

The Legal Director  
Corporate Legal Team  
Legal Services Commission

DX: 328 London

Your Ref  
SPC/TLS/130725/LIT  
Our Ref  
PTJ/Y056089  
Date  
24 January 2008

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**BY FAX (020 7759 0536) AND BY DX**

Dear Madam

## Unified Contract Amendments

- 1 We refer to the reply from Mr Stutt dated January 18<sup>th</sup> 2008 to our letter to you dated January 14<sup>th</sup> 2008. This letter is written (as was our letter dated January 14<sup>th</sup> 2008) on behalf of the Law Society, Fisher Meredith LLP, Kaim Todner LLP and Farrell Matthews & Weir.
- 2 The purpose of this letter is to inform the LSC about the proceedings which will now be brought, to request certain information and to seek the LSC's assistance in the expeditious resolution of the issues in dispute in the public interest.
- 3 We note that the LSC accepts, in the light of the judgment of the Court of Appeal on November 29<sup>th</sup> 2007, that Clause 13.1 of the Unified Contract did not provide the LSC with the power to make the amendments to the Unified Contract it purported to make by notice given in August and November 2007.
- 4 The only power on which the LSC now relies in order to suggest that the amendments had any effect is Clause 13.2. That is a provision which, so far as relevant, only allows the LSC to make such amendments to the Unified Contract, after prior consultation with the Consultative Bodies, as it "considers necessary in the circumstances to comply with, or take account of, any UK legislation". Your contention is that the amendments were required by the Community Legal Service (Funding) Order 2007 ("the Funding Order") and were lawfully effected under this provision.
- 5 Having considered your letter, our clients remain of the view that your contention is devoid of any merit and that Mr Stutt's letter does not respond adequately or at all to the points raised on that matter in our letter dated December 10<sup>th</sup> 2007.
- 6 We explained in paragraphs [7]-[11] of our letter dated December 10<sup>th</sup> 2007 why the Funding Order was inapplicable to the Unified Contract. It is unclear what the LSC's

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response to the points made actually is but it appears to be based in part on a simple mistake as to the construction of the relevant provisions. Section 6(3) of the 1999 Act specifies the ways in which the LSC may fund the services which, under section 6(2) of that Act, it considers appropriate to fund as part of the Community Legal Service. In this case, as the LSC accepts, it has decided to fund services by exercising its power under section 6(3)(a) of the 1999 Act, namely by *entering into* so called “Unified Contracts” with solicitors for the provision of services by them. We do not understand the assertion in Mr Stutt’s letter that “having entered into these contracts the LSC funds services by managing, auditing, amending or terminating those contracts as appropriate”. The reason why Parliament regarded the LSC as funding services by *entering into* a contract is that by entering into such a contract the LSC becomes obliged to pay for such services in accordance with the terms of that contract. It is the function of entering into the contract that the Funding Order (so far as relevant) requires to be discharged in accordance with its terms. It governs the terms upon which certain contracts may be entered into. Thus article 5 of the Funding Order specifies in certain cases certain terms which must, and certain terms which may, be included in the contracts which the LSC may enter into after the Order comes into operation. The Funding Order is thus inapplicable to the Unified Contract because that contract was entered into before that Funding Order came into operation. The LSC discharged its function of entering into the Unified Contract (as it was required to do) in accordance with the Community Legal Service (Funding) Order 2000. But in any event, however, the Funding Order does not purport to require the LSC to amend any existing contract it has. Indeed Mr Stutt’s letter identifies no provision which (so the LSC claims) requires any amendment to be made. Moreover, as we explained in paragraphs [8] and [9] of our letter dated December 10<sup>th</sup> 2007, section 6(4) does not confer the *vires* on the Secretary of State to require any amendment to be made to the existing rights and obligations of the parties under an existing contract. Notwithstanding our specific request in [21.2] of that letter for an explanation of how an order made under section 6(4) can affect the rights and obligations of the parties under a contract which the LSC has already entered into before the order comes into effect, Mr Stutt’s letter makes no attempt whatsoever to address this fundamental point.

- 7 We do not accept that the LSC has provided any evidence that the amendments made by notice dated August 13<sup>th</sup> 2007 were in fact made under Clause 13.2 on the basis that at that date the LSC in fact considered them necessary in the circumstances to comply with, or take account of, the Funding Order. Any such assertion would appear to be entirely inconsistent with the relevant sequence of events (described in paragraphs [13]-[14] of our letter); the decision to proceed with the amendments “as planned” which was announced on July 27<sup>th</sup> 2007 before the Funding Order had even been made; and with the Commission’s Press Releases on July 27<sup>th</sup> and September 5<sup>th</sup> last year (as we pointed out in paragraphs [19] and [20] of our letter dated December 10<sup>th</sup> 2007). Again we asked in paragraph [21.2] of that letter for the LSC to identify any statement by the Commission that the amendments made by notice on August 13<sup>th</sup> 2007, or any of them, were in fact made in the exercise of the power conferred by clause 13.2. Mr Stutt’s letter refers to no such specific statement. Nor does he suggest that, once the Funding Order had been made on August 9<sup>th</sup> 2007, the LSC in fact considered that Order and decided that any or all of the amendments were necessary in

