Neutral Citation Number: [2015] EWHC 295 (Admin)

Case No: CO/5941/2014 & CO/5699/2014

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2015

Before :

LORD JUSTICE LAWS

and

MR JUSTICE CRANSTON

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Between :

The Queen on the application of THE LONDON CRIMINAL COURTS SOLICITORS ASSOCIATION and THE CRIMINAL LAW SOLICITORS ASSOCIATION and NELSON GUEST AND PARTNERS	**1st Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**
The Queen on the application of THE LAW SOCIETY	**2nd Claimant**
- and -	
THE LORD CHANCELLOR	**Defendant**

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Mr Jason Coppel QC, Mr Christopher Knight and Mr Rupert Paines (instructed by **Payton's Solicitors (1st claim) & Kingsley Napley**) for the **1st Claimant**
Ms Dinah Rose QC, Mr Ben Jaffey, and Mr Tristan Jones (instructed by **Bindmans**) for the **2nd Claimant**
Mr Martin Chamberlain QC, Mr Nicholas Moss and Mr Simon Murray (instructed by **The Treasury Solicitor**) for the **The Lord Chancellor**

Hearing dates: 15-16 & 19 January 2015

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Approved Judgment

LORD JUSTICE LAWS:

INTRODUCTION

1. These applications concern proposals by the Lord Chancellor to make profound changes in the market for the provision of criminal legal aid services by solicitors. The essence of the policy is the introduction of two types of contract to be entered into between his department, through the Legal Aid Agency (LAA), and the profession: contracts for Own Client Work (OCW) and contracts for Duty Provider Work (DPW). OCW consists in cases where the client comes to the solicitor because he chooses to engage that firm. DPW consists in casework carried out by solicitors on duty at local police stations (and in some circumstances magistrates courts), where they advise and represent persons detained or brought there. Under the existing regime some 1600 Standard Crime Contracts are in place, under which firms carry out both kinds of work.

2. The Lord Chancellor does not intend to impose any limit on the number of OCW contracts, and some 1808 such contracts were awarded in June 2014 and are due to be operated from summer 2015. But by his decision of 27 November 2014, sought to be challenged in these proceedings, he proposes to restrict the number of DPW contracts to 527. Alongside this dual contract system the Lord Chancellor introduced a cut in legal aid fees of 8.75% on 20 March 2014, and a further cut of 8.75% is now planned for July 2015.

3. There are two sets of proceedings, though their target is the same and the proposed grounds of challenge tend to converge. Both are applications for permission to seek judicial review of the November 2014 decision. In the first there are four claimants, the London Criminal Courts Solicitors Association, the Criminal Law Solicitors Association, Nelson Guest & Partners and Payton's Solicitors. I shall refer to them compendiously as the first claimants. The Law Society is the claimant in the second application. The Lord Chancellor is the defendant in both. Directions have been given in both claims (by Holroyde J in the first on 19 December 2014 and by Jay J in the second on 22 December 2014) for an expedited rolled-up hearing of the permission applications with the substantive judicial review to follow if permission granted. On 23 December 2014 Jay J ordered that the tender process for the DPW contracts should be suspended until after judgment in the proceedings.

4. The principal focus of both claims is the Lord Chancellor's use, in arriving at his decision, of a Report published in February 2014 which he had commissioned from KPMG and which I will describe in greater detail. The figure of 527 DPW contracts was derived from a model developed in the KPMG Report. The model proceeded on various assumptions. KPMG gave warnings about unknowns and uncertainties inherent in the model's application, in particular as regards the need for investment finance that would be required for firms to achieve improved staff efficiency and to restructure or consolidate: these were, and are, evolutions seen as essential to the dual contract scheme.

5. The Law Society's principal complaint, advanced by Miss Dinah Rose QC, is that the Lord Chancellor's adoption of the 527 figure ignores the fact that the KPMG assumptions (especially what may be called the "break-even" assumption: see further below) take no account, as KPMG themselves made clear, of the cost of the

investment finance which would be needed for firms to improve efficiency and restructure or consolidate to meet the challenge of the new system; that the Lord Chancellor misunderstood (or failed to take into account) what KPMG were saying about investment finance; and that since receiving the report he has taken no steps to inform himself of the likely realities, for example by obtaining information from financial institutions, against a background in which there was substantial evidence that law firms would find it difficult to obtain funds. Miss Rose also submits that the Lord Chancellor's response to the difficulty – a reliance on support packages – is flawed, principally in relation to his proposals for interim payments.

6. Mr Jason Coppel QC for the first claimants anticipated Miss Rose's submissions in important respects, and advanced a plethora of further complaints. They include the following. The assumptions are untested and at least some of them are extremely vulnerable, and therefore an "executable version" of the model should have been disclosed to the claimants so that they might test it; the Lord Chancellor's treatment of some 3942 responses to the consultation exercise on KPMG was wholly inadequate; and a two-month deadline which was set for the submission of tenders for a DPW contract was unrealistic and therefore unfair. There is also a complaint that firms (in particular the third and fourth claimants in the first application) will have to give up some of their goodwill to survive under this scheme, and that will constitute an unlawful interference with the peaceful enjoyment of their possessions guaranteed by Article 1 of the First Protocol to the European Convention on Human Rights (A1P1).

7. Aside from the point on A1P1, the challenge falls under two heads of claim. (1) There is a breach of the Lord Chancellor's duty articulated in *Tameside* [1977] AC 1014 (*per* Lord Diplock at 1065) to "ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". (2) The decision has been unfairly arrived at and is unreasonable. In my view the *Tameside* challenge constitutes the substance of the case. Both heads of claim engage an issue as to the appropriate intensity of judicial review.

8. This is not the first judicial review directed to this policy initiative by the Lord Chancellor. On 27 February 2014 he issued an earlier decision, to the effect that there would be 525 DPW contracts. The first 8.75% cut in criminal legal fees was announced at the same time. The 525 figure, like the later 527 figure, was based on KPMG's model. The assumptions on which it proceeded and which were set out in the KPMG Report were largely developed by the Ministry of Justice in light of a Report from Otterburn Legal Consulting LLP commissioned by the Law Society. KPMG's Report, together with the Otterburn Report, was as I understand it published at the same time as the February decision (it was re-issued on 11 March 2014). This earlier decision was challenged before Burnett J, as he then was, on the ground that fairness required the Lord Chancellor to disclose the Otterburn and KPMG Reports so that representations might be made as to their contents; that had not been done before the decision. There was also a challenge to the proposed cut in criminal legal fees. Burnett J rejected the latter complaint, but held (with respect, plainly correctly) that the Otterburn and KPMG Reports should have been disclosed for consultation. His judgment was given on 19 September 2014 ([2014] EWHC Admin 3020). He quashed the Lord Chancellor's decision of February 2014 to provide for 525 DPW

contracts. His account of the background to the case at paragraphs 8 – 31 is very clear and full, and should be read with this judgment: I append it with gratitude at Annex A.

KPMG

9. Among the welter of documents placed before the court, counsel for the claimants place special emphasis on the KPMG Report. In light of their submissions I must set out more of its detail than is contained in Burnett J's narrative. But I will first note these two passages from the Executive Summary in the Otterburn Report, which are important background:

> "The finances of many crime firms are fragile. Most do not have significant cash reserves or high excess bank facilities… [The Solicitors Regulation Authority] found that 5% of firms had a high risk of financial difficulty and 45% of firms faced a medium risk. Generating at least 50% of revenue from legal aid, particularly crime or family, was identified as a risk factor…
>
> "Most firms are dependent on duty contracts for generating fresh work and few would be sustainable in the medium term without it…"

10. The KPMG report opens with a covering letter to the MoJ which includes this:

> "You should note that our findings do not constitute recommendations to you as to whether or not you should proceed with any particular course of action."

