord Chancellor's main answer to the Claimants' challenges to, *inter alia,* the difficulties facing small firms and the OCW tender restriction. Moreover, it has long been the Lord Chancellor's evidenced position that the "*majority of applicants*" for a DPW contract would take the form of a delivery partnership (Gibby, §148 [CB2/14]). The Claimants' unchallenged evidence has been that the formation of these partnerships will involve significant cost: for example, the mandatory due diligence exercise (IFA §2.22 [CB2/11]) will necessitate considerable use of professional accountants (e.g. Nelson 2 §12 [CB2/8]). Further, it is clear from KPMG's model (a) the viability of DPW contracts has been assessed on the basis that a single firm will perform each contract, and (b) that on KPMG's own approach, delivery partnerships will have greater overheads than single firms (thereby ensuring that they do not achieve breakeven). It cannot be lawful for the Lord Chancellor to invite firms to bid for the DPW contracts as delivery partnerships in circumstances where his own model strongly suggests that such partnerships will make a loss and he has made no effort to investigate the position, or seek assurance to the contrary.

23. Further, given the importance of delivery partnerships to the Lord Chancellor, it is unacceptable that he has never sought to establish whether there are significant insurance hurdles. The problem was pointed out to him in evidence in the first claim

(Waddington 2nd, §14(d) [TB1/2]), but no contact was ever made with the insurance industry to confirm or allay such fears. The Lord Chancellor made the *blasé* assertion in argument that PII for a delivery partnership would be no different to PII covering the use of agents. This only underscores the Lord Chancellor's lack of understanding of the reality: Mr Waddington and Mr Nelson have provided a clear explanation of the differences in relation to PII, which the Lord Chancellor entirely failed to address: Waddington 2, §96 [CB1/B/7] (and see Nelson 2, §§17-20 [CB1/B/8]). These are very serious matters, central to the success of the DPW contracts, and so to the Lord Chancellor's fulfilment of his LASPO duty. There is no room for complacency.

24. There were other matters going to viability which were listed by KPMG as requiring investigation before any decision as to contract numbers was taken, in particular, the *"extent to which the average staff efficiency improvement required reflects the local context"* [CB1/C/2/p.35]. There was in fact no investigation of whether up to 20% staff cost efficiency improvements was a realistic expectation. That failure was particularly significant in circumstances where the Lord Chancellor's own report from PA Consulting [CB1/C/4] had stated that a reasonable assumption would be that "cost efficiencies cannot be achieved in the short run" [p.13] and that further analysis should be carried out on a variety of areas, including work "to understand where areas of suppliers' current processes can be streamlined and changed to understand the extent to which process inefficiencies exist" [p.16]. No further analysis was done in response to PA Consulting, or KPMG.

C. The Capacity Challenge

25. KPMG made very clear (p12) that express consideration should be given to the *"capability of incumbents to grow"*, the *"likelihood of the procurement attracting providers from outside the area"* and the *"proportion of market consolidation achievable"*. The Lord Chancellor has failed to evidence any adequate consideration of any of these matters, and for the most part, any consideration at all.

26. The response of the Lord Chancellor was along the lines that 'there are many different ways to skin a cat'. But:

(1) Given that his LASPO duty is one that applies area by area, it cannot be sufficient to satisfy himself that growth requirements averaged across the country were manageable, without focusing on the area by area results.

(2) MoJ officials made the significant error of not aggregating the results of their various statistical analyses before deciding that all was well. For example, there was no aggregation of the Annex F analysis [CB2/16] with the further analysis discussed by Gibby that firms would have to have around £60k worth of additional capacity to deal with OCW returning through the DPW system (because of OCW being given up and unsuccessful bidders failing): Gibby, §§125-127 [CB2/14]. Nor was the sensitivity analysis which illustrated what would be the consequences of the OCW or latent capacity assumptions being incorrect (Massey, §§169-174 [CB1/B/11]) provided to the Lord Chancellor (November submission, §45 [CB2/19]). The Lord Chancellor could not assess for himself the consequences of aggregating the different analyses because he was not even told about the results, contrary to the principle in the *National Association of Health Stores* case [Auth1/17]. The risks inherent in the suggested approach were critical to the Lord Chancellor's considerations yet he was not provided with the raw material, or even a summary of that material, to enable him to assess those risks.

