

CHAPTER 6

Conclusions

I The 'monopoly situation'

164. Our first task is to determine whether a monopoly situation, as defined in section 7 of the Fair Trading Act 1973, exists in the supply of services of barristers in England and Wales. In considering this question we are required by our terms of reference to limit consideration to agreements and practices relating to restrictions on the supply by Her Majesty's Counsel alone of their services, whereby barristers conduct their affairs as mentioned in section 7(2) of the Act.

165. Section 7(1) (c) provides that a monopoly situation shall be taken to exist if the supply of services is, to the extent of at least one-quarter, by members of one and the same group consisting of two or more persons who conduct their affairs in the manner described in section 7(2). Section 7(2) provides *inter alia* that, to create a monopoly situation, the members of the group must so conduct their respective affairs as to prevent, restrict, or distort competition in connection with the supply of these services, whether or not they themselves are affected by the competition.

166. The Bar, consisting of Her Majesty's Counsel and junior counsel, has agreed in General Meeting that restrictions on the supply by Her Majesty's Counsel alone of their services (set out in paragraphs 32 to 38) should be observed. These restrictions, which are operated by the whole body of barristers (Her Majesty's Counsel and juniors), prevent Her Majesty's Counsel from competing with each other and with junior counsel by performing certain services on their own. We conclude that a monopoly situation exists in favour of barristers in England and Wales in that the total supply of the services of such barristers is by persons who so conduct their respective affairs as to restrict competition.

II The public interest

167. We now consider whether any facts found by the Commission in pursuance of our investigation into the two counsel rule operate, or may be expected to operate, against the public interest.

168. There is widespread agreement that there is much court work which, if requiring the services of a QC, also requires the services of a junior, and that juniors rather than QCs should undertake much of the paperwork associated with court proceedings. The issue is whether there should be a mandatory rule determining the circumstances in which a QC must have the assistance of a junior both in court work and in work not connected with court proceedings.

169. We shall consider the possible disadvantages of such a rule (a) in relation to court appearances, (b) in relation to written work (both that connected with court work and that not connected with court work), and (c) in relation to consultation. We shall then consider the case put to us by the Bar Council in defence of the rule.

(a) Court appearances

170. The Law Society and other witnesses considered that cases in which a QC was properly employed and the junior was not required, though not frequent, were sufficiently numerous and serious to merit the abolition or modification of the rule.

171. The Law Society quoted nine types of cases, listed in paragraph 65, in which it might sometimes be appropriate to instruct a QC but inappropriate or unnecessary also to instruct a junior. The Evershed Committee mentioned a particular type of case which had troubled them, namely where a QC had appeared on his own before a tribunal, and then, without good reason, had to have a junior when arguing the same case before the High Court on a stated case. This is a particular example of one of the types given by the Law Society. Four classes of case, roughly corresponding to four of the Law Society types, had also been identified by the Bar Council's 1973 Special Planning Committee.

172. Solicitors also criticised the rule because, if the junior who has hitherto been involved in the case is not available, generally or on occasions, another junior has to be brought in and paid in order to satisfy the rule. The second junior may be completely inexperienced and may have no knowledge of the case, especially if he has to be found at short notice.

173. The Bar Council considered that the occasions on which a QC is properly employed but where it could be argued that the services of the junior are not required are so infrequent and insignificant as not to merit consideration. In the view of the Council, if two counsel appeared in court and one would have sufficed, the explanation was almost invariably that the case should have been taken by a junior. In such cases, and they were not common, it was the QC and not the junior who was unnecessary.

174. We think that the question whether a junior is sometimes unnecessary cannot usefully be considered by attempting to analyse individual cases. Even if it were practicable to make an exhaustive survey of various types of cases the results would still be open to dispute, and would not lead us to any firm conclusion. It is necessary, therefore, to consider the matter in more general terms.