11. It was a premise of the model developed by KPMG that there would be 62 procurement areas for DPW contracts in England and Wales, and a minimum of four such contracts in each area (and one of the assumptions was that there would be at least two bidders for each contract). Under the heading "Outputs of analysis" the Executive Summary has this (punctuation, or its absence, as in the original):

> "**Our analysis has been undertaken in two parts, for which the following definitions have been developed:**
>
> ■ *Sufficient capacity and competition:* There are sufficient providers capable of delivering the required volume of work under the new contracts and for this and at least one further contract renewal there is competitive tension in the market
>
> ■ *Viability:* Winning bidders have a business model that results in a financial performance that enables them to trade in a sustainable way after the 17.5% fee reduction
>
> **There is a trade-off between financial viability and sufficient capacity and competition**

> ■ The larger the contract size, the greater the economy of scale. Therefore fewer contracts improves the viability of successful providers
>
> ■ However larger contracts mean fewer firms in each area have the scale to deliver them without market consolidation. Therefore more consolidation is required for a competitive market
>
> …
>
> **It is not clear to what degree the market can or will consolidate**
>
> ■ Based on the data available, it is possible to illustrate the extent of market consolidation needed, but not to fully assess the extent to which this level of market consolidation can be achieved"

The "trade-off" between capacity and viability is critical to the development of the model, and hence the ascertainment of the number of DPW contracts to be let. It is further explained in the body of the Report, under the heading "There is a trade-off between viability and capacity" (p. 28):

> **"The method described in this section has been developed based upon the data available to consider the question:**
>
> **For each procurement area, how many contracts should be let in order to create a sustainable market at the reduced rates?**
>
> ■ There is a tension between the aims of sufficient capacity, competition and viability. The larger the contract, the more profitable a winning firm will be through economies of scale. Therefore, fewer contracts improves the viability of winning providers
>
> ■ However, the larger the contracts, the fewer the number of firms in each procurement area who have the capacity to be able to deliver them without market consolidation. If there are sufficient firms of scale, competitive tension requires there to be more providers capable of delivering the contracts than there are contracts to let. Therefore, lower value contracts, i.e. a higher number of contracts, means less market consolidation is required
>
> ■ In most markets, some degree of market consolidation is required for there to be enough providers who have sufficient capacity. The extent of the market consolidation required forms the basis of the **'capacity challenge'**

> ■ In most markets, firms need to improve staff efficiency to remain financially viable at the reduced rates. The extent of this efficiency requirement forms the basis of the **'viability challenge'**
>
> ■ The method sets out thresholds for both viability and capacity and describes the range of number of contracts that are within these thresholds. Where the ranges for viability and capacity overlap, the 'inner range' is the range of number of contracts which are within thresholds for both challenges
>
> ■ Where the ranges do not overlap, the procurement area requires further investigation. This involves inspecting the model to identify the range of contracts which provides the least challenge for viability and capacity. The level of challenge is then presented for further consideration as to its achievability in the context of the specific procurement area concerned"

12. The assumptions on which the model proceeded are in two groups, one relating to capacity, the other to viability. One of the capacity assumptions was that the candidate firm or partnership would give up 50% of its OCW capacity, or, as it is put by KPMG (p. 32): "[t]he method applied assumes 50% of existing own client capacity would be available to deliver new duty provider contracts". As Burnett J said (paragraph 28), this figure was "compromised"; as I understand it KPMG and/or the MoJ split the difference between rival contentions of 100% and 0%. KPMG lists the sources of most of the assumptions. Nearly all the capacity assumptions emerged from "discussions with MoJ". All the assumptions are of course predictive, not hard fact, and in the nature of things some are more likely to be right than others. This is not of itself a legal flaw in the exercise. But it underlines the fragility, or uncertainty, of the process. That is important, for reasons to which I shall return.

13. An assumption made by KPMG which is especially significant is that a profit margin however small will qualify (of course alongside other assumptions) for viability. This is the "break-even" assumption to which I have already referred in passing. In argument it has been referred to as the 0.1% profit assumption. It is described in KPMG's list of viability assumptions (p.34) thus:

> "If the firm showed a positive profitability under the proposed number of contracts it was considered viable"

Then this appears:

> "We selected the firm to assess by identifying the smallest firm which had sufficient capacity to deliver the proposed duty contract. If this firm was considered viable then all larger firms and all firms consolidating to become larger than this were assumed to be at least as profitable."

Another viability assumption which bears on the case is an average improvement of staff cost efficiency of 20%.

14. The break-even criterion is plainly critical to the assessment of viability, and therefore to the capacity/viability trade-off. As I have indicated it is at the centre of Miss Rose's argument that the KPMG Report makes it clear that the break-even calculation in the model takes no account of the costs of improving efficiency and (as Miss Rose put it) "scaling up" – that is, consolidation or merger with other firms or practitioners. The Executive Summary in the KPMG Report has a heading "Other Considerations" (p. 11):

> "**A number of barriers to market consolidation exist**
>
> ■ There is no data available on the extent to which firms will consolidate. There is some qualitative evidence from the Otterburn report which suggests that there are significant barriers to mergers of law firms… including:
>
> – Regulatory requirements
>
> – Relocation and redundancy costs
>
> – Integration costs including systems, professional fees and management time
>
> – Desire of independently minded firms to remain independent
>
> **Investment funding may be required in three areas**
>
> To fund increased working capital that would arise as a result of larger contracts
>
> To fund the investment required to achieve the staff efficiency levels implied by the proposed contracts
>
> – For example, IT spend on digital technologies and virtual working could increase productivity and enable greater geographic coverage
>
> To fund the costs of consolidation as outlined above
>
> **We have not sought to quantify the likely size of this funding although we highlight risks to its availability**
>
> ■ Otterburn's survey data indicates that firms have limited cash on their balance sheets available for investment
>
> ■ Other studies indicate that the market believes that it will struggle to obtain funding from lenders…"

The need for investment funding in three areas, and the fact that KPMG had not sought to quantify the extent of funding that might be required, is repeated at p. 57 of the Report. In the Executive Summary at p. 12 there appears a passage headed "Next steps":

> "We recommend MoJ review each procurement area for which a range of contracts has been identified and decide on the number of contracts to let. In particular, we recommend that MoJ:
>
> ■ Consider the results with reference to the assumptions used, in particular the thresholds for average staff efficiency and the extent of market consolidation required and decide upon the most appropriate number of contracts to let where a range of possible solutions is identified
>
> ■ For procurement areas in which further consideration is required, MoJ should consider:
>
> - The capability of incumbents to grow
>
> …
>
> - The proportion of market consolidation achievable. For example, by considering how much firm combinations are required in absolute terms
>
> …
>
> For all areas, we recommend MoJ consider the implications of other factors such as those set out on the previous page [*viz.* the 'other considerations' which I have just set out]"

15. The fragility of the assumptions, and therefore of the model and (it is said) the Lord Chancellor's consequent decision to let 527 DPW contracts, is heightened by the fact that although KPMG identified 23 procurement areas (out of 62) where there was a potential range of contracts in which the viability and capacity thresholds might be met (see pp. 8 and 43 of the Report), there were 30 where further inspection was required to determine a range of contracts (pp. 8 and 44), and in nine of those "further consideration is needed to identify the principal challenge and confirm the range identified": p. 45, where this is stated:

> "Therefore, we recommend that further consideration is given to the specific viability challenge in each market taking account of local cost pressures and the estimated overhead profile of small partnerships or sole practitioners"

So, it is submitted, KPMG made it clear to the Lord Chancellor that he should investigate the position to ascertain whether his proposed strategy was achievable.

16. Following the consultation required by Burnett J's decision, KPMG produced a further document on 13 November 2014, titled "Review of information received in response to the latest consultation on Duty Provider Work contracts". This appears at p. 4:

> "**Definition of viability – breakeven assumption**

> Otterburn's report showed that firms are currently achieving profit levels between a loss of 19% and a profit of 20%, with an average profit level of 5%. For the purpose of modelling, breakeven was adopted as the minimum level for sustainable trading. This was on the basis that Otterburn made provision for a notional salary for equity partners and that therefore all operating costs, including an income for equity partners, are met if breakeven is achieved.
>
> During our discussions with MoJ, it was recognised that this minimum profit level was not the level which firms would aim to achieve, and on pages 57 and 58 of our Original Report we highlighted factors not allowed for in the breakeven assumption including:
>
> ■ Funding of increases in working capital;
> ■ Investment required to achieve growth, staff efficiency savings and consolidation; and
>
> ■ Adequately rewarding equity partners for the risk they take and for the capital they employ.
>
> A number of respondents have questioned the use of breakeven. Respondents appear to interpret the 5% average profitability quoted by Otterburn as a minimum acceptable profit level. No other figure is proposed in the responses.
>
> Were the 5% level to be applied within the model this would have the effect of increasing the average staff efficiency requirement by the amount required to achieve the higher profit level.
>
> The modelling describes the degree of staff efficiency required in each area to achieve breakeven. There is an opportunity to achieve a greater level of profitability if further efficiencies were achieved.
>
> *On the basis that the risks highlighted by respondents with regard to breakeven are already set out in our Original Report, we do not consider it necessary to update it.*"

THE NOVEMBER 2014 DECISION

17. After Burnett J's judgment, which the Lord Chancellor did not seek to appeal, the KPMG and Otterburn Reports were put out to consultation over a three week period. Some 3942 responses were received. In the Executive Summary of the November decision at paragraph (ii) the Lord Chancellor said this:

> "The focus of this consultation was on the KPMG and Otterburn reports, the assumptions relied upon in those reports and the taking of a fresh decision on the number of [DPW]

> contracts to offer. Nevertheless, respondents also used this consultation to express general opposition to the dual contracting model. We recognise that many respondents have strongly held views on this point. However respondents largely express views that were considered in previous consultations and have not provided new evidence that the dual contracting model is not viable."