(3) MoJ officials did not assess the significance even of the average figures once they had been generated. They did not assess whether it would in fact be feasible for firms to grow to the extent calculated (e.g. by working out the costs of so expanding). (This is not a question of how the cat is skinned but what is done with the products of that exercise - here, nothing).

27. The lack of thought given in the Decision to the ways in which capacity could be obtained to meet the capacity challenge is clear from §2.11 (*"There are a number of ways that organisations could achieve scale...such as through mergers, joint ventures or delivery partnerships"*) and §2.51 (firms can *"join with other organisations (through delivery partnerships or joint ventures)"*) [CB2/10]. Most mergers and all joint ventures will create a new legal entity. By the time of the November Decision, new mergers and joint ventures were rendered impossible by the requirements of the OCW tender, and yet the Lord

Chancellor still placed reliance upon them. To put the point negatively, there is no indication in the Decision that the Lord Chancellor appreciated that there was by that time, at the least, a significant barrier to market consolidation.

28. It is no answer that a small number of firms had considered their position at an early stage and had been able to take meaningful action prior to the OCW tender. The Lord Chancellor accepted that there was considerable uncertainty as to: (a) the number of DPW contracts, (b) the value of the contracts and (c) the tender requirements, until 27 November 2014. This is in addition to the considerable financial challenges faced by firms on a day-to-day basis, before the further investment costs required to attempt to scale up or consolidate to tender realistically for a DPW contract.

29. The only answer open to the Lord Chancellor is the availability of delivery partnerships, which do not require the formation of a new legal entity. But this is no answer at all given the absence of any attempt to evaluate the considerable costs involved, the insurance and regulatory difficulties, and the DPW IFA requirement that a finalised written agreement be in place between delivery partners by the point of tender (§2.19), along with the necessary due diligence having been completed (§2.22) [CB2/11]. KPMG were not asked to consider any of these issues, in either of their reports. The evidence is that Delivery Partnerships are impractical and creative of additional, not lesser, cost (Waddington 1 §§153-167 [CB1/C/1]). They provide no answer to the real practical difficulties faced by firms in attempting to scale up, particularly in the very short tender window (and the Lord Chancellor is in no position to contend otherwise).

D. Failure to Grapple with the Consultation Responses

30. The starting point is that Burnett J held, rightly, that criminal legal aid practitioners had "*significant illumination*" to bring to bear on the assumptions relied on in the KPMG model: at §48 [CB1/C/1]. But the Decision simply dismisses the views of nearly 4,000 respondents on the basis that 'no evidence can be available until the contracts start', or that no "*new evidence*" had been provided (see Decision, §§2.6, 2.41, 2.44, 2.56, 2.77, 2.83 [CB2/10]). The former completely undermines the requirement placed by Burnett J to re-consult on the assumptions; the latter is simply not a credible response.

31. In any event, there was no answer to the point that the latent capacity assumption was an assumption directed to firms' current position ("*A 15% improvement in capacity has been assumed to arise from latent capacity currently existing within firms*" (p.32)). It is impossible to understand how testimony from thousands of practitioners as to the extent to which they currently have latent capacity could be dismissed as not providing new evidence. It may be evidence that the Lord Chancellor wished to disregard but that is a different matter.

E. The 50% OCW Assumption

32. Surprisingly, the Lord Chancellor sought to make a virtue of the 50% OCW retention being a completely random assumption. That assumption is critical to the success of the model in being able to generate a number of contracts which does impose unachievable growth requirements. It is a key factor in being able to conclude that firms will have capacity for increased amounts of DPW work, and it expressly has no basis in fact whatsoever. An assumption which bears no resemblance to reality is not a rational assumption to adopt.

33. Moreover, arguing that it was inconsistent for firms to disagree with the OCW assumption, and also with the assumptions as to latent capacity and organic growth, the only substantive answer provided in the Decision, is no answer at all. There was no inconsistency – consultees justifiably highlighted that the model could not give rise to a viable business as firms could not grow sufficiently (either with or without giving up OCW) and could not give up OCW without imperilling their long-term survival. But in any event inconsistency, without more, could not justify the Lord Chancellor disregarding opposition to each of the assumptions. As it is, the Decision provided no additional, substantive reasoning to justify the 20% organic growth assumption or the 50% OCW assumption.

