

JUDGEMENT : Mr Justice Lightman: Chancery Division. 22nd July 2004

PRELIMINARY

1. In this action the third claimant Asghar & Co, a firm of solicitors, and the first and second claimants Mr Asghar and Mr Mughal, the two partners in the firm, claim relief against the first defendant the Legal Services Commission ("the LSC") and the second defendant the Law Society. (I shall refer to the first, second and third claimants together as "the Claimants" and the first and second defendants together as "the Defendants"). The Claimants claim relief in respect of what they allege to have been the unlawful actions taken by the Defendants against the Claimants commencing on the 1st March 2004. By the application now before me the LSC seeks an order staying the action against the LSC on the ground that there is a binding agreement between the Claimants and the LSC to refer the disputes the subject matter of the action to arbitration.

THE CONTRACT

2. The legal relations between the Claimants and the LSC is governed by the terms of LSC's General Civil Contract Solicitors ("the Contract"). Under clause 12 of the Contract the LSC has power to conduct an "Official Investigation". The term "Official Investigation" is defined in clause 1.2 as an investigation into suspected serious professional misconduct breaches of the Access to Justice Act 1999 ("the Act") or the Legal Aid Act 1988 or regulations made under the Act or dishonesty by the Claimants or their personnel and into suspected serious breaches of the Contract. Clause 2.2 requires the LSC to exercise its rights under the Contract, and accordingly to institute and conduct any Official Investigation, in good faith as a responsible public body. Clause 3.6 requires the Claimants, if the LSC initiate an Official Investigation into the Claimants, to give to the LSC access to its premises and clause 3.8 requires provision of any required information, assistance, facilities and documents. Clause 3.15 confers on the LSC power to remove documents.
3. The critically relevant clause of the Contract is clause 23 which provides a system for dispute resolution. It is headed: "Internal Review, Review, Mediation and Arbitration". These are the four successive stages in the dispute resolution system. Clauses 23.2 and 23.3 are the critical clauses. The relevant provisions of clause 23 are as follows:

"What matters are subject to internal review?"

1. All disputes between you and us concerning:

- (a) alleged breaches of this Contract;
- (b) Contract sanctions; and
- (c) decisions by us on whether or not to issue a Schedule,

are subject to internal review, review (mediation by agreement) and arbitration. We will give written reasons for any decision we make to apply a Contract sanction or not to issue a Schedule (and for any decision we make to issue a notice under Clause 22.7 or 22.8).

What matters are subject to internal review, review and arbitration?

2. All disputes between you and us concerning:

- (a) alleged breaches of this Contract;
- (b) Contract sanctions; and
- (c) decisions by us on whether or not to issue a Schedule,

are subject to internal review, review (mediation by agreement) and arbitration....

Must you apply promptly for internal review etc?

3. If you dispute any decision that we have made concerning this Contract but do not pursue your rights under this Clause 23 within the periods of time specified (or such longer periods of time as we may agree) you thereby accept the decision and lose your right to dispute it....

What is the internal review procedure?

6. If you have a dispute with us within the scope of Clause 23.1, you may write to the Regional Director setting out your reasons and requesting an internal review of our decision...

7. If the Regional Director receives a written request for an internal review pursuant to Clause 23.6, he will, within seven days of receipt, forward it to the Supplier Development Group. The Supplier Development Group will, within 14 days of receipt, either (a) review the decision in the light of the information available including the reasons for the decision and your reasons for disagreeing with it or (b) where the dispute is within clause 23.2, may refer it to the secretary to the Contract Review Body, in which case, Clauses 23.13 to 23.15 shall apply....

9. On an internal reviews, the Supplier Development Group may uphold the original decision, overturn the original decision or substitute a fresh decision for the original decision and, if it does so, it will give written reasons for its decision.

What is the review procedure?

10. If you have a dispute with us within the scope of clause 23.2, you may within 21 days of the Supplier Development Group giving its decision and reasons following an internal review (or, where you are applying for a review pursuant to clause 23.5 within 21 days of the original decision) apply in writing for a review by the Contract Review Body....

15. The Contract Review Body may allow the review, dismiss the review or make a different decision. The Contract Review Body may give directions to the Regional Director. The Contract Review body may also recommend that a fresh decision is made after a specified period. The Contract Review Body will give written reasons for its decision.

The Contract Review Body may award interest (from the date of suspension) at the judgement debt rate if a decision for review was to suspend payment and the review is allowed.

Can mediation be agreed to?

16. If either you or we disagree with the decision of the Contract Review Body, the decision shall (if both you and we agree) be referred to a neutral mediator within 14 days of the decision of the Contract Review Body....