175. A mandatory rule does not cater for the situation when a QC, in the circumstances of a particular case, is satisfied that he can conduct a case on his own and will derive little or no benefit from the presence of a junior. The QC may be confident that he can handle the court appearance without the assistance of a junior. We think that there must be cases where QCs would be content to appear in court on their own, since they appear on their own in tribunals to which the rule applies only in modified form.

176. One relevant factor is the extent of the assistance that a solicitor can give to a barrister who is conducting a case on his own in court. A junior taking a case on his own has no other assistance. Where a QC appears with a junior, the junior in most cases will be able to perform valuable services and the solicitor may send only a clerk because of the feeling that it is a waste of time to attempt to duplicate the services provided by the junior counsel. The Law Society said that instructing solicitors would accept that, if a QC were appearing on his own

and informed assistance were needed, every effort would be made to secure the presence of an experienced solicitor or legal executive, provided the cost would be met.

177. We are satisfied that there are cases—not frequent but sufficiently numerous and of sufficient importance to be evident and a matter of concern to litigants—where the rule requires the employment or replacement of a junior and such employment or replacement is unnecessary. This involves unnecessary expense to the litigant (subject to the remarks on cost in paragraph 201), waste of the junior's time, and possible delays in finding times for court appearances that fit in with the other engagements of those concerned in the case, including the junior. It also involves a restriction of choice for the client.

(b) Written work

178. We are dealing here with (i) interlocutory work (covering pleadings and advice on evidence) connected with court proceedings and (ii) written work not connected, or not necessarily connected, with court proceedings.

179. As regards interlocutory work, the rule does not say that a QC must not do this work, but the intention is to discourage a QC from drafting documents by allowing him to do so only if accompanied by a junior.

180. If QCs were allowed to handle cases in court on their own, the question arises who should be responsible for the interlocutory work in these cases (including cases which in the event did not reach court). We think that there must be at least some cases where interlocutory work, or even some part of it, could appropriately be done by the QC alone. The present rule, which is careful to preserve the right of the QC to undertake interlocutory work, appears to recognise that on occasion such work can with advantage have the attention of a QC. Given this, there must be occasions when the simplest course is for the QC to do the work on his own. To the extent that the rule prevents this, it may result in unnecessary expense to the litigant, waste of the junior's time and possibly delay. It also involves a restriction of choice for the client.

181. However, there is general agreement that in the ordinary way interlocutory work should be done by juniors and, although we think that there are disadvantages in providing for this by means of a rule, we would not wish to see any substantial change in the present practice. We consider this matter further in paragraph 205.

182. As regards drafting that is not (or not necessarily) connected with court proceedings, the present wording of the rule is the result of successive efforts to ease the rule. It is complicated, hard to follow, and sometimes misunderstood by the client and even solicitor. Apart from the complexity of this part of the rule, we think that it has disadvantages similar to those set out in paragraph 180 in connection with interlocutory work. We agree with the 1973 Special Planning Committee of the Bar Council in its recommendation that, in relation to documents not required in litigation, a QC should be entitled to draft any documents on his own, though we see no need for a rule on the matter.

(c) Consultation

183. The rule says that where papers have been delivered simultaneously to both a QC and junior counsel the QC should not advise except in consultation

with a junior and it goes on to deal with the situation 'where no papers have been delivered to junior counsel'. The rule seems to be widely misunderstood in the sense that it is taken to mean that once a junior has been instructed a QC may advise only if a junior is present. The Bar Council told us that this was not the meaning of the rule and that it was not in fact operated in this way; it had a very limited scope and was merely intended to prevent a QC 'trying to dispense with the junior where it is clear that the solicitor wanted a joint advice'. In that event the rule appears to us to be unnecessary and we think it would be better to have no rule on this narrow point rather than one which has, it seems, given rise to misunderstanding.