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the circumstances to comply with, or take account of the Funding Order before the notice of amendment was sent on August 13<sup>th</sup> 2007. Indeed he does not suggest that the LSC in fact received the Funding Order before it was published on August 17<sup>th</sup> 2007. At most what Mr Stutt appears to be able to assert is that “clause 13.2 provided a valid contractual power under which the amendments *could* have been made”, not that they were in fact specifically so made.

8 However, in order to order to avoid any misunderstanding, if the LSC in fact contends that the LSC received a copy of the Funding Order before notice of the amendment was issued on August 13<sup>th</sup> 2007, that the LSC considered it before that notice was issued, and that the LSC concluded, having considered the Funding Order, that the amendment made was necessary in the circumstances to comply with, or take account of the Funding Order, we would be grateful if you would by return:

- (1) state when the LSC first received a copy of the Funding Order; and
- (2) provide a copy of the record of the decision taken by the LSC that the amendment was necessary in the circumstances to comply with, or take account of, the Funding Order and any documents relevant to that decision.

9 It is manifest in any event that the LSC never in fact consulted the consultative bodies (including the Law Society) after the Funding Order was made about what amendments it considered necessary in order comply with, or to take account of, the Funding Order. Indeed it would have been manifestly impossible to do so given that the Funding Order was not published until after the LSC had purported to amend the Unified Contract on August 13<sup>th</sup> 2007. No consultation in relation to the exercise of the power under Clause 13.2 which was the precondition for its exercise was thus conducted prior to the amendment on August 13<sup>th</sup> 2007 nor was any further consultation conducted with respect to Mental Health before notice of an amendment was given on November 12<sup>th</sup> 2007. Nor is it suggested in the LSC’s letter dated January 18<sup>th</sup> 2008 that any such consultation was in fact conducted in relation to any proposed exercise of the power to amend under Clause 13.2. The only attempt made to deal with what would be a flagrant breach of Clause 13 if any amendment had in fact been purportedly made under Clause 13.2 of it in relation to the Funding Order is to assert that the LSC “consulted on the substance”. That assertion is devoid of any merit. There was no consultation about what was necessary in order comply with, or to take account of, the Funding Order, which is the substance of what would have been required. Such consultation as there had been was on a completely different legal basis raising different legal and factual questions.

10 It is plainly in the public interest to establish as soon as may be whether the amendments purportedly made by the LSC were effective or ineffective. Accordingly as indicated in our letter dated January 14<sup>th</sup> 2008 the firms of solicitors for whom we act will bring proceedings for a declaration to establish that they were ineffective. These claims can serve as test cases.

11 Plainly there is no point in starting claims for damages at this point until this issue has been resolved as such claims will depend to a considerable extent on its resolution. Accordingly we shall be grateful for your written confirmation by close of business

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tomorrow 25 January that the time already agreed between us for the three individual firms to commence proceedings for damages due to expire at 4pm on 31 January 2008 be extended further until 31 days after the handing down of judgment in the proceedings envisaged to determine the validity of the amendments.

- 12 For the reasons explained further below, the Law Society will also start a claim for judicial review seeking a declaration that the LSC's failure to nullify the consequences of its breaches of European law is itself in breach of European law and that the purported amendments were further breaches of European law (being themselves in breach of the principle of transparency) which the LSC is also obliged to nullify. These breaches are continuing. The Law Society will also seek from the court by way of declaration guidance as to the basis upon which the LSC is obliged to remedy those breaches. Given the LSC's acceptance that it cannot rely on Clause 13.1 to effect the amendments made and as the outcome of the proceedings for a declaration by the individual firms mentioned above will also be of importance for this claim, however, we are considering whether to invite the court to postpone consideration of it until those proceedings have been determined.
- 13 This approach should provide the most expeditious and cost-effective way of determining the issues in dispute in a sensible order.
- 14 There are also a number of matters in Mr Stutt's letter to which we consider that a response is required.
- 15 First, we note the novel suggestion that the LSC considers that it must terminate the Unified Contract having been found in breach of European law with regard to its powers of amendment. This is precisely the opposite of what the LSC stated was its view in its letter dated December 7<sup>th</sup> 2007. It is also not the reason you gave for deciding to terminate the Unified Contracts in your letter to us on December 21<sup>st</sup> 2007 and which was given in the Commission's Press Release on the same date which attributed the decision to the absence of an agreement with the Law Society, when in fact the Law Society and the LSC were then in agreement that the decision of the Court of Appeal did not require the Unified Contract to be terminated in the circumstances. More to the point, however, you have failed to recognise that the LSC's obligation to nullify the effects of such a breach includes not only an obligation to rescind a measure found to be in breach in European law (such as the amendment clause) but also an obligation to make reparation for any unlawful consequences which may ensue or have ensued: see paragraph [4] of our letter dated December 4<sup>th</sup> 2007.
- 16 Second, the LSC suggests that Clause 13.1 needs to be replaced in the Unified Contract with a narrower amendment provision. This is incorrect. Clause 13.1 is in breach of European law. It should be removed from the Unified Contract. There is no scope for replacing it in the Unified Contract with any other, different amendment provision. Indeed any such amendment itself would involve a breach of the principle of transparency. The suggestion in Mr Stutt's letter, therefore, that the absence of progress on this issue is due to any delay on the part of the Law Society is

