

The Legal Director
Corporate Legal Team
Legal Services Commission

DX: 328 London

Your Ref

Our Ref

PTJ/Y056089

Date

14 January 2008

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Dear Madam

Unified Contract Amendments - Letter Before Claim

As you are aware, we act on behalf of:

- (1) The Law Society of 113 Chancery Lane, London WC2A 1PL
- (2) Fisher Meredith LLP of Blue Sky House, 405 Kennington Road, London SE11 4PT
- (3) Kaim Todner LLP of 5 The Ivories, 6-8 Northampton Street, London N1 2HY
- (4) Farrell Matthews & Weir of Broadway Chambers, 20 Hammersmith Broadway, Hammersmith, London W6 7AF

We refer to your letter of 21 December 2007, which (at our invitation) set out the LSC's position in the light of the judgment of the Court of Appeal [2007] EWCA Civ 1264. As we understand your letter (and previous letters), the LSC's position is that:

- It intends to give notice to terminate the Unified Contract;
- In the meantime the LSC "will consider" amending the contract to remove the powers of amendment that have been held to be unlawful and in breach of the requirements of European law;
- However, the LSC does not intend to take any action to nullify the consequences of its unlawful action; and
- It proposes to continue to give effect to the amendments which it has purported to make to the Unified Contract (including amendments relating to the mental health category, which purported to come into effect on 1 January, after the decision of the Court of Appeal), on the basis that they were lawfully made pursuant to clause 13.2 in response to the Community Legal Service (Funding) Order 2007 ("the 2007 Funding Order").

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We also refer to our letter of 4 December 2007 which set out the LSC's obligation under Art. 10 EC to take action to nullify the effects of its breach of EU law. In our letter dated 10 December 2007, we explained in detail why the LSC's reliance now on the 2007 Funding Order is misconceived, since (a) the relevant primary legislation under which that order was made (section 6(4) of the Access to Justice Act 1999) confers no power to interfere with the rights and obligations of parties to existing contracts and the Order does not purport to require the LSC to do so, and in any event (b) the LSC never purported to exercise its powers under Clause 13.2 or (c) consulted on any such exercise of that power in accordance with that Clause which is a precondition of any such amendment. We refer to that letter and do not repeat its contents here.

Your letter states that the LSC is considering these arguments and does not provide any substantive response to them, saying that "whatever their merits" the LSC hopes to resolve the matter through discussion. You have not provided any substantive response, even though your letter saying that you were considering them was written as long ago as December 21st last year.

Our clients view litigation as a last resort, and remain happy to have discussions with the LSC. However, while the LSC continues to insist that the judgment of the Court has no effect on the amendments it has purported to make and refuses to take the action required of it by EU law, there is a fundamental disagreement which, in the interests of achieving clarity, may have to be resolved by the Court. It is in the interests of certainty and the public interest that this disagreement is authoritatively resolved as soon as possible. We would be prepared to consider with you the possibility of mediating the issues between us, but not at the cost of introducing further unacceptable delay into what is a matter requiring urgent resolution.

To the extent that firms are making claims under the amended payment schemes, that should not be taken as a waiver of their rights or an acceptance that those schemes are legitimate or lawful.

Accordingly, the Law Society intend to seek declarations, on an application for judicial review, that the LSC is obliged to nullify the consequences of its breach of European law and that the amendments purportedly made otherwise than in accordance with a lawful power to do so are themselves in breach of the principle of transparency. Our other clients also intend to seek such a declaration and further that the amendments purportedly made by the LSC to the Unified Contract were not made in accordance with Clause 13.2 of the Unified Contract and have no contractual effect under that provision. The LSC has previously been put on notice that our clients Fisher Meredith LLP, Kaim Todner LLP and Farrell Matthews and Weir are suffering financial loss as a result of the unlawful amendments (we refer to our letters of 12 October 2007 and 13 November 2007). They continue to suffer such loss as a result of the LSC's failure to nullify the consequences of its unlawful action and the further breach of the principle of transparency involved in purportedly amending the Unified Contract otherwise than in accordance with a lawful power to do so. They also intend to seek damages under regulation 47 of the Public Contract Regulations 2006 in respect of a breach of these obligations.

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For convenience, we set out below the details required by the Judicial Review Pre-Action Protocol:

The claimants – set out above

The details of the matter being challenged – The LSC’s decision not to nullify the consequences of its breach of its obligations under European law and to amend the Unified Contract in breach of the principle of transparency.

The issue – As set out above and in the letters referred to. The LSC’s amendment power has been held to be unlawful. The purported amendments were further breaches of EU law which the LSC is obliged under Art. 10 EC to nullify. The LSC cannot, as it contends, rely on clause 13.2 and the 2007 Funding Order to justify either of the amendments.

The details of the action that the defendant is expected to take – to nullify the consequences of its breach of its obligations under European law and to nullify the amendments to the Unified Contract made in breach of the principle of transparency.

The details of the legal advisers dealing with this claim - set out at the top of this letter.

The details of any interested parties – The Secretary of State for Justice. This letter has been copied to the Treasury Solicitor on his behalf.

The details of information sought – a fully reasoned response to our letters of 4 and 10 December 2007.

The details of any documents that are considered relevant and necessary – N/A.

The address for reply and service of court documents – set out at the top of this letter.

Proposed reply date – Given that we have already corresponded on these issues, and that you have had ample time to consider your position, close of business on Wednesday 16th January.

In addition, our clients other than the Law Society intend to bring a claim *inter alia* for a declaration in respect of the alleged exercise of the power of amendment under Clause 13.2 of the Unified Contract and for damages under the Public Contracts Regulations in respect of the breaches of European law referred to above. Please also treat this as a letter before claim and in accordance with the Regulations. We likewise seek a fully reasoned response to our letters of 4 and 10 December 2007.

As you will appreciate, these matters require speedy authoritative resolution. Accordingly in the absence of an acceptable and satisfactory reply we intend to seek expedition from the Court in determining them. We suggest that any application for permission should be dealt with in a “rolled up” permission hearing at the same time as the determination of any declaration sought, for which we propose if necessary to issue an application for summary judgment.

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We suggest the following timetable:

1. The question of permission be adjourned to a rolled-up hearing (on a date to be fixed in the period *18 February – 29 February 2008*) with the substantive hearing to follow immediately if permission is granted, with a time estimate of 1 day, with any application for summary judgment to be heard at the same time.
2. Defendant (and any Interested Party) to lodge and serve by *4 February 2008* composite detailed grounds of resistance / skeleton argument together with any evidence in support.
3. Claimants to serve skeleton argument by *11 February 2008*.
4. Acknowledgments of service be dispensed with.
5. Liberty to apply to vary these directions.

We would be grateful if you could indicate in your response whether you agree to this approach.

Yours faithfully

A handwritten signature in blue ink that reads "Bircham Dyson Bell LLP". The signature is written in a cursive, flowing style.

Bircham Dyson Bell LLP