III The Bar Council's case against abolition

184. There is no presumption that, unless good cause can be shown why it should be retained, a restrictive arrangement such as the two counsel rule is against the public interest. At the same time a rule which is arbitrary in its operation, because not necessarily relevant to all individual cases, has to be scrutinised closely for possible undesirable features, particularly when the rule may appear to operate to the advantage of members of the Bar rather than in the interests of the client. We have found that the rule is a restrictive arrangement which has a number of disadvantages. We have to consider whether these disadvantages are out-weighed by any advantages, and we therefore now examine the strongly held view of the Bar Council that the rule is beneficial and that its abolition or even modification would be against the public interest. We have set out in Chapter 5 the case developed by the Bar Council in favour of the retention of the rule.

Structure of the Bar

185. The Bar Council argued that it was in the public interest that there should continue to be a two-tier system under which a small number of experienced practitioners of proved ability is set apart by function from the remainder. These practitioners, being relatively unhampered by routine work or paperwork or by smaller or less onerous cases, were free to handle and concentrate upon the heavier and more important cases. The Bar as a whole appears strongly attached to this system. The essence of the Bar Council's case for the preservation of the two counsel rule was that the two-tier system would break down in the absence of the rule.

186. The Law Society and the majority of those who gave evidence regarded the two-tier system as valuable and wished to retain it. On this point there was no disagreement between these witnesses and the Bar Council.

187. Our reference does not require us to examine the case for or against the two-tier system, but it has in any case been unnecessary for us to do so because, for reasons which we shall explain, we are satisfied that the two-tier system would not, in fact, be undermined by the abolition of the two counsel rule.

The advantages of employing a junior with a QC

188. The Bar Council drew our attention to the advantages to a litigant or accused person of the QC representing him being assisted by a junior. Quite apart from heavy or important cases where the need is self-evident, the Bar Council countered arguments in favour of employing a QC alone in other types of cases partly by arguing that one could never tell what difficulties and complications might not develop in what appeared to be a 'straightforward' case.

189. This argument, if pushed to its conclusion, would prove that all litigants should have two counsel. Although importance may be attached to the value of a junior to the QC who is conducting a case, it must be remembered that juniors conduct many cases efficiently without assistance from any fellow barrister but with the assistance of a solicitor or a solicitor's clerk. This suggests that in certain classes of case a QC might likewise be able to conduct a case with the help of a solicitor.

190. No doubt in a perfect world all litigants would have unlimited legal assistance in conducting their cases. In an imperfect world cost and manpower considerations enter into the matter and a litigant's costs cannot be disregarded, whether he is legally aided, wholly or in part, or bears the costs himself. The Bar Council has itself recognised the possibility that the application of the two counsel rule might cause hardship. In its original form the rule applied only to plaintiffs, and a newly appointed QC can act on his own in already existing cases up to two years after appointment if insistence on appearance with a junior would cause hardship to his client.

191. The fact that there are undoubted advantages in having a junior to assist a QC provides substantial grounds for the view that the two-tier system would flourish without the two counsel rule. In so far as a client's interests are well served by representation by QC and junior, clients and their solicitors will want to employ two counsel in appropriate cases and will undoubtedly continue to do so.

The threat to the two-tier system

192. The nub of the Bar Council's case against the abolition or modification of the two counsel rule was that sooner or later it would destroy the two-tier system. Solicitors would press QCs, particularly recently appointed QCs, to take cases on their own and to do the necessary interlocutory work. QCs would be unable to withstand the pressure on them to do this work because of fear of losing work from solicitors acting in this way. They would therefore be unable to fulfil the proper function of a QC. Solicitors would be bound to have regard to their client's interests in any particular case, and could not be expected to pay full regard to the general arguments in favour of a clear distinction in function between QCs and juniors and the need to permit the QC to develop his special talent. In so far as clients and their solicitors are at present reluctant to pay for a junior as well as a QC where the need to employ a QC is marginal, it would be impracticable in the absence of the rule for a QC to protect himself from being briefed on his own by increasing his fees substantially. In legal aid cases the fees cannot be negotiated in advance; in other cases the Bar Council thought that the taxing authorities would not, at any rate according to present practice, allow any such increases.