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fundamentally misconceived. It is moreover absurd. The duty to nullify the breach of European law is a duty which the LSC, not the Law Society, has.

17 Third, the complaints made in the LSC's letter dated January 18<sup>th</sup> 2008 about delay on the part of the Law Society are ill-founded.

- (1) The Law Society has maintained throughout that Clause 13.1 was in breach of European Law and that amendments could not be lawfully made pursuant to it. The reason why no amendment was made the subject of the claim for judicial review was that no amendment had in fact been made when the claim for judicial review was made. It was the LSC who maintained the contrary throughout until after the decision of the Court of Appeal.
- (2) When the contract amendments were made by notice dated August 13<sup>th</sup> 2007, the position was that Beatson J had accepted the LSC's contention that Clause 13.1 did not violate the principle of transparency. The LSC decided to proceed with the amendment taking effect on October 1<sup>st</sup> 2007 regardless of the Law Society's appeal. Indeed the LSC gave notice of a further amendment in respect of mental health on November 12<sup>th</sup> 2007 notwithstanding the fact that the LSC claimed in its Press Release on November 29<sup>th</sup> 2007 when the Court of Appeal gave judgment to have "already anticipated" the outcome of that appeal. Until that appeal was determined in the Law Society's favour, however, any claim in respect of either amendment would not have had any prospect of success. The assumption you appear to make that the Law Society should have made a further claim before the outcome of that appeal was known is thus indefensible. The Law Society were entitled to await the decision of the Court of Appeal and to assume that, as a responsible public body, the LSC would give effect to the judgment of the Court of Appeal if the LSC was unsuccessful in accordance with its obligations in European law. To have started any claims then would have involved the Law Society (as well as the LSC) in what might have proved to be unnecessary abortive costs and it would have imposed a potentially unnecessary burden on the court system.
- (3) Since the judgment in the Court of Appeal the Law Society has sought to reach agreement with the Commission on its consequences. But the LSC's responses have been uncommunicative and dilatory. Thus:
  - (i) We wrote shortly after the decision on December 4<sup>th</sup> 2007 explaining in detail what the Law Society considered those consequences to be and giving a fully reasoned justification for that view.
  - (ii) In its response late on Friday December 7<sup>th</sup> 2007 the LSC accepted that it could not rely on Clause 13.1 to effect the amendments which it had purported to make. But it merely asserted that the Funding Order had (in some undisclosed way) "obliged" the LSC to amend the Unified Contract and that such amendments were "permissible" (not that they had in fact been made) under Clause 13.2. Indeed that letter effectively recognised that it was impossible to justify all the changes made under

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that provision. This suggested potential reliance on Clause 13.2, however, represented a complete change of position from that in the Commission's Press Release on September 5<sup>th</sup> 2007 that, if the Law Society succeeded in its challenge, it would affect the LSC's ability to make the changes it had made. The LSC now appeared to suggest for the first time that it made no difference at all for most (albeit not all) of the changes made in October 2007.