18. Section 2 of the Decision is headed "Analysis of consultation responses/Government position". Under "Finances" this appears:

> "2.19 In relation to the concerns respondents expressed about providers having the financial capability to scale up there is some assistance that Government can provide as transitional support as we set out in February. We have established a business partnering support network, operated by the LAA to offer information and guidance to practitioners seeking help with regard to restructuring their business and how to go about seeking financial support. We believe this is important to provide ongoing support to businesses during the first two years of the new market structure.
>
> 2.20 Whilst the LAA cannot provide financial advice, it will be able to help providers to find the necessary information regarding funding. We have also opened up specific legal aid market discussions with the British Business Bank (BBB), an Arms Length Body reporting to the Department for Business, Innovation and Skills. We have developed guidance specifically for the legal aid market in conjunction with the BBB on which Government-backed financial products, such as the Enterprise Finance Guarantee, are available to the legal aid market, and have tailored information to specific known working capital and investment funding issues in the sector. This information is available on the LAA website… The model gives organisations the confidence to invest in the restructuring required in the knowledge they would be in receipt of larger and more certain volumes.
>
> 2.21 At the time of the Otterburn report the new interim payment provisions for litigators working on lengthy Crown Court cases had not been announced. These provisions, which were introduced in October, are designed to combat cash flow issues. This means litigators will be paid at more regular intervals on the longer and more expensive cases. Those provisions will substantially help to soften the impact of the fee reductions, before the consolidated DPW contracts are offered.
>
> 2.22 Respondents also suggested consortia have regulatory, insurance, economic and supervisory issues that act as barriers. We do not underestimate the challenges providers face in trying to make the necessary changes, including those looking to

> establish delivery partnership arrangements or joint ventures. The basis of any delivery partnership is a matter for those involved. While there are issues to consider we do not believe those are insurmountable."

19. In a section dealing with respondents' comments on the assumptions, paragraph 2.31 states:

> "We (and KPMG) have always been clear that the model was based on assumptions on future behaviour. Such assumptions always have an element of uncertainty. Self-evidently, we cannot wait until we know whether the assumptions are accurate predictions or not – we will only know once the contracts are live. The model looks at all the options and creates proxies for aggregate market behaviour but ultimately it is up to each individual organisation to decide how they want to proceed."

20. Under "Profitability" this appears:

> "2.55 A 0.1% profit assumption assumes that all staff including equity partners will be properly paid and all existing costs met. An organisation will not know in advance of being awarded a contract what level of profit they might make, and will clearly not be aiming to make a profit as low as 0.1%. However, on the assumption that (contrary to its own expectations) the organisation only achieves a profit as low as 0.1%, then bearing in mind all staff had been paid and costs met the organisation would not become unviable simply by virtue of only having broken even and could continue to trade. A organisation which did get as low as 0.1% profit would be likely to strive to find ways to make further efficiencies so as to improve its profitability going forward. Conversely, organisations may offset the need to find greater staff efficiency savings by exploring mechanisms to use latent capacity.
>
> 2.56 No new evidence has been presented by respondents. All of the points raised were either raised by the Law Society, by practitioners or by other representative bodies in previous consultation exercises or through the extensive engagement throughout that process."

21. Then under "Overall Government Position":

> "2.79 In light of the consultation responses and the further advice from KPMG, we have reconsidered the assumptions. We think that the assumptions remain appropriate predictions of future behaviour on which to base our decision. This does not mean that we can be sure that markets will indeed behave in 'compliance' with the assumptions – but we regard them as

> sound assumptions on which to base a decision. For the reasons outlined above, we do not think there are other assumptions that are more appropriate predictions of future behaviour than the assumptions used by KPMG."

22. Finally under "Next steps – Procurement process":

> "3.1 Today we are launching a tender for 527 duty provider contracts… The indicative timetable is as follows:
>
> – 29 January 2015 – tender closes
>
> – w/c 12 June 2015 – notification of tender outcomes
>
> – July 2015 – subject to further consideration, second fee cut implemented
>
> – 1 October 2015 – service commencement"

Paragraph 3.6 indicates the Lord Chancellor's decision to "proceed with the planned implementation of the second reduction in fees in July 2015". Then this:

> "3.7 This approach will create a three month gap between the implementation of the fee reduction and the start of the new 2015 Crime Contracts and so depart from the approach announced in February. Assessing the likely impact of such an approach on providers, suggests that this gap would not be expected to pose a threat to service provision. This is because a number of factors help to reduce the impact of this headline reduction in fees.
>
> 3.8 The second fee reduction will apply only to new cases…
>
> 3.9 Interim payments also reduce the impact of fee reductions on providers in the short term by improving cash-flow. Following our agreement with the Law Society in March to bring forward the implementation of interim payments for litigators in Crown Court cases (which was originally planned for next summer but was implemented on 2 October) providers are already able to benefit from improved cash-flow. This will have a substantial positive effect on provider revenues in the period from July to October 2015."

23. There are other documents I shall have to consider, including submissions made by officials to the Lord Chancellor which cast light on what was in the mind of the MoJ and the Lord Chancellor himself at significant stages, but it will make for clarity if I do so when I come to confront the arguments. At this stage I will turn to the law.

THE LORD CHANCELLOR'S STATUTORY DUTY

24. S.1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") provides in part:

> "(1) The Lord Chancellor must secure that legal aid is made available in accordance with this Part.
>
> (2) In this Part 'legal aid' means—
>
> …
>
> (b) services consisting of advice, assistance and representation required to be made available under section 13… (criminal legal aid).
>
> …
>
> (4) The Lord Chancellor may do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the Lord Chancellor's functions under this Part."

S.2:

> "(1) The Lord Chancellor may make such arrangements as the Lord Chancellor considers appropriate for the purposes of carrying out the Lord Chancellor's functions under this Part.
>
> …
>
> (3) The Lord Chancellor may by regulations make provision about the payment of remuneration by the Lord Chancellor to persons who provide services under arrangements made for the purposes of this Part."

S.13(1):

> "Initial advice and initial assistance are to be available under this Part to an individual who is arrested and held in custody at a police station or other premises…"

THE APPLICABLE STANDARD OF REVIEW

25. The claimants submit that two features of the case militate in favour of an especially intensive, or rigorous, standard of review. The first is the general context of the case: the administration of criminal justice, whose integrity is a benchmark of the rule of law. The court has a particular responsibility as its guardian. The second is the nature of the particular duty imposed by LASPO on the Lord Chancellor: an absolute duty to secure advice and assistance for detained criminal suspects in accordance with the Act.

26. It must be obvious that if the Lord Chancellor failed to comply with his duty under LASPO ss.1(1), (2)(b) and 13(1), the court's inevitable judgment against him would not be qualified by any considerations of respect for his role as primary decision-maker. He would simply be acting illegally, and the court would say so. But although the claimants assert that the November 2014 decision puts compliance with the LASPO duty at risk, they do not (and cannot) assert that it will be violated. If the

new scheme goes badly wrong, the Lord Chancellor will have to mend it or adopt another. He accepts without cavil that he must ensure that criminal legal aid is made available to those who are entitled to it.

27. The claimants urge on the court a "what if?" scenario – what if the November decision turns out to be wrong? Where then does the Lord Chancellor's duty under LASPO stand? (See in particular Mr Coppel's written reply, paragraph 4.) But this is not a submission that the duty will be breached, and if it were it would be contrary to the evidence, which (and I shall refer to some of it) repeatedly demonstrates the Lord Chancellor's practical commitment to the duty, whether or not it may be fulfilled by the arrangements now under challenge. Moreover the "what if?" scenario proceeds on the implicit premise that the duty is endangered unless the Lord Chancellor's policy is grounded on firm objective predictions, or at least something close to that: see for example Miss Rose's principal skeleton paragraphs 8, 61 and 79; compare Mr Coppel's reply at paragraph 5. I shall explain below why this premise is wrong.

