

The Legal Director
Corporate Legal Team
Legal Services Commission

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Your Ref
SPC
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BY FAX (020 7759 0536) AND BY DX

Dear Madam

The Unified Contract

- 1 We write on behalf of The Law Society.
- 2 Thank you for your letter dated 7 December 2007.
- 3 The Law Society is currently considering the position with respect to other contracts. This letter, therefore, deals solely with the position with respect to the Unified Contract.
- 4 It appears from your letter that the Commission accepts that it cannot lawfully seek to take advantage of, or to continue to rely on, rights under the Unified Contract that have been found to be incompatible with its obligations under European Law. As you will be aware, in the Law Society's view it follows that the changes to the Unified Contract introduced in October this year should be treated as being of no effect and those planned to be introduced in relation to mental health on 1 January 2008 cannot go ahead.
- 5 In your letter the only reason you give for disagreeing with this conclusion is the following:

"As was made clear in the proceedings, the changes to the Unified Contract introduced in October 2007 were a necessary response to The Community Legal Service (Funding) Order 2007....enacted by the Lord Chancellor pursuant to powers conferred on him by the Access to Justice Act 1999. This legislation came into force on 1 October 2007 and it follows that the LSC was obliged to amend the contract. Such amendments were and are permissible under Clause 13.2, a provision specifically excluded from the terms of the declaration sought."

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6 For the reasons given below these contentions are devoid of any legal or factual foundation.

(i) The Funding Order is inapplicable to the Contract

7 The Community Legal Services (Funding) Order 2007 was made (so far as material) under section 6(4) of the Access to Justice Act 1999. As you will be aware, section 6 of that Act provides *inter alia* that:

“(3)The Commission may fund services as part of the Community Legal Service by—

(a) entering into contracts with persons or bodies for the provision of services by them;

....

(4) The Lord Chancellor may by order require the Commission to discharge the function in subsection (3) in accordance with the order.” (Emphasis added)

8 So far as relevant an order made under section 6(4) may thus only require the Commission to discharge its function of *entering into* contracts in accordance with the Order after such an Order comes into effect. The Lord Chancellor is thus able to regulate what contracts the Commission may enter into, or how they may enter into them, prospectively. Section 6(4) does not purport to confer any power on the Lord Chancellor to interfere with the rights and obligations of the parties under any contract which has already been entered into before such an order comes into effect or to require the Commission to do anything inconsistent with such rights and obligations or to seek to vary them.

9 Any other construction of the relevant provisions would be incompatible with the obligations imposed by European law to secure transparency in the procurement of legal services: no economic operator could have any reasonable certainty about what his remuneration under a public contract will be if a Government Minister has a power to vary it after the contract has been concluded in such manner as the Minister may determine after the contract has been concluded. Moreover such a construction of the relevant empowering provisions in section 56 of the 1999 Act, even if it was possible (which it is not) would be incompatible with the rights under Article 1 of the First Protocol to the ECHR of those who already have contracts with the Commission when the order comes into effect.

10 Unified Contracts were entered into by the Commission and solicitors in March this year, well before the Community Legal Services (Funding) Order 2007 came into effect on October 1 2007. They were entered into by the Commission on terms which were compatible with the Funding Order which governed the terms on which contracts could then be entered into by the Commission.

11 The suggestion that the terms of such Unified Contracts must now be varied after they have been entered into in order to comply with the provisions of a Funding Order

which cannot lawfully be made to apply to them, therefore, is without any legal foundation.

(ii) The October amendments were not made under Clause 13.2 of the Unified Contract in order to comply with the Community Legal Services (Funding) Order 2007

12 Your suggestion that the amendment introducing a new Specification (of which notice was given on 13 August this year) was in fact introduced under Clause 13.2 of the Unified Contract is not merely novel: it is factually unfounded.

13 The sequence of events (as you will be well aware) is that the amendment to introduce the new Specification was purportedly made after consultation with the Law Society and other consultative bodies. That consultation (which itself followed an earlier consultation in October 2006) began on 1 March 2007 and ended on 16 April 2007. That consultation was not conducted on the basis that the amendment to include the proposed new Specification was necessary in order to make the Unified Contract comply with the Community Legal Services (Funding) Order 2007, for the obvious reason that that Order had not been made. Indeed a draft of it had not even been produced by then for consultation by the Lord Chancellor. The proposed new Specification was proposed, so the Commission then claimed¹, to achieve three overall objectives, namely:

“(i) To give effect to the new fee schemes as published in the ‘Way Ahead’ document;

(ii) To update and amend the old Contract Rules in order for them to be fit for purpose for a standard fee regime;

(iii) General updating and modifying of the Contract Specification to match the new Unified Contract Standard Terms and to simplify and replace the detailed regulations under the 1988 Legal Aid Act which were previously incorporated into the Contract.”

The new Specification was thus introduced to facilitate what the Commission considered to be a “Reform of the Legal Aid Scheme”. It was not proposed or introduced because it was thought necessary to comply with any legislation. Indeed the Community Legal Services (Funding) Order 2007 had still not even been made when the Commission announced on 27 July this year that “the new fixed fees for civil legal aid cases will be introduced as planned from October 2007”.

14 Indeed you accept in effect that the wholly new Specification purportedly introduced by the amendment on 13 August 2007 could not have been justified in any event under Clause 13.2 in conjunction with the 2007 Funding Order. Indeed, far from a new Specification (including a new payment annex) being inserted into existing contracts in

¹ See LSC Review of Responses to consultation on the General Specification (July 2007) at [15].