193. The abolition or modification of the two counsel rule is usually discussed in terms of employing QCs alone in some cases where at present two counsel are employed. The Bar Council's main objection to abolition is that the result would be to require or induce QCs to do work at present performed by juniors single handed. Especially as regards criminal cases, the Bar Council feared that there would be a tendency to use QCs on their own in a wide range of cases where juniors are employed on their own at present.

194. In our view the Bar Council exaggerates the danger of QCs doing the work of juniors. During much of the nineteenth century the two-tier system existed without the prop of a formal rule and when first introduced it applied only to plaintiffs in civil cases. At present there is a transitional phase during which newly appointed QCs can continue to act as juniors. Although this is only for a limited period, the fact that a recently appointed QC, while he is establishing himself, does a certain amount of junior work does not appear to be detrimental to the two-tier system. As regards the implication that a QC might continue to do a lot of junior work for some years after appointment, we consider that the Bar Council has overstated this risk. A QC must be jealous of his reputation and he must be aware that his good name among judges and the more senior QCs, as well as his future prospects, depend on his restricting himself to work regarded as proper to his new status. We believe that this factor would be more potent than any pressure by solicitors to continue to act in cases more suited for a junior.

195. The arrangements under the legal aid scheme could provide a further safeguard against the misuse of a QC's talents and experience. The employment of two counsel in civil cases normally requires the authority of the area committee and we have referred in paragraph 53 to factors which may be considered by committees to justify the instruction of a QC. If the rule were abolished similar guidelines could be applied to the employment of a QC on his own. In criminal cases, regulations give guidance whether or not the appropriate court may authorise the employment of two counsel and in practice the defending solicitor normally decides whether one of the two counsel should be a QC. Here again guidance, the same as, or similar to, that which applies to the employment of two counsel could be applied to the employment of a QC on his own.

The cab-rank rule

196. The Bar Council were concerned lest, in the absence of the two counsel rule, the cab-rank rule would require QCs operating on their own to act in cases that in the Council's view should properly be taken by juniors. We regard this line of argument as unconvincing.

197. The cab-rank rule is expressed in general terms and has the object of ensuring that a litigant, no matter how unattractive he or his case may be, can rely on securing the assistance of counsel. It also safeguards counsel against criticism for having undertaken a case of an unpopular nature.

198. There seems to us to be an element of unreality in the suggestion that a rule of practice formally introduced by the Bar at the end of the nineteenth century could not be abolished without modifying the principles of the cab-rank rule, which has stood for a much longer period of time. A closer scrutiny of the subject bears this out.

199. The cab-rank rule has remained unchanged for a very long time although the methods of conducting legal business have undergone many changes in that period. Throughout much of the nineteenth century, there was no two counsel rule, but we had no evidence that, in the absence of the rule, QCs found themselves being compelled to do interlocutory work or to take on cases that were more suited for junior counsel. As indicated in paragraph 39, notwithstanding that the two counsel rule did not apply to such appearances, the Bar Council in 1902 reported that KCs appearing in civil cases for defendants or in criminal

cases could 'insist' upon having a junior. In other words it has not been shown that, if the two counsel rule were abolished, the cab-rank rule would operate to prevent a reasonable organisation of work at the Bar.

200. For these various reasons we are not persuaded that, in the absence of the two counsel rule, the cab-rank rule would be so operated as to compel QCs either to act on their own if they considered that a case required two counsel or to take on cases appropriate for juniors.

Cost

201. The Bar Council considered that the financial benefits to litigants claimed from abolition of the two counsel rule had been exaggerated. It argued first that in so far as QCs were employed in place of juniors, the costs to litigants would increase. Certainly it might be expected that a QC's fee for a particular piece of work would be higher than a junior's; but no litigant would be compelled to instruct a QC alone, and if in a particular case it were more expensive he presumably would not do so unless he considered that some particular advantage outweighed the additional cost. Secondly the Bar Council argued that if, through abolition of the two counsel rule, juniors lost fees for court appearances they would tend to increase their fees for interlocutory work. It is not impossible that this would happen, but in our view the overall effect would not be important. The majority of cases would, in the absence of the two counsel rule, be conducted as they are now, and we visualise only a small proportion of cases which would be handled in court by QCs alone to the exclusion of juniors. The loss to juniors would be small, and any compensatory increase in fees would be negligible when spread over the much greater volume of work still remaining to juniors.

