

Conclusions

I The 'monopoly situation'

65. 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 advocates in Scotland. We are also required to limit consideration to agreements and practices relating to the advertising by advocates 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 advocates in Scotland 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.

66. Although there is no formal rule against advertising by members of the Faculty (that is no single formula promulgated by the Dean or by the Faculty as a rule of professional conduct), it is understood by all members of the Faculty that practising advocates do not, and should not, advertise their services, canvass or tout for business, or seek publicity for themselves in their professional capacity (see paragraph 27). Moreover it is clear that the effect of this understanding is the same as if there were a formal rule, and that any advocate who acted contrary to it could expect to be disciplined as though there were such a rule. It is evident therefore that there are restrictions which provide, and that the profession accepts, that (apart from some minor and limited exceptions as mentioned in paragraph 26) all forms of personal advertisement and publicity and of touting are forbidden to advocates. Advocates 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.

67. 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 advocates in Scotland.

II The public interest

68. 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 advocates in Scotland, 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

69. 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 advocates' services the position is clearly different since, although a lay client is a user of the services, he cannot approach an advocate direct and must do so through a solicitor¹; he therefore automatically has access to the advice his solicitor can give on the selection of an advocate.

70. It appears to us that the layman who needs an advocate'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.

71. 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 an advocate and which advertising by individual advocates might provide. However, the Faculty maintained that there was in practice no demand for such advertising nor any need for it, since solicitors were knowledgeable and experienced, or had ready access to knowledge and experience, and therefore had no difficulty in this context. Neither the Law Society of Scotland nor any individual Scottish solicitor or firm of solicitors represented to us that they would favour advertising by advocates or that they would be helped by it. In our view this is not surprising, particularly since there is a relatively small number of practising advocates in Scotland and they all practise in Edinburgh. Solicitors outside Edinburgh may be less well informed about the abilities and suitabilities of individual advocates, but partly because of the system of Edinburgh 'correspondents' they do not appear to have any difficulty in obtaining the information and advice they need.

72. We consider that, in view of the special relationship between solicitors and advocates, solicitors are likely from their experience to have adequate information about advocates, 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 advocates do not deprive solicitors of useful information which might otherwise be made available to them or prevent them from readily obtaining information. We conclude therefore that the restrictions are not harmful in respect of the availability to solicitors of infor-

¹Or, where appropriate, through a patent agent (see paragraph 13).

mation about advocates. It follows also (paragraph 69) that the restrictions are not harmful to members of the general public in respect of the availability of information.

73. On new entrants to the profession, the Faculty gave us a substantial amount of information about the ways in which a newly admitted advocate can, and does in practice, obtain work and establish himself as a practising advocate (see paragraphs 56 to 58); in particular, the Faculty drew our attention to the fact that newly admitted advocates were already known to solicitors as a result of their period of work in a solicitor's office before they became advocates. We accept that a newly admitted advocate would not expect to gain any significant advantage by advertising. In our view, therefore, 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. The same considerations apply to those few advocates who cease practice and later resume it.

Efficiency and the competitive situation

74. With regard to the second objection mentioned in paragraph 68, 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.

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

76. In our view the nature of an advocate's work is such that efficiency must be thought of largely in terms of the advocate'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 an advocate is required to work on his own and, unlike most professional men, cannot be a member of a partnership or firm. In these circumstances the connection between advertising restrictions and efficiency that we have outlined in paragraph 74 seems to us to be negligible.

77. The possibility that the restrictions make it more difficult to set up a new practice is scarcely relevant to advocates. 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. An advocate has no such option; all practising advocates must work on their own and establish their own separate practices.

Effect on the public's attitude to the profession

78. 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 advocates 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

79. For the reasons we have stated we are satisfied that, given the present organisation of the Bar in Scotland and the framework within which advocates 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 advocates' services. We conclude that the monopoly situation which we have found to exist (paragraph 67) 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 advocates in Scotland for the purpose of exploiting or maintaining the monopoly situation, nor have we found that any action or omission on the part of advocates is attributable to the existence of the monopoly situation.

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