

legal services

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Our Ref: SPC/TLS/130725/LIT

You Ref: PTJ/Y052757

Date: 18 January 2008

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Dear Sirs

R (The Law Society) v Legal Services Commission and Others

Thank you for your letter of 14th January. You may treat this letter as a reply not only to that letter but also to your letters of 4th and 10th December, in so far as they have not already been responded to. It is drafted in the format suggested in the Pre-Action Protocol.

1. **The Claimant:** The Law Society
2. **From:** The Legal Service Commission
3. **Reference details:** As per the above letterhead
4. **The details of the matter being challenged:** The amendments to the Unified Contract made with effect from 1 October 2007 (1 January 2008 for Mental Health).
5. **Response to the proposed claim:**

Your case

As I understand it, the aim of your proposed challenge is to establish that contract amendments which:

- (a) were made to give effect to a Funding Order published in draft on 3rd July 2007 and made on 9th August, and which has not been challenged by you or any other person until now;
- (b) were stated to come into effect on 1st October 2007;
- (c) form the basis of your members' firms' remuneration since then and on which they will have planned their future business;



(d) will operate to the financial benefit of many of your members' firms should now be declared void and ineffective, with the result that the LSC would be obliged to revert to the payment terms set out in the contract prior to its amendment.

Summary of the LSC position

The LSC considers that you have misunderstood the scope and effect of the Court of Appeal's judgment. The Court went out of its way at [8] of its judgment to note that the one and only issue before it was whether the powers of amendment given to the LSC under the Unified Contract satisfied the transparency provisions of the Public Contract Regulations 2006 ("the 2006 Regulations"). At [9] the Court noted specifically that it "was not invited to rule on any other aspect of the Unified Contract or on the changes introduced by the Secretary of State and the LSC to the system for public funding of legal services". As you know, the Court in the event declared clause 13.1, but not clause 13.2, to be incompatible with the 2006 Regulations.

The LSC recognises that it cannot simply "do nothing" in circumstances where the Court has declared that the amendment power in clause 13.1 of the Unified Contract is unlawful. That is why we have been anxious to engage with you to agree an appropriate response in a variety of ways.

First, as you acknowledge in your letter of 4th December the normal response of being found to be in breach of the 2006 Regulations is to bring the relevant contract to an end (see Case C-503/04 *Commission v Germany*). We made clear our intention to use our contractual termination powers to do so in our letter of 21st December.

Secondly, we accept the need to replace clause 13.1 with a narrower amendment provision, but despite our requests you had until recently made no proposals to address this (although we have now started to discuss these issues in the context of consultation on our criminal contracts).

Thirdly, however, pending termination, we consider the amendments made under clauses 13.1 and 13.2 continue to have effect because, even though clause 13.1 did not provide the power to make them, clause 13.2 did. The use of clause 13.2 to make the amendments was not challenged when made and has not been challenged since (until now).

Response to your letter dated 10th December

It appears from your letter that you accept the validity of the Order but do not accept that it has any effect on the Unified Contract. You raise three points, to which I respond below in turn.

1. The Order is inapplicable to the contract: The LSC's function under section 6(3) is to "fund services as part of the CLS". That is the activity the LSC is required to perform – but it can be done in any of the various ways set out in the paragraphs of 6(3). Those provisions give examples of how the LSC's functions may be performed but do not purport to limit the function itself. The LSC has chosen to fund services by means of entering into contracts, in accordance with 6(3)(a). Having entered into those contracts the LSC funds services by managing, auditing, amending or terminating those contracts as appropriate. Section 6(4) gives the Lord Chancellor power to regulate any of those activities by Order.

The nature of Orders under 6(4) is made even clearer by the specific provisions concerning "remuneration orders" under section 25 of the Act. Remuneration orders, which carry statutory consultation obligations, are clearly intended to govern remuneration rates from time to time.