28. The reality is that these claims' true target is action taken under LASPO s.2(1), to "make… arrangements… for the purposes of carrying out the Lord Chancellor's functions under this Part". That, quintessentially, involves the making of discretionary judgments.

29. However the context remains the administration of criminal justice, and to that extent the rule of law. Does that circumstance require the court to apply an intensive quality of review? In *Lumsdon* [2014] HRLR 29, [2014] EWCA Civ 1276 the court was concerned with the proposed introduction by the Legal Services Board of the Quality Assurance Scheme for Advocates (QASA). The claimants, who were members of the Bar, asserted that the assessment of advocates' performance by judges, for which the scheme provided, was constitutionally improper. The Court of Appeal addressed the issue of intensity of review at paragraphs 78 – 86. They concluded that an approach based on proportionality was not appropriate, partly because of considerations arising from the relevant statutory regime, but also because

> "85… QASA does not in any event involve any interference with fundamental rights or constitutional principles. For the reasons already given, it does not undermine the independence of the advocate or the judiciary. As Mr Giffin puts it: a scheme specifically designed to increase the quality of legal representation in criminal trials cannot be equated with (for example) the denial of access to a court. We do not understand the claimants to contend that proportionality is the correct standard of review even if we reject (as we have done) their arguments that QASA infringes the principles of the independence of the advocate and the judge…"

The court continued:

> "86. That is not to say that, in reviewing the lawfulness of the LSB's decision, the court should only uphold a substantive challenge if it is satisfied that the decision is irrational. The Divisional Court was right to apply a 'heightened' *Wednesbury* standard of review in this case. The court enjoys a high level of

> institutional competence and constitutional legitimacy when addressing challenges to the criminal justice process. This should be reflected in the applicable common law standard of substantive review."

30. Mr Chamberlain QC for the Lord Chancellor submits, delicately but firmly, that by contrast the court in this case enjoys neither a high level of institutional competence nor of constitutional legitimacy. His argument is as follows. As for institutional competence, the decision challenged is a predictive judgment conditioned by complex economic factors: compare *R (Centro) v Secretary of State for Transport* [2007] EWHC 2729 (Admin) at paragraph 36 *per* Beatson J as he then was, citing amongst other materials *Ex p. Hammersmith & Fulham LBC* [1991] 1 AC 521 and *Nottinghamshire CC v Secretary of State for the Environment* [1986] AC 240. As for constitutional legitimacy, we are concerned (as I have stated) with the Lord Chancellor's discretion to make arrangements under LASPO s.2(1); and assuming no breach of the primary s.1 duty is shown, his choice of arrangements should attract no more intensive review by the courts than any other broad public law discretion.

31. There is a further string to Mr Chamberlain's bow. He submits that the delay inevitably involved in the Lord Chancellor's compliance with any obligation imposed upon him by the court to take further steps (such as to investigate the issue of investment finance cost) would itself alter the effects of his policy; so that the court would then become, as it were, a player in the decision. The point has force: I will give the detail at paragraphs 48 – 49 below. But it should come with a health warning. There is an important distinction between a state of affairs in which the court becomes, as I have put it, a player in the primary decision, and the notion that the court should temper the quality of judicial review by reference to the difficulties which the process may cause to the decision-maker. The former consideration may rightly tell in favour of restraint. The second does not, for it would mean that the force of law is conditioned by the imperatives of government; whereas, by our constitution, the opposite is the case.

32. Restraint is not only dictated in this case by the danger that relief granted by the court might distort the decision-making process. It is true that we are not asked to examine a decision of macro-economic policy, for the change to dual contracts, and the dictates of economic austerity behind it, are not themselves the subject of any challenge: if it were otherwise, an especially "light-touch" approach would be appropriate (see the *Hammersmith* and *Nottinghamshire* decisions of the House of Lords cited by Beatson J in *Centro*). But we are dealing with a decision-making process larded with technical complexity, as to whose refinements we plainly have no special expertise. To this extent Mr Chamberlain's submission that the court possesses no particular institutional competence has force. His linked submission that we may claim no special constitutional legitimacy has support from the fact that as I have said these claims' true target is action taken under LASPO s.2(1): a function which quintessentially involves the making of discretionary judgments.

33. In all these circumstances, in my judgment the conventional *Wednesbury* standard of judicial supervision applies here. But that requires a further understanding. In any more or less sophisticated process of decision-making, there may be two particular questions the decision-maker must consider. First, what factors should be treated as relevant? Secondly, what further investigation or inquiry should be undertaken?

Statute will often provide at least part of the answer, especially to the first question. But when the dictates of statute are fulfilled, as likely as not there will remain points of fact and circumstance about whose relevance there may be disagreement, or areas of possible enquiry whose pursuit will seem necessary to some but not to others. In such cases, how does the law determine what must, and what need not, be considered or enquired into?

34. In *CREEDNZ Inc. v Governor General* [1981] 1 NZLR 172 Cooke J (as he then was) stated at 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision… [However] there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers… would not be in accordance with the intention of the Act."

This *dictum* in *CREEDNZ* has many times been acknowledged as good in English law, from the House of Lords decision in *Re Findlay* [1985] AC 318 onwards. It shows that where statute does not tell the decision-maker what he must treat as relevant, it will be for him to decide – subject to *Wednesbury* review. But what of the second question, how should the court determine what further investigation or inquiry needs, or needed, to be undertaken by the decision-maker? In *Khatun* [2005] QB 37 I said at paragraph 35:

> "In my judgment *CREEDNZ* (*via* the decision in *Findlay*) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such."

35. *CREEDNZ* and *Khatun* do no more than exemplify a long-standing principle of our public law: where there is more than one reasonable view of an issue which a decision-maker must consider – what he should treat as relevant, or what he should enquire into – the court should not interfere with the view of it which the decision-maker takes. To the extent that the law requires more intensive forms of judicial review, this principle is progressively disapplied. Our law of human rights gives the clearest instance of this (though here too, a strong public interest context may firmly indicate more conventional review). But in the present case there is nothing to

disapply this principle. On the contrary; as I shall show, its application – especially the *Khatun* dimension – is of the first importance.

36. *CREEDNZ* and *Khatun* call to mind two aspects of public decision-making which, though by no means mutually exclusive, possess important differences. The first arises where the primary decision-maker has to ascertain facts. Here the reviewing court's task is relatively constant: its focus will be upon the question whether the decision is rationally supported by evidence. The second – the *Khatun* dimension – arises where the decision-maker has to decide what to do: what discretionary judgment to make. Here the reviewing court's task is much less constant, requiring a more or less intrusive approach according to the subject-matter. The distinction is of course not clear-cut. A discretionary judgment may involve fact-finding, as to the present or future. And the intensity of review in a fact-finding may vary: where the finding of facts may touch a question of life and limb, the court may be required to bring an "anxious scrutiny" to bear: see *Ex p. Bugdaycay* [1986] 1 WLR 155).

37. It is predominantly in the area of discretionary judgment that issues of the intensity of judicial review arise for the court's consideration. That is, emphatically, this present case's territory; and it is the context in which the Lord Chancellor's *Tameside* duty – to "ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly" – has to be considered. For reasons I shall elaborate (see paragraph 46 below) the claimants' submissions invite the court to measure its reviewing function too closely by what is appropriate for the fact-finding case.

ARGUMENT

The Principal Issue – Investment Finance

38. I will first address Miss Rose's principal argument, which I have already summarised. Her core proposition may be simply stated: in light of the KPMG Report, the Lord Chancellor was bound (1) to direct his mind to the transitional costs that would inevitably be incurred by bidding firms – that is, the costs involved in raising the investment finance required for improved efficiency and consolidation; and (2) to take reasonable steps, informed by appropriate enquiries, to quantify these transitional costs. In fact the Lord Chancellor did neither.

39. This central argument has been helpfully crystallised in a written reply submitted by Miss Rose and her juniors after the hearing. The bite of the point is that because KPMG's model assumed that a firm which broke even would be viable, and KPMG concluded that in a significant number of areas efficiency improvements greater than the assumed 20% would be required, "the calculation of the percentage of the improvement to staff efficiency which is required before firms break even and are viable has been consistently understated in the model" (reply note paragraph 10); or "[p]utting it another way, firms with the revenues and costs that have been identified by KPMG will not break even, but will make a loss" (paragraph 11). "There is thus a risk, the severity of which is unknown and has not been assessed, that the projected number of contracts in some areas may not in fact be viable" (paragraph 14).

