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
CRIMINAL LAW SOLICITORS ASSOCIATION
NELSON GUEST & PARTNERS
PAYTON'S SOLICITORS

Claimants

-and-

THE LORD CHANCELLOR

Defendant

CLAIMANTS' WRITTEN SUBMISSIONS
On the form of Order for hand-down, 18 February 2015

Save where the context indicates otherwise, references to paragraphs given as "§" refer to paragraphs in the draft judgment.

Consequential matters

1. The matters which arise for decision by the Court are (a) permission to appeal and (b) continuation of the injunction pending an appeal or application for permission to appeal.

2. The Claimants respectfully invite the Court:

   (1) to grant permission to appeal, both on grounds that the appeal has a realistic prospect of success and that the issues in the case raise matters of general public importance.

(2) if permission is granted, to order the continuation of the injunction pursuant to the Order of Jay J. Alternatively, if the Court declines to grant permission, it should order that the injunction continue for a period of 21 days in order to afford the Claimants the opportunity to apply to the Court of Appeal for: (i) permission to appeal, and (ii) a further continuation of the injunction until the (expedited) appeal is determined.

(1) Permission to appeal

3. At this stage, the Claimant's proposed grounds of appeal are as follows.

Intensity of Review

4. At §§33 and 37, the Court held that the appropriate intensity of review was the *Wednesbury* standard, both in the context of a rationality challenge and the scrutiny to be applied under a *Tameside* challenge. This finding coloured the entirety of the judgment: §§74, 89. In reaching this conclusion the Court erred in law.

5. The case concerns issues of great constitutional and individual importance. The Court has special competence and oversight over the integrity of the criminal justice process, which the Lord Chancellor's LASPO duties are intended to secure. Not only are there significant implications for access to justice inherent in the Lord Chancellor's decision, but as Burnett J recognised (at §37) impact on individual firms who are likely to go out of business is "*very profound*". The context is unique and not determined by any previous authority. The Court's consideration of the intensity of review did not consider the judgments of either *Kennedy* or *Refugee Action*, which were the principal authorities relied upon by the Claimants in this regard. Moreover, with respect, the holding (at §§31 and 48) that the Court is entitled to reduce the intensity of review so as to avoid becoming a "*player in the primary decision*" falls precisely into the trap of tempering "*the quality of judicial review by reference to the difficulties which the process may cause to the decision-maker*" (at §31). There were, in truth, no special factors in this case which differentiated from the standard case where a finding adverse to a public authority, and the consequent

necessity for reconsideration, will lead to delay in the completion of its decision-making process.

The Error in the 'Wrong Gear'

6. The Court wrongly characterised the Claimants' case regarding the high level of risk in the Lord Chancellor's decision, and the considerable uncertainty surrounding his modeling, as a submission "*in the wrong gear*": §§47-50. It is an error of law for the Court to conclude that because the variables are inherently uncertain their assessment is all the more for the Lord Chancellor (at §47); the reverse is true. It was no part of the Claimants' case to require "*firm objective predictions*" (at §27); that is a mischaracterisation. But it is precisely because the variables are known to be so uncertain, and so critical, along with the potential impact upon the criminal justice system if the Lord Chancellor's prediction turns out to be wrong, that the role of the Court in ensuring that the Lord Chancellor has properly analysed and investigated those variables must be enhanced, not reduced.

The 0.1% Profit Assumption and Investment Costs

7. The Court erred in law in respect of each of the three questions it posed to itself at §53. First, the discussion of paragraph 2.55 of the Decision at §54 fails to recognise that this paragraph either indicates the Lord Chancellor had not understood that investment costs were excluded from the 0.1% profit assumption, or it misrepresented the effect of that assumption. Either was unlawful, and the wording was the same as that in the 21 November Submission (at §56 [CB2/19]). Second, the conclusion at §59 that it was rational for the Lord Chancellor to decline to investigate the impact of investment costs is contrary to the clear indication from KPMG that he should do so, an indication which could only have been made if KPMG thought such an exercise was achievable. It also wrongly fails to understand the significance of the scale of investment required, and the difficulties firms have in obtaining it. Third, the provision of interim payments cannot rationally have satisfied the Lord Chancellor given the Decision itself envisages firms will be suffering a 5% loss in income in the relevant period [CB2/10/§3.10] and the

money is neither new nor directed at the problem of investment. The additional advice sought by the Lord Chancellor, which is relied upon in §54 of the judgment, was sought *after* the decision had been taken and in the context of how the already-taken decision would be justified in correspondence with interested parties. The majority of the measures set out in that advice were not relied upon even by the Lord Chancellor himself as being of any practical benefit.

Delivery Partnerships

8. At §89, the Court dismissed the claim that the failure to carry out any investigation into the availability and viability of forming and running delivery partnerships was a breach of the *Tameside* duty, apparently solely on the basis of the applicable intensity of review. This was an error of law for the reasons already stated, but even on its own terms the Court erred in failing to engage with the fact that the Lord Chancellor's own evidence was that the "*majority of applicants*" for a DPW contract would take the form of delivery partnerships (Gibby, §148 [CB2/14]). He did not challenge the considerable evidence of the Claimants as to the difficulties and costs associated with such partnerships, and neither the Lord Chancellor nor the Court addressed the accepted fact that the KPMG Report is premised upon delivery through a single firm (hence no modeling at all was done on the viability of delivery partnerships). On any standard of rationality, this was a critical flaw in the Lord Chancellor's approach, given the importance he himself gave to delivery partnerships.

