

Conclusions

I The 'monopoly situation'

124. 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 advocates in Scotland. Advocates are defined in the reference as meaning members of the Faculty of Advocates. 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 Senior Counsel alone of their services, whereby advocates conduct their affairs as mentioned in section 7(2) of the Act.

125. 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 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 two or more persons 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.

126. The Faculty put forward the view that a monopoly situation within the terms of the Act did not exist. It argued that the services covered by the reference were supplied in Scotland not only by advocates but also by solicitors, and that the number of solicitors was much greater than the number of advocates. The Faculty also argued that if (which it did not accept) there was any restriction of competition it was in the way in which Senior Counsel conducted their affairs. The Ruling by the Dean of 30 October 1970 did not result in junior counsel so conducting their affairs as to restrict competition. The only relevant effect, if any, was on the conduct of Senior Counsel, and there was no group of Senior counsel who supplied at least one-quarter of the total services in question. The Faculty further argued that the relevant Ruling by the Dean did not impose restrictions on the conduct of their affairs by Senior Counsel. Acceptance of the Ruling by Senior Counsel amounted, according to the Faculty, to no more than an announcement by Senior Counsel that they did not undertake certain classes of work at all and that, in respect of other classes of work, they would undertake these only in certain circumstances. This in no way prevented, restricted or distorted competition in connection with the supply of advocates' services.

127. In considering for the purpose of section 7(1)(c) of the Act the total supply of advocates' services, we do not accept the argument of the Faculty that account should be taken of similar services provided by solicitors. The supply to be taken into account is confined to the supply of services as described in the reference, that is the services of advocates, who are defined in the reference as members of the Faculty of Advocates. The reference does not relate to services of the kind provided by advocates, only services provided by advocates.

128. The Faculty, of which junior as well as Senior Counsel are members, imposes restrictions on the supply by Senior Counsel alone of their services. All

advocates, as members of the Faculty, agree that the restrictions described in paragraphs 29 to 44 should be observed.

129. In its original submission the Faculty itself said that one of the reasons for adopting detailed rules in 1907 was to prevent unfair competition between members of the Bar. The Faculty also said that it was right that junior counsel should be at an advantage in competing against his seniors. We find that the restrictions restrict competition in that they prevent Senior Counsel from competing with other Senior Counsel, or with junior counsel, by performing certain services on their own. We regard this as sufficient.

130. We would, however, add that we are not persuaded by the argument that only Senior Counsel could be said to conduct their affairs so as to restrict competition. As we have pointed out, the restrictions were adopted by the Faculty as a whole, including junior as well as Senior Counsel. Further juniors, by participating in the operation of the restrictions, so conduct their affairs as to restrict competition. Thus so long as junior counsel must necessarily be employed in a case with Senior Counsel, a junior counsel is thereby restricted in the conduct of his affairs from competing with counsel in some other case.

131. We therefore find that all advocates, as defined in the reference, are parties to the restrictions adopted by the Faculty on the supply by Senior Counsel alone of their services and so conduct their respective affairs that competition between advocates is restricted. We conclude that a monopoly situation exists in favour of advocates in Scotland who are members of the Faculty of Advocates in that the total supply of the services of such advocates is by persons who so conduct their respective affairs as to restrict competition.

II The public interest

132. There is widespread agreement that there is much court work which, if requiring the services of a Senior Counsel, also requires the services of a junior, and that juniors should undertake much of the written work associated with litigation.

133. We had no evidence that prior to our inquiry there was any widespread dissatisfaction with the operation of the restrictions. Moreover in recent years the Faculty has modified them in detail when need was shown. The latest modification was the Ruling of 1970 that in criminal cases Senior Counsel were entitled but not obliged to appear without junior counsel.

134. Now that the restrictions have become the subject of a reference, however, the organisations concerned with the conduct of legal business have reviewed the position, as we have done, and have given us their views. The essential issue is whether there should be mandatory restrictions determining the circumstances in which a Senior Counsel should have the assistance of a junior.

135. We shall consider the possible disadvantages of the restrictions (a) in relation to court appearances (b) in relation to written work connected with court proceedings and (c) in relation to tribunals.

Court appearances

136. The Law Society of Scotland, by its recommendation that the restrictions should cease to be mandatory on Senior Counsel, implied that in its view there were court cases where a Senior Counsel was employed but junior counsel was not necessary. This was confirmed when representatives of the Society gave oral evidence.

137. We also had evidence from solicitors to the effect that there was a type of case where the employment of two counsel either could not be justified or could not be afforded, but where the case was of sufficient importance to be suitable for a single experienced advocate. At present that means, in effect, choosing an advocate of not more than about fifteen years standing (since juniors tend to take silk after about that time), whereas a Senior Counsel with greater experience might handle the case more effectively. One firm of solicitors instanced cases involving only a legal issue, but a legal issue of sufficient complexity to justify the instruction of Senior Counsel.