General Observations on the Principal Issue

40. It is, I think, important to have in mind that there has been an awareness in the MoJ from an early stage that there are inherent risks in the development and execution of the new regime of dual contracts. In a submission to the Lord Chancellor by Dr Elizabeth Gibby, Deputy Director for Legal Aid and Legal Services Policy, of 14 February 2014 (thus shortly before the 27 February 2014 decision to the effect that there would be 525 DPW contracts) a number of risks were set out, not least under the heading "Insufficient number of bidders for [DPW] contracts". At paragraph 64 this is stated:

> "On the assumption the tendering exercise proceeds without legal challenge or industrial action…, there is a very real and significant risk that current providers will not be in a position to scale up to the level required and either decide not to bid or bid but fail to meet the criteria…"

This is the very concern identified by Miss Rose. At paragraph 67:

> "In the event we do not have sufficient bidders in a number of areas, we will ensure effective representation remains available for those who require it by exploring a number of options (not all mutually exclusive) including, offering more work to successful bidders, retender on same basis with interim cover, temporarily offering the work to existing providers pending a full retender and revised process or mobilisation of the Public Defender Service in the affected areas) see Contingency Plan at Annex E)."

Then at paragraph 115:

> "As discussed above, there are a number of procurement areas that present a higher level of challenge on either the consolidation required or in terms of the financial viability of the contract sizes, although as noted the nature of the data used may mean this challenge is over-stated. Provided firms are prepared to make the necessary changes in their structure; join with others; take the difficult decisions to reduce salaries; or even make some employees redundant, even the smallest value contracts would be financially viable. However, in the event that providers behave in such a way that suggests likely market collapse, then we would ensure that effective representation would remain available by putting in place the contingency measures described above and at Annex E."

41. Annex E is before us. These statements are preceded by what seems to me to be an important observation, at paragraph 63 of the submission of 14 February 2014:

> "Some of the risks and challenges set out below exist simply because we are trying to intervene in an unpredictable and an

> unsophisticated market when it comes to commercial behaviour…"

This observation may be compared with this passage from p. 3 of KPMG's further document of 13 November 2014, to which I have already referred:

> "It is recognised that market participants may have found themselves commenting upon market changes which they would not wish to be imposed, while also planning contingent strategies to pursue should the changes be implemented. It is important to distinguish between the current preferences of firms, pre-change, and the potential future strategies they may adopt, post-change."

42. This evidence recognises an important truth, namely that the very imposition of radical change (especially, perhaps, radical change which is much objected to) may evoke unexpected and unpredictable responses from those most closely affected. Professionals whose world has changed may look the new world in the eye and find the means to live in it. This truth underscores the obvious fact that the premises upon which the number of DPW contracts to be let is chosen – not least the assumptions (so far as they are deployed as predictive tools) in the KPMG Report – are by no means a matter of precise forecast but of judgment: and uncertain judgment at that. It also lends emphasis to the no less obvious fact that a reasonable decision-maker will have contingency measures in mind and will monitor the situation as it develops.

43. These facts, and the truth that underscores them, are important for a proper understanding of this court's task, and in particular the application of the *CREEDNZ*/*Khatun* principle. And they are further reflected in the evidence before us.

44. By way of example, it is plain that the risks inherent in the proposed changes were kept under review. A further submission was made to the Lord Chancellor on 21 November 2014, just before the decision of 27 November now sought to be challenged. There are cross-references to Dr Gibby's earlier warnings of risk: see paragraphs 106 – 111 of the 21 November submission. I will just cite paragraphs 106 and 110:

> "106. Throughout the policy development phase of this Programme we have considered the key risks associated with the planned duty tender and the sustainability both for providers in terms of their financial position and for clients in terms of access to justice. None of the reforms set out in this advice alter the rights or level of access for a client to criminal legal aid.
>
> 110. The LAA has considered a range of scenarios that could develop during the course of the tender process, such as insufficient number of bids in particular areas, and the potential for challenges concerning decisions made in individual procurement areas or concerning individual bidders… Whilst the LAA has considered the range of options open to it in any such scenario, the response in each case will need consideration

> on its own merits and recommendations will be escalated appropriately in each instance."

45. Recognition of the need to monitor developing responses to the proposals, and emerging risk factors, is spoken to in the evidence put in on the Lord Chancellor's behalf. So is the fact that his precise policy choice is grounded in assumptions which are matters of uncertain judgment. Hilda Massey and Caroline Crowther job-share in a senior position in the MoJ. Ms Massey's witness statement has this:

> "176… [T]he Lord Chancellor recognises that as the assumptions are predictions as to the future behaviour of the market under changed circumstances, and so inherently uncertain, it is incumbent on him to keep the market under review – to determine how in fact it is reacting to the change in circumstances – and have robust contingency plans in place to deal with any unexpected difficulties. Under the current arrangements the LAA… regularly monitors providers and meets with them and their representative bodies to identify early where action needs to be taken to mitigate a possible issue with supply…"

46. The fact that the KPMG assumptions are themselves the product of uncertain judgment is well illustrated by the evidence concerning the capacity assumption that the candidate firm or partnership would give up 50% of its OCW capacity. As I have indicated, KPMG and/or the MoJ split the difference between rival contentions of 100% and 0%. This looks almost cavalier; but Dr Gibby observes (witness statement paragraph 168):

> "The 50% assumption is intended to indicate that when push comes to shove and their capacity is constrained, contrary to what they may want to do, for the long term sustainability of their business some firms will have to choose to either give up at least some of their OCW, find ways to make efficiency improvements within their current staff complement or recruit additional staff."

I think this exemplifies the truth I have sought to emphasise: professionals whose world has changed may look the new world in the eye and find the means to live in it.

47. For the purpose of these proceedings, the overall importance of what may be called the uncertainty factor in the elaboration of the Lord Chancellor's policy is that many of the submissions advanced by Miss Rose and Mr Coppel are, so to speak, in the wrong gear. They suggest that the court should prescribe what information the Lord Chancellor should obtain and treat as pivotal to his decision. But because the variables in the decision-making process are inherently so uncertain, their assessment is especially a matter for the Lord Chancellor's judgment. For the court to tighten its grip on the process to the extent urged by the claimants would itself be to take a policy view: not as to the outcome, certainly, but as to the procedures by which the outcome should be approached. And it would be, as I suggested at paragraph 37, to measure our supervisory function too closely by reference to what may be appropriate

for review of a purely fact-finding exercise. Given the nature of the case, that would not be legitimate; it would offend the *CREEDNZ/Khatun* principle.

48. I will give two concrete instances of the claimants' wrong gear. The first is the point to which I have already referred in passing at paragraph 31. It may be explained as follows. There is now no challenge to the fee reduction of 17.5%. (A challenge to the first cut was advanced before Burnett J, but rejected by him: paragraph 55 of the judgment.) And it is accepted on all hands that the enhanced efficiency needed to make the fee cuts sustainable requires that there be a degree of market consolidation. That might be achieved simply by making the cuts: in that case some firms would go out of business, thus producing *de facto* consolidation. The Lord Chancellor's policy, by contrast, is a means of managing consolidation by reducing the number of DPW contracts. That being so, Mr Chamberlain submitted that further investigations of the kind sought by the claimants, for example by making enquiries of financial institutions, would most likely lengthen the time-gap between fee reduction and the start of the new regime – and in that period there would be a risk of uncontrolled consolidation: firms going out of business. So if the court required such investigations, that would itself influence the market; and to that extent be an arbiter of policy.

49. This is not merely an *ex post facto* construction by Mr Chamberlain. In the submission to the Lord Chancellor of 21 November 2014 this appears at paragraph 2, under the heading "Timing":

> "Urgent. You are aware with the inter-linkages between the tender launch and the fee reduction. If you decide that the fee reduction should take effect on 1 July…, the merits of there being no more than 3 months between fee reduction and service commencement (discussed below), the merits of allowing providers more than 3 months mobilisation (discussed in previous advice) and the merits of allowing providers adequate time to bid… means that we need to launch the tender as soon as possible. The proposed launch date of 27 November will allow us to achieve the 1 October service commencement date…"

At paragraphs 102 – 103 it is stated that a 3 month gap between fee reduction and service commencement would not "pose a significant threat to the viability of providers".

50. My second example of the fact, as I see it, that many of the claimants' submissions are in the wrong gear is much narrower. It arises out of the response to a submission of Mr Chamberlain (at paragraph 8 of a note he provided on "investment costs, interim payments and the capacity challenge") that "[t]here was no reliable way of modelling or estimating the value of the investment costs that firms would face in advance of a decision about contract numbers". Mr Chamberlain supported this submission by a series of bullet points. This evoked, after the hearing, a witness statement from Mr Otterburn of Otterburn Legal Consulting LLP. Mr Otterburn gives (paragraph 5 ff) detailed reasons for his opinion that Mr Chamberlain's submission is incorrect. In return this prompted a further note from Mr Chamberlain stating, amongst many other things, that "it does not address the principal uncertainties to

which Ms Massey and Ms Crowther had adverted; and appears to make a number of incorrect assumptions [which are then set out in detail]" (paragraph 6).