F. Testing the Sensitivities of the Model

34. There are two aspects to this ground. First, that it was an aspect of the Lord Chancellor's *Tameside* duty to test the sensitivity of the model, particularly the "controversial" assumptions adopted by KPMG (Burnett J at §48), in order to inform himself of the likely

consequences of one or more of the predictions within the model turning out to be incorrect. Whilst no assumption can be perfect, where they are highly disputed by the bodies best placed to understand if they reflect reality, it is both obvious and simple to test the sensitivity of the model by establishing the effects of the assumptions being wrong. The Lord Chancellor did not do so (himself, or through KPMG). The Lord Chancellor cannot now rely upon the July 2014 analysis set out in Massey, §§169-174 [CB1/B/11]) because not only was it never provided to the Lord Chancellor, but he was told it did not exist (November submission, §45 [CB2/19]). Anyone reading that passage in the submission (or indeed the Decision, §2.42) would conclude there had been no such testing.[4] This challenge has not been answered.

35. Even if it were possible to overlook the misinforming of the Lord Chancellor, the fact remains that the sensitivity testing which was conducted gave rise to worrying results in terms of the growth requirements which would be imposed upon firms. The Lord Chancellor's oral submissions provided no illumination as to why nothing was done in response to those results.

36. The second aspect is that the executable version of the model should have been disclosed to in the re-consultation. The Lord Chancellor's answer to this is that the request is barred by abuse of process.

37. This is a novel attempt to apply the doctrine of abuse of process well beyond its natural field, without any supporting authority. Lord Bingham concluded in *Johnson*[5] at p.31 [Auth1/13] that the court should take a "*broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case*", and that "*there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party*": it would be "*wrong to hold that because a matter*

[4] Although it was said orally that there was no misrepresentation in the Lord Chancellor's pre-action letter where it had stated that the assumptions had not been tested [CB2/D/2/§68], it was not explained how the MoJ managed to carry out testing on a model it did not have and at the same time was prevented from testing any of the other assumptions.

[5] Importantly, the quotation from *Johnson* mis-stated at §183 (and relied on at §191(2)) of the Lord Chancellor's skeleton argument is not the *ratio* of Lord Bingham's judgment in that case: it is rather a quotation from his judgment as Master of the Rolls in *Barrow v Bankside Agency* [1996] 1 WLR 257, 260 (quoted without comment in *Johnson* at p. 27).

could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive" (emphasis added).

38. Contrary to the Lord Chancellor's assertion, *Eco-Power* [Auth2/35] is not authority for the proposition that *Henderson* abuse applies in judicial review. It is authority for the narrower propositions that (a) *res judicata* does not apply in judicial review (at §19) but that (b) the Court retains its "*inherent jurisdiction to prevent issues being tried repeatedly before different tribunals*" (at §21). There is no relitigation here.

39. The Lord Chancellor's final assertion is that "*there is no reason of principle*" why *Henderson* abuse should not apply in judicial review (skeleton at §184). This is simply incorrect. It is inapplicable for at least 3 reasons:

    (1) Judicial review vindicates not (only) the private interests of citizens, but the constitutional interest in lawful government. That is not a matter which can be weighed in the balance and, potentially, countermanded by other factors.

    (2) The need of public authorities for certainty and finality in decisions has been recognised by Parliament in the provisions of s.31 Senior Courts Act 1981, and in Part 54 CPR. There is no need or room for the application of *Henderson* abuse in addition to the bespoke framework of judicial review procedure.

    (3) To recognise *Henderson* abuse in the public law sphere would create significant practical problems for the Administrative Court. Claimants (particularly those bringing procedural challenges) would be forced to bring hypothetical, premature, or additional claims in order to preserve their position if they were successful in their procedural challenge: any further challenge could, as here, be met with an abuse argument.

40. In any event, in this case the doctrine is plainly inapplicable. The third and fourth Claimants, and the Law Society, were not claimants in the first proceedings. *Henderson* abuse operates in private law because there is a *lis inter partes*: once that *lis* is joined, the proceedings form a closed whole between "*the parties to that litigation*". It has never applied to parties who might have joined another party's proceedings but did not. The

Lord Chancellor seeks not only to apply a private law doctrine in public law without authority, but to do so with a radical, wholly novel, additional limb that debars claimants with a pressing interest in the matter before the Court. This cannot be in the interests of justice nor consistent with the right of access to the Court.

41. Absent abuse of process, the claim in the present case falls squarely within the principles in *Eisai*, it not being in dispute that the effect of the assumptions used in the model was relevant to the risks which would be run by the Lord Chancellor in adopting the number of contracts set out (provisionally) in KPMG's report.