138. A mandatory rule does not cater for the circumstances when a Senior Counsel, 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 Senior may be confident that he can handle the court appearance without the assistance of a junior. Although the Faculty told us that there was no demand from the Bar for Senior Counsel to supply their services alone, we consider that there must be cases where they would be content to do so, since they appear on their own in criminal cases and in tribunals to which the 1970 Ruling does not apply in full.

139. One relevant factor is the extent of the assistance that a solicitor can give to an advocate who is conducting a case on his own in court. A junior taking a case on his own has no other assistance. Where a Senior 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 wasteful to attempt to duplicate the services provided by the junior counsel. Solicitors considered that they could provide Senior Counsel with the assistance they would need, if the nature of the case and the client's means made it inappropriate to employ two counsel, though the expertise which juniors acquired as note-takers in court was recognised.

140. Although statistics are not available, we formed the impression that two counsel appear in a much higher proportion of cases (other than divorce cases) in the Court of Session than in the English High Court. The lack of specialisation in the Scottish courts means that there is nothing corresponding to the tradition of the high proportion of cases taken by juniors which marks the English Chancery Court. There is, therefore, a presumption that the proportion of cases in which a Senior Counsel might appear on his own, if this were allowed, might be higher than in England, though in both countries that proportion would probably be small.

141. There was a fairly strong expression of view that the Ruling should be abolished in the Sheriff Court and inferior courts. The Law Society believed

that, in some appeals to the Sheriff Principal from a decision by a Sheriff, a Senior Counsel could dispense with the services of a junior. The Lord Justice General envisaged that, if the Ruling had to be modified, it might be by eliminating from its application certain courts and tribunals of lesser importance where Senior Counsel are infrequently engaged, for example the Lyon Court and the Dean of Guild Court.

142. What was more general than a reference to specific types of case was the view that the client, advised by his solicitor and counsel, should be free to decide whether he wished to be represented by a junior, by a Senior, or by a Senior assisted by a junior.

143. The Faculty's reply to all this was that the number of cases in which a Senior could appropriately appear without a junior was insignificant and in no way detracted from the strength of the case for retaining the Ruling.

144. Our view is that there are cases, perhaps not numerous, in all courts in which the Ruling requires the employment of a junior and such employment is not necessary. This involves unnecessary expense to the litigant, waste of the junior's time and possible delays in finding times for court appearances that fit in with engagements of those concerned in the case, including the junior. It also involves a restriction of choice for the client.

Written work

145. Civil proceedings in Scotland originally followed the continental practice of being conducted to a substantial degree in writing. Although English ways were introduced at the beginning of the nineteenth century as a result of the introduction of the jury system into civil cases, written pleadings still play a larger part than in England. Historically, the distinction between Senior Counsel and junior arose from the practice of Senior Counsel announcing that they had 'given up writing'—i.e. that they wished to be relieved of time-consuming and often tedious written work and to concentrate on advocacy. Pleadings are drawn by junior counsel though they will often be revised by Senior Counsel.

146. Those who envisaged that there might be cases in which a Senior appeared on his own assumed that he would also undertake the written work. There might be cases in which a junior undertook the written work and the court proceedings were conducted by the Senior on his own, but this was thought to be less likely and to present possible difficulties.

147. The Faculty considered that if the restrictions were abolished, existing Senior Counsel at the Scottish Bar would not be prepared, 'save in the most exceptional circumstances which are not readily definable at this stage', to undertake junior work. The Faculty was, however, concerned that solicitors might exert pressure on recently appointed Seniors to continue to do written work and that recently appointed Seniors might fear that they would lose solicitors' goodwill if they failed to meet the wishes of solicitors. The trend would then be for more and more Senior Counsel to be involved in routine work, to the detriment of their true function.

148. We consider that the Faculty exaggerates the danger that Senior Counsel would become involved in a mass of routine work, but we accept that in the ordinary way the great bulk of the writings should be done by juniors.

Tribunals

149. The formulation of practice which the Faculty adopted in 1907 noted that it was 'proper practice' for King's Counsel to be accompanied by juniors before Provisional Order Tribunals, Board of Trade Inquiries, Parliamentary Committees and Royal Commissions and Departmental Inquiries. By 1970, this was expressed in the same peremptory terms as in respect of courts generally. We consider that the disadvantages of requiring a Senior Counsel who appears before one of these bodies to be accompanied in all cases by a junior are the same as in the case of court appearances (see paragraph 144). And there are other objections. The Scottish rule is more rigid than the English rule which applies only in modified form to appearances before these bodies. This is surprising, because in Scotland the rule stemmed from the unwillingness of Senior Counsel to continue with technical pleadings and those do not arise in the case of these tribunals. Moreover, there seems to be a lack of consistency in the Scottish practice, since the rule does not apply fully to planning appeals or to appearances before the General or Special Commissioners of Income Tax. Nor does it in terms apply to the Restrictive Practices Court, though we were told that it was the intention to cover it by the parenthesis in paragraph (1)(b) of the Dean's Ruling of 1970.