51. The extent to which the assessment or evaluation of investment costs raised difficulties was surely a matter of judgment. And if the court were to accept the claimants' implicit invitation to judge the rights and wrongs of estimating the price of investment costs, that would be a naked assumption of a duty to decide the procedures by which the outcome of the decision-making process should be approached. In my judgment it would be contrary to principle.

Principal Issue - Merits

52. Nothing I have said is intended to suggest that the Lord Chancellor might simply ignore the qualifications in the KPMG report. But it was up to him to decide what he should make of them. In that light I turn to the merits of the main argument – an avoidable failure to consider the implications of transitional costs so that the out-turn decision, 527 DPW contracts, is unreliable to the point of being unlawful – in light of the approach to this court's duty which I have outlined.

53. Miss Rose's argument has condescended to much detail; Mr Coppel's submissions even more so. However given the correct approach in law, in my judgment the core of the case can be addressed by asking and answering three questions. (1) Did the Lord Chancellor squarely understand that the break-even assumption made no allowance for investment costs? If he did not (as the claimants assert he did not), he would have misapprehended a significant dimension of the KPMG material. (2) Should the Lord Chancellor have taken steps to investigate the likely impact of investment costs on firms which might bid for DPW contracts? More accurately: was it perverse not to do so? (3) In the circumstances, are the Lord Chancellor's proposed measures of support (notably interim payments) legally sufficient (in *Wednesbury* terms)?

Question 1: Did the Lord Chancellor squarely understand that the break-even assumption made no allowance for investment costs?

54. The claimants understandably point to paragraph 2.55 of the November decision, which I have set out, and in particular the first sentence: "[a] 0.1% profit assumption assumes that all staff including equity partners will be properly paid and all existing costs met". But this does not indicate that scaling-up costs, attributable to a successful bid, are assumed in the viability break-even assumption. In any event it is plain on the evidence that the Lord Chancellor was personally very familiar with the KPMG Report. More concretely, after seeing the submission of 21 November 2014 the Lord Chancellor asked for specific advice on transition costs and was provided with a note which referred to provision for interim fees, which would "substantially help to soften the impact of the fee cuts, and will help providers to manage any cash flow challenges posed by the transition". I will have more to say about interim fees in relation to Question 3. Further, the terms of paragraph 138 of Ms Massey's witness statement deserve notice:

> "The Claimants complain that the Department failed to take account of all potential costs in their assessment of viability. One of these is the associated cost of transition of winning a

> contract and having to grow to service the larger volumes of duty work. Transition costs are something the Department did in fact consider and discussed with the Law Society before the February Response was finalised and published and those discussions continued shortly thereafter. The model does not include an estimate of the financial viability assessment of the market in each procurement area. The likely investment costs for organisations looking to bid for a DPW contract were not assessed but KPMG make this clear on page 57 of their report. The report and the views expressed by respondents regarding the likely investment needs of firms were considered by the Lord Chancellor before arriving at his decision in February 2014 and in the [November] Decision…"

55. In my judgment it is inescapable that the Lord Chancellor was aware of, and gave consideration to, the fact that the break-even assumption took no account of investment costs.

Question 2: Was it perverse of the Lord Chancellor not to take steps to investigate the likely impact of investment costs on firms which might bid for DPW contracts?

56. Mr Chamberlain points to the fact that KPMG did not recommend that the Lord Chancellor should investigate the impact of investment costs, but rather (KPMG Report p.12) that he should "… consider the implications of other factors", which included investment costs. Miss Rose in her written reply (paragraph 17) submits that this misses the point: had the Lord Chancellor considered the implications as KPMG advised, "the only rational conclusion [he] could have reached would have been that at least some attempt, however imprecise, should be made to estimate the costs".

57. I do not agree with Miss Rose. On the evidence, the Lord Chancellor did consider the implications of investment costs. His adumbration of various means by which financial support might be offered to bidding firms (see for example paragraphs 2.19 – 2.21 of the November decision) exemplifies this. It is in particular demonstrated by the proposal put forward by the Lord Chancellor at a meeting with the Law Society, which he attended in person, on 26 March 2014. A note of the meeting referred to a "proposal on further transitional support for litigators", that is, support to enable transition to the new contracts. It was intended to enable firms to cope with the prospective fee reductions, and also the market restructuring which it was seen would be required. The proposal involved two options. One was to provide grants to successful bidders. The other was to bring forward by twelve months part of an interim payments scheme in criminal proceedings which had already been announced. Both had *pros* and *cons*. The President and Chief Executive of the Law Society, after consultation, favoured the second option. I will have more to say about interim payments in addressing Question 3.

58. There are further points to be borne in mind, going to the practicality of any investigation by the Lord Chancellor. Thus the investment costs likely to be incurred are liable to vary considerably according to the choices providers may make, and the time when the costs are incurred (Ms Massey paragraph 159). Firms might consolidate in different ways (growth, merger, delivery partnerships). There were real imponderables about the need for and extent of third party lending; and as regards any

enquiry that might be made of financial institutions, banks and others would no doubt respond (so Mr Chamberlain submitted) that their position would depend on a whole range of factors which would depend on the circumstances of the proposed borrower. Any attempt by the Lord Chancellor to model or quantify transition costs would presumably have to rely on data from the firms themselves. However as Mr Chamberlain pointed out in his note on investment costs, there is evidence of considerable reluctance by at least some in the profession to disclose financial information to the legal aid authorities: the small number of firms who replied to Otterburn (the response rate to the Otterburn survey was 10%) did so only on condition that their data would not be shared with the Lord Chancellor.

59. All these points go to the feasibility of investigation by the Lord Chancellor, and that is the issue which as I have shown prompted Mr Otterburn's witness statement after the hearing and Mr Chamberlain's response. I have already made clear my view that the extent of the difficulties involved in the assessment or evaluation of transition costs was a matter of judgment for the Lord Chancellor. No doubt there may be differing, perhaps contradictory, opinions on all of the points to which I have referred. But it is to my mind entirely plain that a reasonable Lord Chancellor might in the circumstances decline, as the Lord Chancellor did, to take steps to investigate.

60. I note these further considerations. Mr Chamberlain submits that there was some leeway, or give, in KPMG's analysis, because it provided a range (or ranges) of potentially viable DPW contract numbers: see in particular pp. 8 – 9 of the Report. Thus a lower number than 527, should that be the outcome, would not be outside the range. In that connection Mr Chamberlain draws attention to the fact that KPMG factored in the 17.5% fee reduction; the break-even assumption was directed at the smallest bidding firms (he corrected this after intervention by the claimants: it was directed at bidding firms, rather than incumbents, in some classes of case); and the model assumes twice as many bidders as contracts (KPMG p. 32).

61. Then there is the delay factor. I have already cited paragraph 2 of the submission to the Lord Chancellor of 21 November 2014, under the heading "Timing". Inquiry and investigation, asking financial institutions what they might be prepared to do in hypothetical situations, attempts to quantify the scale of transition costs, would take time; and as matters stood in November 2014, there was a premium on the passage of time.

62. Lastly, our response to Question 2 must I think be coloured by what we make of Question 3 – the legal sufficiency of the Lord Chancellor's proposed measures of support (notably interim payments) – to which I will now turn.

Question 3: Are the Lord Chancellor's proposed measures of support (notably interim payments) legally sufficient (in Wednesbury terms)?

63. I will deal with interim payments after considering the other measures.

64. The support proposals are summarised at paragraphs 2.19 – 2.21 of the November decision under the heading "Finances". I have set out the passage above at paragraph 18. The claimants submit that the business partnering support network referred to at paragraph 2.19 is effectively non-existent; the guidance on obtaining finance from the Legal Aid Agency is so basic as to be patronising; the British Business Bank, which

facilitates agreements between borrowers and private sector enterprises, only underwrites the loans of other institutions and seems unaware of any agreements involving a legal aid firm; and its enterprise finance guarantee is unsuitable for law firms, since it covers only 75% of a loan made by a commercial lender, on their standard lending criteria, at a 2% fee.

