

CHAPTER 5

Conclusions

I The 'monopoly situation'

64. We are required by the terms of our reference to investigate and report whether a monopoly situation exists in relation to the supply of services of barristers in England and Wales. We are also required to limit consideration to agreements and practices relating to the advertising by barristers of their professional services, whereby they conduct their affairs as mentioned in section 7(2) of the Fair Trading Act 1973. By virtue of section 7(1) and (2) of the Act a monopoly situation exists if the supply of services of barristers in England and Wales is, to the extent of at least one-quarter, supply by or to members of one and the same group consisting of two or more persons who, by any such agreements or practices, so conduct their respective affairs as in any way to prevent, restrict, or distort competition in connection with the supply of the services.

65. The present rules of the Bar Council on advertising, touting and publicity are set out in Appendix 2. It is clear that the restrictions on advertising contained in the rules provide, and that the profession accepts, that (apart from some minor and limited exceptions) all forms of personal advertisement and publicity and of touting are forbidden to barristers. Barristers are therefore not allowed to use any form of advertising as a means of competing with one another, and it follows from this that the restrictions on advertising involve some restriction of competition.

66. Accordingly at least one-quarter (in fact the whole) of the supply of services covered by the reference is by members of one and the same group consisting of persons who so conduct their respective affairs as to restrict competition in connection with the supply of those services. We conclude that a monopoly situation as defined in section 7(1)(c) and (2) of the Fair Trading Act exists by virtue of agreements or practices of the kind specified in the reference, and that it exists in favour of barristers in England and Wales.

II The public interest

67. It appears to us that in general there are two principal objections to restrictions on the advertising of professional services. These are first that they deprive users and potential users of the services, and also potential entrants to the profession, of helpful information which might otherwise be available to them, and secondly that they reduce the stimulus to competition within the profession and so to efficiency, to cost-saving, to innovation and to the setting up of new practices. In the following paragraphs we shall consider both these objections in the particular context of the services supplied by barristers in England and Wales, and we shall also consider a third objection concerning the possible effect of the restrictions on covert means of attracting business and on public confidence in the profession.

The provision of information

68. In most cases the users and potential users of professional services are (or include) members of the general public who have little or no contact with the profession concerned and may be uninformed about members of the profession and uncertain how to obtain the most suitable advice. In the case of barristers' services the position is clearly different since, although a lay client is a user of the services, he cannot approach a barrister direct and must do so through a solicitor¹; he therefore automatically has access to the advice his solicitor can give on the selection of a barrister.

69. It appears to us that the layman who needs a barrister's services is in a favourable position in this respect. He may not be unique in this (for example the medical patient who consults a specialist is normally in a similar position), but his position is more favourable than that of the layman needing most other professional services.

70. We considered the effect of the restrictions on the provision of information to solicitors. It is arguable that solicitors may sometimes be denied information which might be useful to them in selecting a barrister and which advertising by individual barristers might provide. However, the Bar Council argued that solicitors, as professional legal practitioners, were knowledgeable about the services of barristers and well able to judge by results, and that there was no evidence to suggest that the restrictions created any difficulties for solicitors. It is possible that country solicitors may be less well informed about the abilities and suitabilities of individual barristers than are solicitors in London and in towns where there is a local Bar; but we think there are ways (as the Bar Council pointed out—see paragraph 50) in which such solicitors can obtain ample reliable information and advice. We note with interest that the Bar Council Planning Committee is considering whether the areas of law in which individual barristers practise can be indicated in the *Law List* (see paragraph 35) so as to cut down the area of enquiry and direct the mind of the enquirer to suitable individual barristers.

71. We consider that, in view of the special relationship between solicitors and barristers, solicitors are likely from their experience to have adequate information about barristers, or to have the means of obtaining it readily. Although we recognise that such information cannot be complete we are satisfied that the restrictions on advertising by barristers do not deprive solicitors of useful information which might otherwise be made available to them or prevent them readily obtaining information. We conclude therefore that the restrictions are not harmful in respect of the availability to solicitors of information about barristers. It follows also (paragraph 69) that the restrictions are not harmful to members of the general public in respect of the availability of information.