III The faculty's case against abolition

150. There is no presumption that, unless good cause can be shown why they should be retained, restrictive arrangements such as the restrictions with which we are concerned are against the public interest. At the same time restrictions which are arbitrary in their operation, because not necessarily relevant to all individual cases, have to be scrutinised closely for possible undesirable features, particularly when they may appear to operate to the advantage of the Bar rather than of the client. We have found that the restrictions have a number of disadvantages. We have to consider whether these disadvantages are outweighed by any advantages, and we now examine the strongly held view of the Faculty that the restrictions are beneficial and that their abolition or even, at present, their modification would be against the public interest. We have set out in Chapter 5 the case developed by the Faculty in favour of the retention of the restrictions.

The advantages of employing a junior with a Senior

151. The Faculty drew our attention to the advantages to a litigant of the Senior representing him being assisted by a junior. The same point was also a feature of the Lord Justice General's representations. This argument, if pushed to its conclusion, would prove that all litigants should have two counsel.

152. 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.

153. The fact that there are undoubted advantages in having a junior to assist a Senior provides substantial grounds for the view that the two-tier system would flourish without the restrictions. In so far as a client's interests are well served by representation by Senior 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

154. The main argument advanced by the Faculty against the abolition or modification of the restrictions was that sooner or later this would destroy the two-tier system. Solicitors would press Senior Counsel, particularly those recently appointed, to take cases on their own and to do the necessary writings. Senior Counsel 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, and would therefore be unable to fulfil the proper function of a Senior.

155. The abolition or modification of the restrictions is usually discussed in terms of employing Senior Counsel alone in some cases where at present two counsel are employed. The Faculty's main objection to abolition was that the result would be to require or induce Seniors to do work at present performed by juniors without Seniors.

156. In our view the Faculty exaggerates the danger of Senior Counsel doing the work of juniors. Until 1907, the two-tier system existed without the prop of formal restrictions. At present there is a transitional phase during which newly appointed Senior Counsel can continue to act as juniors. Although this is only for a limited period, the fact that a recently appointed Senior Counsel, 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 suggestion that a Senior Counsel might be compelled to do a lot of junior work for some years after appointment, we consider that the Faculty was overstated the risk. A Senior Counsel must be aware that his standing and reputation in his profession will depend on his restricting himself to work regarded as proper to his new status. We would expect this factor to be more potent than any pressure by solicitors to continue to act in cases more suited for a junior.

157. The arrangements under the legal aid scheme could provide a further safeguard in civil cases against the misuse of a Senior Counsel's talents and experience. The part played by the Central Committee and local committees in connection with the employment of two counsel is described in paragraphs 49 and 50; the same or similar arrangements could be applied to the employment of a Senior Counsel on his own. In criminal cases, the employment of counsel (including the employment of Senior Counsel on his own) is already governed by regulations (see paragraph 51).

158. The Faculty also argued that there might be a return to the difficulties that existed before the adoption of the restrictions in 1907. The problems which led to their adoption were not concerned primarily with the division of work between Seniors and juniors but with questions of seniority. The roll of Queen's

Counsel had been created in Scotland to give Scottish Senior Counsel the necessary seniority, as compared with English barristers, in House of Lords appeals, and also because there was no outward and visible sign to indicate whether an advocate had given up writing or not. However, not all Senior Counsel were made Queen's Counsel after 1896, and there were, therefore, Queen's Counsel, other Senior Counsel and juniors. The giving up of writing by counsel did not confer any seniority. A young Senior Counsel remained lower in seniority than an older junior counsel and could not 'lead' him. In 1907, the authorities were working towards a solution under which, in time, senior counsel would become King's Counsel and be entitled to lead any other counsel not having that rank. The committee whose recommendations were accepted in 1907 said that a member of the Faculty who was promoted to the rank of King's Counsel obtained very substantial privileges and that this was a reason for enforcing more strictly against King's Counsel 'the disabilities which in times past more or less languidly restricted the practice of Seniors'. In other words, the restrictions relieved juniors of a measure of competition from seniors as a *quid pro quo* for the enhanced privileges obtained by Seniors. Against this background, we do not accept the Faculty's contention that the abolition of the restrictions would mean a return to the unsatisfactory state of affairs prevailing immediately before 1907. It is now firmly established that Senior Counsel are all Queen's Counsel. The difficulty before 1907 was that there existed King's Counsel and other Senior Counsel.