65. I accept that some of the written financial advice provided to law firms is puerile and insulting. It is a matter of surprise that it has gone out under the Lord Chancellor's name. I will not lengthen this judgment by setting out the passages, as to which the parties will be under no mistake. However, a reasonable decision-maker might properly take the view that recourses such as the enterprise finance guarantee are viable and productive. Moreover it appears from Ms Massey's evidence that the Law Society had not engaged with the British Business Bank to explore funding opportunities which might be accessed by its members, and the bank has expressed surprise that the Law Society endorses only one non-bank finance provider, Syscap Finance Solutions. The force of this is, I accept, qualified by the evidence of Mr Miller, head of legal aid policy at the Law Society: he explains that a former colleague had had discussions with the bank, that the bank only underwrites the loans of others, and that the Law Society's endorsement of one particular finance company does not prevent its members accessing others. But the essence of this part of the case is that there are potential sources of financial assistance to be tapped if the profession were to take appropriate initiatives: at the least, that is a reasonable view in public law terms.

66. Now I will turn to the issue of interim payments. The Lord Chancellor's reliance on their utility for DPW bidders was emphatically assaulted by Miss Rose.

67. I should first summarise the history of interim payments. The proposal first came to light in the consultation document "Transforming Legal Aid: Next Steps" published on 5 September 2013, referred to by Burnett J (see Annex A). The scheme was announced in the decision of 27 February 2014. At that stage the proposal was for interim fees to be paid to litigators and advocates in long trials of 10 days or more, and to litigators after an effective Plea and Case Management Hearing (PCMH) ahead of a trial of any length. The February document described the purpose of the scheme as being to cushion the impact of fee reductions (paragraph 89). Interim payments at the start of long trials were to be implemented in 2014, and PCMH payments in the summer of 2015.

68. There followed the meeting at the Law Society on 26 March 2014, attended personally by the Lord Chancellor, to which I have already referred. It was on this occasion that the Lord Chancellor offered alternative means of transitional support: either to provide a £9m grant for successful DPW bidders, or to bring forward the introduction of interim fees at the PCMH stage by twelve months. As I have said, the Law Society chose the latter: the first option offered grants only to successful bidders, whereas the second applied to all providers and would provide cash flow both before they bid and later.

69. I may go forward to the decision of 27 November 2014, now under challenge. I have already set out paragraph 3.1, giving the "indicative timetable" for the launch of the tender for 527 DPW contracts, and paragraph 3.9, dealing with the effect of the March

2014 decision (following the Law Society's choice) to advance the introduction of interim fees at the PCMH stage. It will be recalled that the last sentence states:

> "This will have a substantial positive effect on provider revenues in the period from July to October 2015."

70. Ms Massey's witness statement and the pleaded Detailed Grounds of Defence of 7 January 2015 misstate the value of the March decision for DPW providers. Miss Rose, very understandably, made much of the fact. At paragraph 54 Ms Massey asserts:

> "The effect of the policy is to pull forward an additional £28m of funding at a time when providers needed it most, improving cash flow for organisations."

But although the matter was misstated in these proceedings, and that was careless, there was no mistake in what was put to the Lord Chancellor. It was made clear to him that the figure of £28m in fact represented the total for interim payments for litigators, both the interim fees for the PCMH stage accelerated by the March 2014 decision, and the interim payments for long trials; not just the former.

71. Miss Rose however submits (Law Society's Note on Interim Payments, paragraph 20) that "[t]he true value to DPW providers of the interim payments scheme as a whole (*a fortiori* the value of the March 2014 decision to bring forward the PCMH part of the scheme) is in fact unknown to the Lord Chancellor". In fact tables given in a MoJ submission of September 2014, updated in a letter from the Treasury Solicitor of 11 January 2015, indicate that the March 2014 decision entails the injection of some £15.5m into the market over three accounting years, £15m of it over the first two, 2014/15 and 2015/16. This will, however, enure for the benefit of all providers, including those made to litigators who do not win DPW contracts.

72. Miss Rose's substantive point is that it was unreasonable for the Lord Chancellor to rely on the interim payments scheme to fund firms' transitional costs of restructuring. No attempt had been made to assess whether the interim payments scheme is sufficient to cover matters such as the likely upfront transition costs of restructuring or consolidation, or what those costs were likely to be. The evidence of Mr Waddington of the Criminal Law Solicitors Association is that only a small proportion of interim payments for long trials are likely to be payable to solicitors obtaining work through the duty provider scheme. Further, the effect of the interim payments scheme is to pull forward payments to which providers are entitled in any event: they would not be receiving any extra money, but simply being paid more promptly for work they have already undertaken. Miss Rose also submitted that even if the Lord Chancellor's evidence in relation to interim payments is accepted, the benefits will not in reality be available to offset transition costs since the intention was always that they would mitigate the effects of implementing the second fee reduction.

73. In my judgment it is not demonstrated to the *Wednesbury* standard that a reasonable decision-maker could not have concluded, as the Lord Chancellor did, that "[the interim payment provisions] will have a substantial positive effect on provider revenues in the period from July to October 2015" (paragraph 3.9). As I have indicated, the Lord Chancellor knew of the difficulties firms faced in obtaining

finance for restructuring. He intended that interim payments would assist with this. So much has been clear from February 2014 onwards. The measures regarding interim fees were treated by both the MoJ and the Law Society as being of substantial benefit to firms, notwithstanding that they were accelerated payments of what the firms would eventually be paid in any event. It was reasonable to take the view that the provision of interim fees would be a real advantage to bidders from July 2015 (when the second fee reduction will take effect) and October 2015 (when the DPW contracts will come into force) – an advantage not limited to softening the blow of the fee cut: as Mr Chamberlain submitted, the lower rates will only apply to cases in which legal aid is granted after 1 July 2015, and even in those cases the normal delay before the case is billed and paid means that revenue is not affected until some time after the reduction applies.

74. For all these reasons the three questions which encapsulate the core of Miss Rose's case, and Mr Coppel's overlapping submissions, are in my judgment to be answered in favour of the Lord Chancellor. I turn next to a series of arguments principally advanced by Mr Coppel. With respect I will address them quite shortly; it will be seen that what I have said about the standard of review informs the judgment to be made upon most of them.

Other Points

An "executable" version of the model?

75. Mr Coppel submitted that his clients (or the Law Society) should have been given access to an executable version of the KPMG model so that the impact of the different assumptions, and thus the model's reliability, could be thoroughly tested. He referred to *R (Eisai Ltd) v National Institute for Clinical Excellence & others* [2008] EWCA Civ 438, at paragraph 66 and *R* (*British Dental Association) v General Dental Council* [2014] EWHC 4311 (Admin). With respect I will not cite the text.

76. This point should have been taken much sooner if it was to be taken at all. Seen as a distinct head of judicial review, it is significantly out of time. The KPMG report, including the details of the modelling, had been released on 27 February 2014. The first two claimants before Burnett J could and should have raised this challenge before him; not least since their case was that they should have had disclosure of the KPMG Report so that they might respond to what was proposed. In fact the argument was not advanced until after Burnett J's judgment, during the further consultation period in late September 2014. Likewise the Law Society (whether or not they asked for the model in late 2013) failed to take the point when the KPMG report was published in February 2014.

77. I would therefore decline to entertain this argument. In any event I consider the methodology, showing how KPMG's analysis was undertaken, was clear on the face of the Report. The claimants did not need an "executable" version in order to offer critical comment.

78. It is convenient under this head to note that Mr Coppel advanced a number of criticisms of the assumptions themselves. Thus he submitted that no evidence has ever been provided for the assumption that firms could take on 20% more staff through organic growth. But the Lord Chancellor was entitled to look ahead to how

firms would behave under the new arrangements; and to conclude that firms would be able to recruit the small numbers of additional lawyers necessary (given that the market is currently so fragmented) to deliver on the contracts, as well as generate economies of scale without necessarily having to reduce fee earner salaries.

The Lord Chancellor's treatment of the responses to the consultation exercise

79. There were 3942 responses to the consultation which followed Burnett J's decision. The MoJ engaged KPMG to review the key responses and summaries of others, and KPMG produced its further document of 13 November 2014. The submission to the Lord Chancellor of 21 November 2014 contained passages on the points made. Annex A to the submission was a six page summary of the responses arranged under various headings. The submission recommended that the total number of duty provider contracts be varied to 527. Section 2 of the 27 November 2014 decision, which contained 96 paragraphs (I have only cited eight of them), was as I have said headed "Analysis of consultation responses/Government position".