Testing Sensitivities of the Model

9. The Court simply did not address the claim that it was incumbent on the Lord Chancellor, as an aspect of his *Tameside* duty, to test the sensitivities of a model he knew to be controversial and critical to his decision, in order to inform himself of the consequences if the model was flawed. Had the Court addressed the point, it would have been bound to find that it was unlawful not to so test the sensitivities, given the relative ease with which this could be done by the Lord Chancellor or KPMG on his behalf. It was

an error of law not to reach this conclusion even on the intensity of review adopted by the Court; the Lord Chancellor's failure was irrational. Nor did the Court address the fact that where limited testing was done, the (worrying) results of this were not provided to the Lord Chancellor; indeed, he was told that such testing did not exist (21 November Submission, §45 [CB2/19]).

Failure to Investigate Staff Efficiency

10. The Court did not address the specific complaint made concerning the assumption that staff efficiency could be improved by 20% (set out at, for example, the Claimants' Reply, §24), which was a precondition for firms to break-even, even if they could achieve consolidation to the required size. To the extent that the Court's general answer, at §78, that the Lord Chancellor was entitled to look ahead to how firms would behave under the new arrangements is said to apply to this point, it does not answer it. The failure to investigate whether that assumption was realistic was irrational and a breach of the Lord Chancellor's *Tameside* obligations, particularly where the reports of KPMG and PA Consulting, commissioned by the Lord Chancellor, had already concluded that improving efficiency would be very difficult and more specific analysis was required. None was done.

The Capacity Challenge

11. The Court did not address the cogent criticisms made of the limited analysis carried out on behalf of the Lord Chancellor into the growth challenge faced by firms under the proposed DPW model. These are set out in the Claimants' Reply at §26. It was irrational, and a breach of his *Tameside* duty, for the Lord Chancellor to rely on analysis which (a) was averaged on a national basis and did not focus on particular areas, (b) which did not consider the interaction and cumulative effect of the results of the different analyses which were undertaken, and (c) which made no attempt to analyse the significance of the average figures once generated.

Article 1 of the First Protocol ("Article 1P")

12. The Court erred in law in holding that the Article 1P complaint was misconceived (§91). No authority was cited in support of the apparent specific finding that an Article 1P right could not arise in the context of a contractual right which has a particular term, against the context of the State having sole control over access to the particular marketplace. The only authorities cited relate to the undisputed proposition that Article 1P does not protect an interest in future income; they do not address the loss of goodwill firms will suffer by their exclusion from the State-controlled DPW market. Further, the Court erred in holding at §93 that it cannot be said which firms will go out of business; the evidence from the Third and Fourth Claimants was clear that they were unlikely to be successful in tendering and would go out of business shortly thereafter. In the circumstances, the finding at §94 that any interference is proportionate is unexplained and inconsistent with the holding in *Bank Mellat* that a hard look be taken at the facts.

Public importance

13. The Court has held that the Lord Chancellor can drastically reduce the number of DPW contracts by some two-thirds, where access to DPW is a critical factor in the survival of individual criminal legal aid firms, thereby placing at risk – at least to some degree - the Lord Chancellor's ability to comply with his sections 1(1) and 13(1) LASPO duties. The basis of that decision is a heavily caveatted modeling exercise which on its face sets out a range of issues which the model does not cover, still does not produce a viable range for a number of procurement areas and which expressly recommends that the Lord Chancellor carry out further work. Whether or not the Lord Chancellor is permitted to go ahead without carrying out that further work, in a manner which will be fatal to large numbers of small firms, is a matter of significant public importance which merits the attention of the Court of Appeal, particularly given this Court's restrictive approach to the intensity of review.

(2) Continuation of the Injunction

14. The Court, having granted permission to appeal, should continue the injunction ordered on 23 December 2014 by Jay J pending determination of the appeal. That injunction halts the DPW tender process.

15. That injunction was ordered because Jay J recognised the significant prejudice that would be caused to the Claimants and those they represent if criminal legal aid firms were required to tender for contracts which, in many cases, will require significant consolidation, when the legality of those contracts is doubtful. As the Court will be aware, mergers and joint ventures are highly problematic for criminal firms given their very low profit margins, the fact that many are in financial difficulties, and the commercial difficulties inherent in seeking to merge with direct competitors.

16. Firms that (in order to tender) are required to scale up/form consortia must utilise their very limited financial resources on what is a high-stakes gamble, attempting to form consortia of/scale up to a size that will render the DPW contracts profitable. That gamble will have been both expensive and pointless if the Claimants are successful on appeal: the Lord Chancellor will be required to re-make his decision with an open mind, and the DPW contract numbers may well change. The injunction should accordingly be continued pending the outcome of any appeal.

(3) Alternatively, the Court should grant a stay of its order for 21 days

17. In the event that the Court is not minded to grant permission to appeal, the Claimants intend to seek the permission of the Court of Appeal. The appropriate course would be for this Court to grant a continuation of Jay J's injunction for a short period in order to allow the Claimants to attempt to persuade the Court of Appeal that it should: (a) give permission, and (b) grant a further continuation of the stay until it has determined the appeal on an expedited basis. Given that the Claimants will need both to prepare its appeal and then obtain a decision on permission from the Court of Appeal (including potentially by attending an oral hearing) it is submitted that a continuation of 21 days

would be a proportionate period. Such an order is required by the interests of justice for the reasons given above: absent such provision, the DPW tender process will re-start and firms will have no choice but to attempt to scale up and bid for contracts of a size and number which is unlawful and which may well change as a result of these proceedings. As recognised by Jay J, in those circumstances, the proceedings would risk ceasing to have any utility for the Claimants and the firms they represent.

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