2. The amendments were not in fact made under 13(2): The contract notices stated that the new Specification was being introduced under "Clause 13" of the Standard Terms. This had already been made clear in Ruth Wayte's witness statement of 29 May. We accept that the fee schemes were finalised and agreed before the Order was made and might well have been brought into force solely under 13(1) if there had been no Order. But the fact remains that the contract notices were not issued until after the Order had been made. They were made under both paragraphs of clause 13 at a time when the LSC was statutorily obliged to implement the fee schemes. Notwithstanding the incompatibility of clause 13.1, clause 13.2 provided a valid contractual power under which the amendments could be made.

3. Consultation on the Amendment under 13(2): There was substantial consultation on the fee schemes going back to late 2006. There was also a statutory consultation by the Ministry of Justice on the Order itself, as required by section 25(2) of the Act. The Law Society responded to that consultation on 24th July 2007 but did not challenge the use of the Order in their reply. Having consulted on the substance the LSC was entitled to amend the contracts and the amendments so made became binding under clause 13(7).

Prejudice, delay and alternative remedy

In any event, it is plain that any challenge by you is now well out of time and would cause substantial prejudice to those for whom remuneration will have been under the amended contract and who have planned their business on the basis that the amendments were effective. In particular:

1. Delay: Since the Access to Justice Act 1999 came into force there has always been a Funding Order to regulate CLS remuneration. In the *Sustainable Future* document, published in July 2006 the LSC indicated

that changes would be required to the 2000 Order to give the LSC power to implement the new schemes. Clause 13.2 came into operation in April 2007 but has at no stage been challenged by you. The Order was made on the 9th August and the subsequent contract amendment on 13th August 2007, more than five months ago. It is too late to raise these issues now.

2. Prejudice: It must be plain to you (not least from discussions with your members' firms) that a challenge at this late stage would cause very substantial prejudice to many of the 3167 firms who have signed the Unified Contract. Remuneration since October 2007 (or the start of this month for Mental Health) has been under the new fee schemes. If the contract amendments were declared invalid at this stage, the fees paid by the LSC under those schemes would presumably have to be recovered as *ultra vires* payments, subject to any claim by the firms for a *quantum meruit* for their services. Perhaps more importantly, the financial and business planning which firms will have reasonably undertaken for the future will be disrupted and all would be required to change their systems for recording and claiming of payments, which would in many cases be a considerable undertaking.

3. Alternative remedy: Reg. 47 of the 2006 Regulations provides a remedy – damages –, which is available in certain circumstances for breach of the Regulations. For the avoidance of doubt the LSC does not accept that that remedy would be available in this case. If individual firms had disagreed they could have brought claims for damages under the Regulations. The availability of a right to seek damages (subject, of course, to a stringent requirement of promptness) indicates a statutory policy that breaches of the Regulations should be remedied in that way rather than by public law orders declaring particular contractual provisions invalid.

The Next Steps

As has been made clear in all our earlier correspondence we also view litigation as a last resort. We wish to continue dialogue with a view to avoiding such litigation.

I note you raise the possibility of mediating "the issues between us". We would be happy to consider this. However we do need much more clarity as to what is proposed, particularly as to the scope of any mediation and its likely timescale. We are anxious to move swiftly to put new contracting arrangements in place not least to remove any continuing uncertainty hanging over the existing schemes.

Our provisional view, subject to further discussion and consultation, is that we could introduce new contracts from around October 2008. To meet this timetable however we would need to commence consultation on those contracts and related bid round criteria by the middle of

February. This needs to be borne in mind in alongside any future timetable for negotiation or mediation. Six months' formal notice would be given of termination.

We will consider your proposals as to timetable further if it becomes clear that litigation cannot be avoided, in which case we accept that the question of expedition will need to be considered. Meanwhile, as is clear from the above, we will defend the fee schemes and our current contracting arrangements from any challenge, while continuing to explore all proper avenues available to us to avoid the need for further litigation.

6. **Details of other interested parties:** The Secretary of State for Justice.
7. **Address for further correspondence and service of court documents:** As per this letterhead.

Yours faithfully



Colin Stutt

Acting Legal Director