80. It is entirely clear that the Lord Chancellor well understood the views expressed by respondents on a whole range of matters arising out of his proposals seen in the light of the Otterburn and KPMG reports. But Mr Coppel submitted that the Lord Chancellor did not "grapple" with them; that he ignored the views of experienced practitioners; that he did not engage with crucial, specific, practical problems arising out of the KPMG approach.

81. The Lord Chancellor was of course obliged to give proper consideration to the points made in the consultation exercise following Burnett J's judgment. Fairness to the respondents and his *Tameside* duty both so required. But as Mr Chamberlain submitted, he was entitled to conclude that respondents were inclined to think in terms of the current market and how it operated; and in contrast to proceed on the perception, as I have put it, that professionals whose world has changed may look the new world in the eye and find the means to live in it. And the conclusion of the November decision that the responses offered no new evidence meant no more than that the responses had not revealed any further matters of which the MoJ had previously been unaware and not considered.

82. In my judgment there is no force in this part of the case. It is not shown that the responses were not properly considered.

Two-month tender deadline

83. There was as I have said a two-month deadline for the submission of tenders for DPW contracts. Paragraph 3.1 of the November 2014 decision stipulates 29 January 2015 as the closing date for DPW tenders. Mr Coppel submitted that this timescale was "wildly unrealistic" for firms needing access to additional capacity in order to bid: it was disproportionate and discriminated in favour of the few largest firms who already have sufficient capacity. The tender process remains suspended until after judgment in the proceedings, following Jay J's order of 23 January 2014; but I should deal with Mr Coppel's argument in principle.

84. It is common ground that the Public Contracts Regulations 2006, giving effect to measures of EU law, apply to the tender process. Regulation 4(3) requires that

economic operators be treated "equally and in a non-discriminatory way". Mr Coppel submits that the process is a lengthy and time-consuming exercise for small firms, and presents particular challenges for new entrants. He seeks to emphasise (principal skeleton paragraph 91 and his oral argument) the following facts as highlighting the discrimination against small firms which, he says, is inherent in the timescale. (1) Only 4% of the criminal legal aid market is made up of firms with 15 or more duty solicitors. (2) The final number of DPW contracts available to tender for in each area, their values, and the requirements and criteria of the tender, only became available on 27 November 2014. (3) A DPW contract bidder must be the "same entity" as one which already holds an OCW contract but the OCW contract tender process closed on 23 May 2014. (4) The Law Society's estimate is that the process leading to agreement for a delivery partnership will take 5-6 months. (And there is evidence that all forms of consolidation take time: 6 months or more for mergers.) (5) Although an agent (which must also hold an OCW contract) may be used for up to 25% of the contract work, no consideration is given in the award of marks for capability provided through an agent. (6) A full staffing plan is in effect required by the close of the tender. In all the circumstances Mr Coppel submits (skeleton paragraph 93) that "giving firms an arbitrary two months in which to make the required consolidation arrangements deprives them of a fair opportunity to adapt and grow, as the Lord Chancellor wishes them to do, and undermines the very rationale for [his decision] by precluding firms from consolidating".

85. In my judgment Mr Coppel's argument does less than justice to the true factual picture. Firms had five months – from the outcome of the own client tender process to the date of the November decision – to pursue scaling up or delivery partnerships. In fact they have had, or will have had, longer: the need for legal aid firms to consolidate has been looming since well before November 2014, and firms have until October 2015 for the final stages of restructuring, the recruitment of staff, the making of IT arrangements and the securing of office premises. Although the precise number or value of duty provider contracts will not have been known, it must have been open to firms to make progress in discussions with other firms. It is to be noted that the conditions for own client contracts stated that firms could contract as the organisation they were, as well as the organisation they intended to become, for the purposes of a duty provider bid. And there is scope for organisational change during the life of a duty provider contract through the medium of the contract's novation clause or clauses.

86. It is also Mr Coppel's case that given the DPW contracts will not be awarded until June 2015 and work under them will not begin until October 2015, there is in reality ample time for a longer tender period. But this ignores the unchallenged evidence from the MoJ that the assessment of completed tenders will be complex and time-consuming, and once the outcome of the tender process is known there will be a need for some months to elapse so that the successful bidders can make the necessary arrangements.

87. The disciplines of EU law apply to the case; however even in such a context "the more complex and the more judgment-based the decision, the greater the margin of discretion to be afforded to the decision-maker": *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2014] 3 CMLR 51 *per* Lord Dyson MR at paragraph 70. Mr Coppel acknowledges that an evaluation criterion which can only

be satisfied by a small number of tenderers, or which some tenderers find it easier to satisfy than others, is not *ipso facto* discriminatory. In my judgment, on a proper appreciation of the whole context of the DPW tender process, there is no want of proportionality or unlawful discrimination or unequal treatment.

Delivery Partnerships

88. The February 2014 decision recorded that the MoJ had "reached a shared view with the Law Society" that a delivery partnership model for duty provider contracts would be achievable, sitting between very loose consortia arrangements and a strict merger/joint venture approach. Delivery partnerships are referred to also in the November decision under challenge. Mr Coppel contends that there are problems associated with delivery partnerships. The KPMG report did not take them into account. Thereafter, Mr Coppel submitted, the Lord Chancellor failed to investigate them. He has not sought to establish the costs associated with them, though they will or may involve greater overheads than single firms; nor whether there are significant insurance or regulatory hurdles to forming them.

89. In my judgment this argument, like so much else in the case, fails in the face of what I have said about the intensity of review. The Lord Chancellor arrived at a conclusion, based on assumptions which he was entitled to make, that if firms did not wish or were unable to grow organically or to merge, delivery partnerships were a means by which they might undertake duty provider work. He was entitled to conclude that there would be efficiencies and that overheads would not remain static.

ECHR Article 1 Protocol 1

90. Mr Coppel submits that the November decision violates A1P1 because it interferes with the goodwill of the practices of criminal legal aid firms. Their goodwill is in their own client work. It is said that the decision to limit the number of DPW contracts to 527 threatens to destroy the goodwill of many firms. The firms which do not obtain such contracts will fall into financial difficulty because they will be deprived of the opportunity to act as duty solicitor and many will close. Even firms which do obtain DPW contracts will be expected, on the Lord Chancellor's modelling, to give up (on average) 50% of their own client work, and that is a further interference with their possessions.

91. I consider that this argument is misconceived. Legal aid contracts are time-limited. The current contracts, which began in 2010, were of three years duration but have been extended until June 2015. There is no right to be awarded a legal aid contract in any fresh round. Though it is clear that in principle business goodwill may constitute a possession for the purpose of A1P1, the interest of a business in future trade cannot be dressed up as goodwill if it is in substance an interest in future income: *Malik v United Kingdom* (Application No.23780/08).

92. The distinction between goodwill and future income was discussed by Lord Bingham in *R (on the application of Countryside Alliance and others) v Her Majesty's Attorney General* [2007] UKHL 52, [2008] 1 AC 719 at paragraph 21:

> "Strasbourg jurisprudence has drawn a distinction between goodwill which may be a possession for purposes of article 1 of

> the First Protocol and future income, not yet earned and to which no enforceable claim exists, which may not: see, for instance, *Ian Edgar (Liverpool) Ltd v United Kingdom* Reports of Judgments and Decisions 2000-I, p 465; *Wendenburg v Germany* (2003) 36 EHRR CD 154, 169…"

Lady Hale said this in the same case at paragraph 128:

> "There is no Convention right to continue to enjoy a particular level of trade. There is no Convention right to retain one's job beyond the 'right to a job' which is recognised by domestic law … All sorts of laws may reduce demand for particular services and thus affect the profits of the self-employed or the job security of employed people. They do not in my view usually have to be justified under [A1P1], although that should not be difficult."

See also *Breyer Group plc v Department of Energy and Climate Change* [2014] EWHC 2257 (QB), *per* Coulson J at paragraphs 63-75.

93. Moreover as matters presently stand it cannot be said which firms will be successful in bidding for a duty provider contract, and which, if any, will go out of business if unsuccessful. Thus on the claimants' own argument it is not shown that any particular firm has a case to make under A1P1. But as I have said, the argument is in my judgment misconceived.

94. I should add that if there were any question of justification, I should conclude without hesitation that the scheme is proportionate. It is accepted on all hands that consolidation in the legal aid market is needed, if legal aid is to be provided at reduced fees. It may reasonably be concluded that this is a proper way to achieve it.

CONCLUSION

95. The issue concerning the applicable standard of review is important, and has merited a full debate between the parties. For that reason I would grant permission to seek judicial review in both sets of proceedings. But for all the reasons I have given, I would dismiss the substantive application.

MR JUSTICE CRANSTON:

96. I agree.