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order to comply with the new Funding Order, it is more accurate to say that the new Funding Order was made so that new contracts would have to be made by the Commission on the same terms as to payment as those which the Commission had already decided that it would amend its existing Unified Contracts to include².

(iii) Consultation in respect of any amendment under Clause 13.2 of the Unified Contract has not occurred

- 15 Even if it was possible to argue that amendment to the Unified Contract to introduce a new Specification was necessary to comply with the Community Legal Services (Funding) Order 2007, consultation in respect of any such amendment (to be effected under Clause 13.2 of the Unified Contract) is required by virtue of Clause 13.3 of it. Only after such consultation is the Commission entitled (under Clause 13.7) unilaterally to amend the Unified Contract by notice.
- 16 The Community Legal Services (Funding) Order 2007 was made on 9 August 2007 and laid before Parliament on 17 August 2007 to come into force on 1 October 2007. No consultation with the Law Society or other consultative bodies took place after the Order was made in relation to what amendments to the Unified Contract (if any) were necessary to comply with the Order. Nor did the Commission suggest in any consultation document that it was proposing to amend the Unified Contract under Clause 13.2 to comply with or take account of the provisions of that Funding Order, identifying what changes for that purpose it thought were necessary and seeking the views of the Law Society and other consultative bodies on them.
- 17 Accordingly, even if any such amendment could be said to be required by virtue of that Order (which is denied), the Commission has not complied with the requirement to consult on that matter which is a precondition to the exercise by it of any power to amend the Unified Contract under Clause 13.2. Accordingly, if the amendment to introduce the new Specification was made under Clause 13.2 (which it plainly was not), it was ineffective.

Conclusion

- 18 Your contention, that the Commission's ability to amend the Unified Contract to include the new Specification (including the new civil fee schemes) is unaffected by the fact that the Law Society has now succeeded in its judicial review, is inconsistent with the Commission's position hitherto.
- 19 The reason why the Commission has not consulted about any amendment proposed to be effected under Clause 13.2 is that it has not purported to exercise, or even thought that it was exercising, the power which that provision confers. Indeed you accept in effect that the wholly new Specification purportedly introduced by the amendment on 13 August 2007 could not have been justified in any event under that provision. The

²

See the letters from the Ministry of Justice dated 26 June 2007 and 3 July 2007.

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powers which were in fact relied upon to give effect to the amendments in October 2007 were those referred to in Clause 13(1)(i) and (iii) of the Unified Contract, the provisions which the Court of Appeal has found to be incompatible with relevant EU and domestic procurement law. It was precisely because it was those powers that were to be, and were relied upon, that the Commission welcomed Mr Justice Beatson's judgment. Thus, in its Press Release on 27 July 2007, the Commission stated that:

"In his judgment, Mr Justice Beatson rejected the Law Society's attempt to stop the new fees being introduced through its judicial review of the unified contract.... Welcoming the judgment, Carolyn Regan, Chief Executive of the Legal Services Commission (LSC), said:

"I am obviously pleased that the court has confirmed that it is lawful for the LSC to amend the unified contract to introduce the new civil legal aid fee schemes from October 2007... The Court decided that the contractual provision enabling the LSC to amend the contract in relation to fee levels and structures was lawful and not in breach of European Union procurement rules."

Similarly in its Press Release on 5 September this year, after the amendments had been notified, the Commission stated that:

"If [the Law Society's] challenge had fully succeeded, it would have affected the LSC's ability to introduce new civil fee schemes from October 2007."

- 20 Now that the Law Society's challenge has fully succeeded, the Commission inconsistently seeks to suggest instead that the judgment of the Court of Appeal has had no effect whatsoever on the Commission's ability to introduce the new civil fee schemes from October 2007.
- 21 For the reasons given above, the Commission's new argument based on Clause 13.2 which it advances in an attempt to save the new payment provisions is devoid of any legal and factual foundation. It will be most unfortunate, however, if further litigation is required to clarify the position. We would be grateful, therefore, if the Commission would reconsider its position. If after such reconsideration it wishes to maintain the argument it advanced in your letter dated 7 December 2007, we would be grateful if:
 - 21.1 you would explain how an order made under section 6(4) of the 1999 Act can affect the rights and obligations of the parties under a contract which the Commission has already entered into before that order comes into effect;
 - 21.2 you would identify any statement by the Commission that the amendments made by notice on August 13 2007, or any of them, were in fact made in the exercise of the power conferred by Clause 13.2 of the Unified Contract;
 - 21.3 you would identify when, and with whom, the Commission consulted about what changes should be made to the Unified Contract in order to comply with the Community Legal Services (Funding) Order 2007 and (if you accept that the Commission did not consult on that matter as required under the Unified Contract)

Bircham Dyson Bell

whether the Commission accepts that the amendment is of no effect (and, if not, why not); and

- 21.4 you would explain how the amendment purportedly made to substitute a wholly new Specification can be severed, even if some unspecified part or parts of it might lawfully have been made (as you recognise that Clause 13.2 could not have justified a wholly new Specification even on the basis of the Commission's unsustainable current contentions).
- 22 We look forward to the meeting on Friday. Given the need in the public interest to clarify the current position swiftly, however, we would be grateful for a response to this letter by 4pm this Thursday.

Yours faithfully

Bircham Dyson Bell LLP

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