Rule of court

159. There is a rule, dating back to 1532 (see paragraph 28) that, in the wording of the Codifying Act of Sederunt (CAS A VI 4 of 1913):

No advocate, without very good cause, shall refuse to act for any person, tendering a reasonable fee, under pain of deprivation of his office of advocate.

160. The Lord Justice General said, as we would have expected, that the Court of Session would not countenance any departure from the rule.

161. The Faculty argued that if the restrictions were abolished, rule CAS A VI 4 would have to be amended since without an amendment a Senior Counsel could be compelled against his better judgment to act in cases more appropriate for a junior.

162. There is an inherent lack of plausibility in the argument that Faculty procedural arrangements introduced as recently as 1907 could not be abolished without modifying a fundamental rule of court which has existed since the sixteenth century. A more detailed examination of the proposition bears this out.

163. The purpose of the rule of court is to ensure that a litigant, however unpopular or unattractive he or his case may be, shall secure the assistance of counsel. Another purpose, as the late Lord Reid spelt out in a recent case, is to afford a safeguard to counsel against imputations that he should not have

taken on the case. Without the rule, counsel might find some clients showing a disinclination to employ him in future cases.

164. We have no reason to believe that the rule of court has been applied or would be applied to interfere with what was regarded as the appropriate conduct of his business by any advocate. We were not told of any difficulties on this score before the adoption of the restrictions in 1907. There was no evidence that Seniors had been compelled to take on cases more appropriate to juniors. The Faculty told us that, in criminal cases, Seniors rarely appeared on their own and had not been pressed to do so since the 1970 relaxation of the restrictions.

165. For these various reasons we are not persuaded that, in the absence of the restrictions, the rule of court could operate to compel Senior Counsel to act on their own if they considered that a case required two counsel or to take on cases more suitable for juniors.

Cost

166. The Faculty considered that the financial benefits to litigants claimed from abolition of the restrictions had been exaggerated. It argued first that in so far as Senior Counsel were employed in place of juniors, the costs of litigants would increase. Certainly it might be expected that a Senior's fee for a particular piece of work would be higher than a junior's; but no litigant would be compelled to instruct a Senior 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. The Faculty also argued that if, through abolition of the restrictions, juniors lost fees for court appearances they would tend to increase their fees for preparatory 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 restrictions, be conducted as they are now, and we visualise only a small proportion of cases which would be handled in court by Seniors 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

167. The Faculty argued that, in the absence of the restrictions, juniors would have fewer opportunities of appearing with a Senior and learning from him. The Faculty did not put this point in the forefront of its case; it was merely a consideration. This appears to us to be right and we do not think that, in the absence of the restrictions, opportunities would be lost on any significant scale.

IV Conclusions

168. As indicated in paragraph 131 we conclude that a monopoly situation exists in favour of advocates in Scotland who are members of the Faculty of Advocates. We further conclude that the monopoly situation results in disadvantages to the public interest in that the restrictions on the supply by Senior Counsel alone of their services 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 advocates who are members of the Faculty of Advocates for the purpose of exploiting or maintaining the monopoly situation; nor have we found that any action or omission on the part of these advocates is attributable to the existence of the monopoly situation.

V Recommendations

169. We have considered whether, as regards advocacy, it would be enough to modify the restrictions so as to provide that in civil cases, as in criminal cases, a Senior Counsel 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. We consider that the question whether, in any particular case, representation should be by junior alone, Senior and junior or (probably exceptionally) Senior alone should not be fettered by a rule or determined by the Senior alone, but should be a matter for decision by the client after discussion with his professional advisers.

170. However, we recognise that it is important that Senior Counsel should be available to devote time to the more difficult cases. In order to facilitate this there should be a general understanding that a Senior Counsel 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 criminal cases. Whilst we consider that it should be recognised that in the ordinary way pleadings should be handled by juniors we do not wish to prevent a Senior from doing pleadings, whether alone or with a junior.

171. We think that, in respect of appearances and pleadings, intelligent assessment of individual cases as they arise will be sufficient and that there is no need for any formal restrictions.

172. We believe that the fears expressed by the Faculty about the consequences of abolition of the restrictions are exaggerated. We therefore consider that the simple course should be taken of abolishing the restrictions. This step 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 Senior, if instructed, should be assisted by a junior;
- (ii) it avoids the necessity of deciding whether the present division between courts and tribunals where the restrictions apply in full and courts and tribunals where they do not so apply is the right one.

173. We recommend, therefore, that all the existing provisions which restrict the freedom of a Senior Counsel to supply his services without being accompanied by or assisted by a junior should be terminated.

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