THE CHAIRMAN
TIMOTHY DUTTON QC

Richard Collins
Legal Services Commission
85 Gray's Inn Road
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21 January 2008

Dear Richard,

I have received your letter of 17 January 2008.

As you know the Bar Council has repeatedly informed the profession that the decision whether to sign VHCC advocates' contracts is entirely a matter for each individual and that each individual must make his or her own decision. You suggest that we have omitted advice that decisions should not be taken jointly. That is simply not so; advice that decisions should be made individually clearly indicates that individuals should not make joint decisions.

I do not propose to debate the views you have expressed as to applicable competition law. At the end of the day it is for each barrister or set of chambers to take legal advice if that is thought appropriate on this issue. Inevitably, there have been meetings and discussions within the profession to inform the profession about the contracts, rates and deadlines, professional obligations and so on, but I do not understand it to be suggested that these are prohibited per se – indeed that would be extraordinary. What matters is that competition law is complied with.

There are, however, a number of matters you mention on which we would differ. For example, you suggest that "all that is required for a breach of the Competition Act is a "concurrence of wills". This is incorrect. The existence of a concurrence of wills goes <u>only</u> to the existence of an agreement or concerted practice and this is only one of a number of conditions which have to be satisfied before there can be a breach of the Act.

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To constitute a breach, the collusion must <u>in addition</u> be with the "object or effect" of restricting competition, <u>and</u> the resultant agreement must not be of the sort which is capable of exemption. Moreover, the agreement must be of a scale which "may affect trade within the United Kingdom".

Be that as it may, the Bar Council has always adopted a cautious approach on this issue and for this reason has always urged barristers to adopt individual decisions, and not to take joint decisions. The Bar Council has always been scrupulous in emphasising that, when decisions of this nature come to be taken, each individual barrister must take an individual decision. Circuit leaders and the leadership of the CBA are aware of this, and have been reinforcing this advice.

The Bar Council has taken every opportunity to emphasise that each barrister's decision must be competition law compliant. Naturally we will go on saying this.

I reject any suggestion that the Bar Council has sought to encourage barristers to act in a manner inconsistent with competition law obligations. In fairness your letter does not make this allegation outright (rather there is an implication of it), and for the record I should say that I was grateful to you for acknowledging, when we spoke on the telephone last week, the lengths to which we have gone to ensure compliance with the law.

You suggest that there has been some apparent change of mind amongst barristers and this has led fewer to sign up than expected. This both misses the point, and does not take account of the manner in which the LSC organised the tender. Putting their names forward in the tender process was a necessary pre-condition to barristers being able to sign a contract, should one be offered to them via a firm of solicitors, in the future. It did not commit the advocate in any way (and the tender documents expressly say so (VHCC Panel Application Form, Declaration, section 3 pp22)). A barrister who did not put his name forward via a solicitor's tender would be excluded from signing a contract if one was offered to him by that solicitor at a later stage. Joining a solicitor's tender therefore preserved the position should a contract be offered at a later stage.

Second, contrary to the Bar Council's advice to the LSC throughout, you organised the tender by requiring that instead of there being separate tenders by litigators and barristers there should be tenders only by solicitors who would place barristers into their tenders as potential members of their team, and if accepted, a future advocates' panel. The effect of this was that many barristers were contacted, close to a tight deadline, and asked to join a solicitor's tender. Forms were signed by barristers at or close to the deadline with little involvement in the complex and detailed arrangements which might apply. This was the result of the way the tender was organised, the complex arrangements, and the tight deadline the LSC imposed, as well as the fact that individual barristers are professionally committed in Court.

You suggest there must have been agreements or concerted practices, possibly at the chambers level. We do not accept there is a factual basis for drawing this inference. The Bar Council has no knowledge of any such agreement or concerted practice and it has not encouraged or facilitated any such arrangement. There are bound to have been chambers meetings to have discussed these contracts (if offered) but that is how the Bar has always conducted its affairs and ensured that colleagues are properly informed before they make individual judgments as self employed practitioners about their future practices.

More fundamentally, if barristers are declining to sign, it seems likely that this is because they are coming to the independent view, having carried out an examination of the proposed contracts (issued to them in final form as late as 7th January 2008) that the terms are simply not economically viable given their circumstances, nor acceptable on their merits. In any event the rates included in the contract details published on the LSC website on 7th January 2008 were the lowest of the 3 bid levels that were offered during the earlier tendering process. The low take up of contracts thus far seems to have taken you by surprise, but you may recall that I warned officials at our meetings from the time when this scheme was first being put forward that it might not attract barristers to enter the contracts and was unlikely to attract barristers of sufficient skill and experience to make the scheme viable so as properly to serve the interests of criminal justice in these complex cases.

Because the Bar Council was anxious to ensure that your position was brought fully to the attention of the profession at the earliest possible moment, on Thursday (having said I would in my e-mail of 17 January and to the MOJ) I circulated to the Bar your letter to me dealing with the Competition Act. It was also placed on the Bar Council website. I also ensured that the LSC information was given the widest circulation (without comment), re-iterated the Bar Council's advice, and I personally contacted all Circuit Leaders to re-iterate the advice that competition law must be complied with and that all decisions must be taken on an individual basis. I know that the advice has been passed on to practitioners on their respective circuits. I am quite sure that barristers will have read your letter on competition law with great interest before making their final choices.

I have been leading the Bar's team in the discussions with the LSC over the past months to find an acceptable, long term solution to the VHCC issues. The Bar Council is determined to work with the LSC and the Ministry to ensure that a scheme emerges which attracts the best advocates and solicitors, is economical, non-inflationary, and leads to cases being economically managed and short, with solicitors and barristers being fairly, but **never** excessively, remunerated for the responsibility involved.

It is common ground that there are problems with VHCCs and the amount of money spent on them which need to be solved. It would be preferable for these discussions to take place in an environment that is free from threats to invoke competition law, let alone criminal sanction, against the legal profession.

I am saddened that the LSC should have written in the terms of your letter. I am also concerned that the LSC should have put out a statement last Friday to the effect that many barristers were signing these contracts when your letter of 17th January now indicates the contrary. It is possible to view the statement and the letter as an attempt to put pressure on the very individuals whom we both agree should make individual informed decisions free from coercion.

At our meeting on Thursday with the Secretary of State for Justice and Lord Hunt, it was clear that they had been sent copies of your letter. I am therefore sending them a copy of this letter. I shall also be circulating it to the profession today

Yours sincerely

Tim Dutton

CC Jack Straw MP, Secretary of State for Justice
Lord Hunt of Kings Heath, Minister for Legal Aid