- (iii) We replied promptly on Monday December 10<sup>th</sup> 2007 explaining in detail why any reliance on Clause 13.2 was devoid of legal and factual foundation and inviting the LSC to reconsider its position in the light of the arguments. We invited a response by December 13<sup>th</sup> 2007.
  - (iv) On December 13<sup>th</sup> 2007 you stated that the LSC was considering our letter and would respond "in due course". We replied the following day enquiring when a response would be provided and pointing out that we did not understand the need for the delay since the matters raised in our letter dated December 10<sup>th</sup> should have been considered by the LSC before the LSC's letter dated December 7<sup>th</sup> was sent.
  - (v) On December 14<sup>th</sup> 2007 you confirmed that the LSC "will respond to the points about Clause 13.2...by the end of next week".
  - (vi) Late on Friday December 21<sup>st</sup> 2007 (just as the Law Society and many firms were effectively closing for business) the LSC purported to reply to those points in our letter dated December 10<sup>th</sup> 2007. In fact all that was said in that letter in response to those points, apart from indicating the LSC was apparently proceeding regardless, was that "we are considering [the arguments put forward in the letter of December 10<sup>th</sup>] further".
  - (vii) No further response was forthcoming from the LSC indicating what the outcome of that further consideration may have been in response to our letters dated December 4<sup>th</sup> and 10<sup>th</sup> 2007.
  - (viii) Accordingly we had to write letters before claim on January 14<sup>th</sup> 2008 in order to obtain such response as we have received in the letter from the LSC dated January 18<sup>th</sup> 2008 to the points we originally made in letters on December 4<sup>th</sup> and 10<sup>th</sup> 2007.
- (4) The current position and any practical difficulties it may involve are thus the responsibility of the LSC. It is the LSC which promoted a power of amendment which was in breach of European law; it is the LSC who maintained that it was valid until after the decision of the Court of Appeal; it was the LSC who proceeded with amendments regardless of the appeal proceedings which were pending; it was the LSC which only raised the issue that the amendment in August 2007 had been "permissible" under Clause 13.2 in December 2007; and it was the LSC which has delayed until January 18<sup>th</sup> 2008 to respond in any substantive manner to our explanation, provided by letter dated December 10<sup>th</sup> 2007, why any such reliance was misconceived.

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- 18 We also note the LSC's stated intention to seek to rely on delay as a reason for denying the Law Society permission to make, or any relief on, a claim for judicial review. The suggestion that any delay should be held against the Law Society is entirely inconsistent with the LSC's repeated assertions that it wished to discuss the issues with the Law Society in order to avoid further litigation. The Law Society has sought to do this before and after the judgment in the Court of Appeal. It has stated clearly with reasons what in its view the consequences of the LSC's unlawful actions are. But, as explained above, even after the decision of the Court of Appeal, the LSC's response to these points has been dilatory. It has in fact simply proceeded regardless. The LSC's stated intention to rely on the period which has elapsed while the Law Society was pursuing its appeal and whilst the Law Society has been seeking to engage with the LSC at its invitation is thus without merit. It also leaves the Law Society no option but to begin a claim for judicial review as indicated above.
- 19 Finally the LSC appears to suggest that individual solicitors should have no remedy in damages under the 2006 Regulations as they brought no claim promptly. We fail to understand how the contention can be advanced in respect of those firms for whom we act in the circumstances. For example the position of Fisher Meredith LLP and Kaim Todner LLP was made plain in our letter dated October 12<sup>th</sup> 2007. Since then you have agreed that any claim they wished to make should not be brought until after the decision in the Court of Appeal and while discussions with the Law Society were continuing. Assuming, however, that this suggestion is directed at other firms, it is, in our view, a contention devoid of merit factually and legally. First, The Law Society brought a test case against the LSC who are a public body. As you will be aware, even before Lord Woolf's reforms to the civil justice system, others were entitled to await the outcome of such a test case and were not expected to begin proceedings to protect themselves as they are entitled to expect the result of such a test case to be applied to them: see eg per Lord Donaldson MR *R v Hertfordshire CC ex p Cheung* (1986) Times April 4<sup>th</sup>. Second, the correspondence between the LSC and the Law Society since the judgment of the Court of Appeal, in which the LSC has repeatedly said that it wanted to reach an agreement with The Law Society and avoid further litigation if possible, has been available to solicitors (as you will have been aware) on The Law Society website. Solicitors were again entitled in our view to await the outcome of those discussions before deciding whether to begin proceedings. Indeed the LSC would no doubt have criticised any solicitor who began proceedings whilst such discussions were being undertaken. The LSC's suggestion is also, however, devoid of merit legally in our view. The LSC is in continuing breach of its obligations in European law to nullify the effects of its previous breaches. Solicitors are entitled to complain of that continuing breach as well as of the amendments the LSC has purported to make.
- 20 We note that the LSC recognises that "the question of expedition will need to be considered" in relation to any proceedings. We hope that it will agree that an authoritative and expeditious resolution of the issues on the merits is in the public interest.
- 21 The Law Society has sought to discuss these issues with the LSC without resorting to litigation but this has not proved fruitful. It has offered to consider mediation with the

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LSC but this does not seem possible in the light of your response. It therefore proposes an exploratory tripartite meeting including the Ministry of Justice, short of formal mediation, but facilitated by a mediator if you think it would be of use. However, this could only take place alongside the proceedings outlined above and, as previously mentioned, not at the cost of introducing any delay in their progress.

22 We look forward to hearing from you as requested and in particular in regard to paragraph 11 by close of business tomorrow 25 January.

Yours faithfully

*Bircham Dyson Bell LLP*

**Bircham Dyson Bell LLP**