Training of juniors

202. The Bar Council argued that in the absence of the two counsel rule the opportunities for juniors to gain experience would be reduced in two respects. Juniors would be used less in one counsel cases and 'would often be dropped' before the trial in two counsel cases. They would thus lose opportunities for developing the skills and techniques of court advocacy. Secondly they would have fewer opportunities of appearing with a QC and learning from him. The Bar Council appeared to regard the opportunities for juniors to gain experience at present afforded by the rule as a benefit of the rule but not as a crucial argument for its retention. This appears to us to be right, and we do not think that, in the absence of the rule, opportunities would be lost on any significant scale.

IV Conclusions

203. As indicated in paragraph 166 we conclude that a monopoly situation exists in favour of barristers in England and Wales. We further conclude that the monopoly situation results in disadvantages to the public interest in that the restrictions on the supply by Her Majesty's Counsel alone of their services (the two counsel rule) on occasions cause unnecessary expense to litigants and waste of juniors' time. We have considered the various benefits claimed to result from the restrictions but find that the disadvantages outweigh the advantages to the public interest. We conclude therefore that the monopoly situation operates, and may be expected to operate, against the public interest. We regard the enforcement of the restrictions as part of the restrictions by virtue of which we have

found the monopoly situation to exist. Within our limited terms of reference we have not found that any other steps (by way of uncompetitive practices or otherwise) are being taken by barristers in England and Wales for the purpose of exploiting or maintaining the monopoly situation; nor have we found that any action or omission on the part of these barristers is attributable to the existence of the monopoly situation.

V Recommendations

204. We have considered whether as regards advocacy it would be enough to modify the rule on the lines recommended by the Bar's 1973 Special Planning Committee, and by some of our witnesses—namely that a QC should have a discretion to appear as an advocate without a junior if he considered that the case did not warrant the attention of two counsel and no junior was entitled to a brief under the retainer rules. We consider that the question whether, in any particular case, representation in court should be by junior alone, QC and junior, or (probably exceptionally) QC alone should not be fettered by a rule or determined by the QC alone but should be a matter for decision by the client after discussion with his professional advisers.

205. However, we recognise that it is important that QCs should be available to devote time to the more difficult cases. In order to facilitate this there should be a general understanding that a QC should be able in any particular case to request the assistance of a junior at any stage in litigation. This would be applying in a rather less formal way what is in effect the existing position in courts and tribunals where the rule applies in modified form. Whilst we consider that it should be recognised that in the ordinary way interlocutory work should be handled by juniors we do not wish to exclude the performance of interlocutory work in some cases by a QC, either alone or with a junior.

206. We think that, in respect of appearances, interlocutory and advisory work, intelligent assessment of individual cases as they arise will be sufficient and that there is no need for any new rule to replace the present two counsel rule.

207. We believe that the fears expressed by the Bar Council about the consequences of abolition of the two counsel rule are exaggerated. We therefore consider that the simple course should be taken of abolishing the rule. This may be expected to eliminate some unnecessary use of juniors and some unnecessary expense to litigants. It also has the following advantages:

- (i) it leaves for discussion between the client, solicitor and counsel the question of whether and to what extent a QC, if briefed, should be assisted by a junior;
- (ii) it avoids the necessity of deciding whether the present division between courts and tribunals where the two counsel rule applies in full and where it applies in modified form is the right one;
- (iii) it removes the possibility of misinterpretation, mentioned in paragraph 182, of the rule regarding drafting by QCs in non-litigation work.

208. We recommend therefore that the two counsel rule (that is all the existing provisions which restrict the freedom by a QC to supply his services without being accompanied or assisted by a junior) should be terminated.

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