G. The Tender Timescale

42. The Lord Chancellor's principal defence to the challenge that the tender timescale discriminates against smaller firms and is disproportionate is that EU law would not prohibit him from adopting the timescale he has chosen even if the Public Contracts Regulations applied to their full extent. He relies upon reg. 16(16), which provides for a minimum tender period of 40 days. But that does not mean that a 40 day limit will always be lawful: there is a minimum requirement, but the actual tender period will remain subject to challenge based on reg. 4, and public law challenge, in the ordinary way. In other words, a minimum of 40 days is necessary but not sufficient.

43. As to the legality of the period actually adopted in this case, that turns on the extent of the requirements which are imposed upon bidders before they can be in a position to bid. There is a close analogy to the *Law Society* family legal aid tender challenge [Auth2/44], which held to be unlawful a tender process which obliged firms to meet a particular requirement, which could not be acquired by the time it was announced. This frustrated the purpose of the tender (see at §96 especially). Adopting a two month tender timescale where the purpose of the tender is to force market consolidation, but where the clear evidence is that that timescale is insufficient for the market to materially consolidate (even if it could afford to do so), similarly frustrates the purpose of the Decision. The effect is to discriminate in favour of the small number of firms which do not need to consolidate, where 76% of the market has between one and five fee earners on criminal legal aid work: Crowther, §24. This outcome is disproportionate, at least in the sense that it was not the least restrictive alternative, and it is irrational. Given that

the next fee cut is scheduled for July 2014 in any event, and even if the tender process were to take longer than currently scheduled, it is difficult to see how the advantages to the Lord Chancellor of a compressed timescale for the tender process can outweigh the disadvantages to smaller firms.

H. Article 1 of Protocol 1 ECHR ("Article 1P")

44. It is clear that criminal legal aid firms have marketable goodwill constituting a possession within Article 1P. That goodwill is in their OCW. The Decision will interfere with firms' goodwill in two respects: firms which will not obtain DPW contracts will close, and those which do will (on the Lord Chancellor's own reasoning) have to give up 50% of their OCW (on average) to satisfy the contract.

45. The Lord Chancellor's response is to mischaracterise the argument on interference with possessions: he suggested that the argument was akin to saying 'if people on Government benefits buy food from a supermarket, and their benefits are cut such that they no longer buy as much from supermarkets, that is an interference with the supermarkets' possessions'. This is a false analogy, which confuses a change in market demand with a change to the contract structure (which, in the analogy, is obscured and replaced with a free market situation). The true 'supermarket' analogy would be this:

    (1) The supermarket holds one of a limited number of contracts exclusively to supply groceries to those on benefits (by analogy, the 2010 Standard Crime Contract under which criminal legal aid services are currently provided);

    (2) The Government determines to retender those contracts on different, more stringent, criteria, which effectively precludes many smaller supermarkets from obtaining that contract and so continuing to service their loyal customers.

46. In that hypothetical, there would be an interference with the smaller supermarkets' possessions. The limited number contract is, in effect, a licence entitling criminal legal aid firms to provide services to a section of the public. As discussed in *Malik* [Auth1/19] at §§22-23, 31-45 there is clear authority that the termination of such a licence and its

replacement on less favourable terms will constitute an interference with the incumbents' possessions.

47. By contrast, the Lord Chancellor's submissions were focused on cases, including the *Countryside Alliance* case on the Hunting Act 1997, where Government measures had the effect of reducing demand for particular goods or services. The present case concerns formal and practical restrictions on the current right of firms to provide services which are currently provided to a loyal customer base. The LCCSA Claimants do not submit that measures which merely have the effect of reducing demand for criminal legal aid services could amount to an interference with firms' possessions. But the Decision in this case, which prevents firms from exploiting goodwill which they have undeniably built up over many years, does amount to the requisite interference as it has "*material economic consequences*" (whether formal or practical) on the value of that goodwill (see *Malik* at §77).

48. The Lord Chancellor must therefore justify his decision according to the stringent proportionality standard set out in *Bank Mellat* [Auth2/53]. He cannot do so. His actions, particularly given his failures carefully to investigate, amount to the use of a hammer (the DPW scheme) to crack a nut (the need for market consolidation). In particular, the short tender window constitutes a clearly unnecessary additional detriment to hard-pressed smaller tenderers.

Conclusion

49. For the reasons set out in the skeleton argument of the LCCSA Claimants, made orally to the Court, and in these written reply submissions, the Court should grant permission and quash the Decision.

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