72. Although a new entrant to the profession may well have considerable difficulty in choosing suitable chambers, we accept that, as the Bar Council told

¹Or, where appropriate, through a patent agent (see paragraph 14).

us, the Senate is always ready with advice on this matter to supplement personal and informal contacts, and we do not think that the restrictions on advertising add to the difficulty. The Council also argued that it was through membership of chambers that a barrister became known and that, if his performance was satisfactory, he could become established. The Council explained how the clerk of a set of chambers might direct work to one of its younger members in response to an appropriate approach from a solicitor (see paragraph 57). In our view the restrictions on advertising do not deter new entrants to the profession or make it significantly more difficult for them to become established as practitioners; and we think that many if not all new entrants would be reluctant and unlikely to advertise were this to be permitted. The same considerations apply to those few barristers who cease practice and later resume it. Such barristers are in any case allowed to notify previous clients of their return. The names of new entrants and re-entrants appear in the next issue of the *Law List*, which is published annually. However, we think that the Bar Council should consider making the relevant information available at the time of re-entry in the same way as is done for the opening of a new set of chambers (see paragraph 34).

Efficiency and the competitive situation

73. With regard to the second objection mentioned in paragraph 67, the possibility is that restrictions on the advertising of professional services deprive the more efficient practitioners of something which might help them to expand at the expense of the less efficient; that, by depriving practitioners who wish to introduce new methods or new kinds of service of some part of their means of attracting demand, they discourage innovation; that similarly they may make it more difficult to set up practices; and that, in so far as enhanced competition among practitioners may be expected to stimulate efficiency and so contribute to cost reduction, the restrictions may be expected to produce contrary, disadvantageous effects.

74. In judging the relevance of such objections to restrictions on advertising of the services of barristers we have to take into account two factors in particular, namely the nature of the work that barristers do and the framework within which they do it.

75. In our view the nature of a barrister's work is such that efficiency must be thought of largely in terms of the barrister's personal ability, and only to a very limited extent in terms of office organisation and methods, machinery, labour saving devices and the like. This is all the more so because a barrister is required to work on his own and, unlike most professional men, cannot be a member of a partnership or firm although he normally shares facilities with others in his chambers. In these circumstances the connection between advertising restrictions and efficiency that we have outlined in paragraph 73 seems to us to be negligible.

76. The possibility that the restrictions make it more difficult to set up a new practice is scarcely relevant to barristers. In other professions a practitioner may practise as a member of an existing practice or partnership, or

he may (either alone or with others) set up a new practice. A barrister has no such option; all practising barristers must work on their own (albeit in a set of chambers which is shared with others) and establish separate practices. The point may have more relevance in the matter of setting up new chambers, but we do not think that the inability to advertise is an inhibiting factor. It seems likely that new chambers would be set up only if they included barristers who were already in practice; they would already be known to instructing solicitors and would not need to seek business by advertising.

Effect on the public's attitude to the profession

77. We considered the possibility that the present restrictions on advertising, by prohibiting the use of explicit claims in advertisements, might enhance the importance of other less direct means of attracting business. These means might be entirely honourable, such as, for example, the acquiring of a reputation by unsolicited newspaper publicity, or they might be less creditable. But in either case there would be no claims in a form open to challenge. We also considered the possibility that public confidence in the profession might be diminished, rather than increased, by restrictions on advertising which preclude any open attempt at promoting an individual practice and which thereby deter barristers from acknowledging frankly that they are in business to make a living. However, we are satisfied that any such effects are not likely to be sufficiently serious or widespread to justify condemnation of the restrictions on these grounds alone.

Conclusion

78. For the reasons we have stated we are satisfied that, given the present organisation of the Bar and the framework within which barristers at present provide their services, objections to restrictions on advertising which may apply to some professions do not apply in practice to the restrictions on the advertising of barristers' services. We conclude that the monopoly situation which we have found to exist (paragraph 66) does not operate, and may not be expected to operate, against the public interest. Within our limited terms of reference, we have not found that any 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.

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