22. If no agreement (or no full agreement) is reached within 60 days of the appointment of the mediator (or such longer period as you and we may agree) the dispute, or any remaining party of it must be referred to arbitration under Clause 23.23.

When are disputes subject to arbitration?

23. If either you or we disagree with the decision of the Contract Review Body (or if Clause 23.22 applies) the decision of the Contract Review Body shall be referred to arbitration to be decided under the Arbitration Act. The arbitration shall be in accordance with the relevant arbitration scheme run by the Chartered Institute of Arbitrators and shall be final and binding. Notice of intention to enter arbitration must be given within 21 days of the decision of the Contract Review Body or (if later) the date when Clause 23.22 applies.

24. Both you and we must use reasonable endeavours to ensure that any arbitration is concluded within three months or as soon as practicable thereafter and must provide in a timely manner all reasonable information, assistance, co-operation and responses that may be required."

4. On the 1st March 2004 the LSC and the Law Society by their duly appointed officers without prior warning arrived at the Claimants' offices in Southall and in Slough. The Law Society attended to require production of documents pursuant to Rule 15C(1) of the Solicitors Practice Rules 1990 and Rule 34(1) of the Solicitors Accounts Rules 1991 and Rule 27 of the Solicitors Accounts Rules 1991. The legitimacy of the imposition of this requirement is challenged in the action. I need say no more about that challenge. The LSC say that they attended in pursuance of an Official Investigation.

5. The officers of the LSC on arrival at the Claimants' offices handed over a letter to the Claimants in the following terms:

"Dear Mr Asghar

Re: Notification of Official Investigation

I write to advise you that the Legal Services Commission is to undertake an Official Investigation into the provision of legally aided services by your firm. The Commission will attend your premises at Southall and Slough at 9.30 am on Monday, 1st March 2004.

It is anticipated that we will be on site for between 2 and 4 days during which time we will require access to all current legal aid work files and financial records. Please ensure that, as far as possible, all records and files can be produced upon request. Naturally, my colleagues and I will attempt to minimise any disruption to your office caused by their presence.

This action is deemed necessary in order to conclude to the Commission's satisfaction concerns we have regarding in particular the use of and payment to interpreters and other possible breaches of the terms of your contract with the Commission.

The procedures that will be adopted during the visit will be set out in an initial meeting with you.

Yours sincerely

[signed]

pp Neil Tyson

Head of Special investigations"

6. After their arrival the officers of both the Law Society and the LSC over a period of days required production of documents and obtained information.

THE CLAIM

7. The Claimants' Particulars of Claim (so far as material) read as follows: "...

3. [the Contract] contained the following terms implied by law and/or in order to give the same business efficacy:

(1) That the contract would not be interpreted or operated in a manner that would infringe the Claimants' rights under Art 8 of Schedule 1 to the Human Rights Act 1998 ('Art 8');

(2) That any investigation by the First Defendant would be initiated and carried out in good faith and in a manner which was reasonable and proportionate to the importance and urgency of the investigation and so as to minimise disruption to the Claimants' business, staff and clients and in accordance with the rules of natural justice.

...

5. On a date of which the Claimants are unable to give particulars in late 2003 or early 2004 the Defendants secretly, unlawfully and improperly agreed to carry out a raid on the Claimants' business premises to see whether they could find an excuse for the First Defendants to terminate the Firm's contract and/or for the Second Defendants to intervene in the Firm's practice. There was no proper reason for such a 'raid', nor did the Defendants honestly believe that there was such a reason. Further the Defendants knew and intended that that the raid would cause serious harm to the Claimants and their business.

6. The said agreement amounted to a tortious conspiracy between the Defendants (a) to commit an unlawful act namely the raid, and (b) to harm the claimants' business. Further or alternatively it constituted misfeasance in public office by the Defendants and/or an inducement by the Second Defendants of the First Defendants to breach their contract with the Claimants.
7. In support of the above the Claimants will rely upon the following facts:
 - (1) There was in fact no proper justification for the raid;
 - (2) The Defendants refused to give any proper or adequate justification for the raid. The Claimants will contend that this was because there was none to give;
 - (3) This is the second occasion on which the Second Defendants have attempted to interfere with the Claimants' practice without any proper or adequate grounds;
 - (4) The Defendants untruthfully and dishonestly informed the Claimants and their staff (see below) that the Defendants were acting independently;
 - (5) The number of personnel involved and the number of files and documents requested and studies by the Defendants shows that the Defendants were not looking for any files or documents in particular and that the raid was simply a 'fishing expedition'.
8. On 1st March 2004, without any prior warning, the Defendants arrived at the Claimants' offices with a total of 17 persons from the First Defendants and 2 persons from the second Defendants. The Second Defendants refused to give any reason for their participation in the raid, The First Defendants stated, by letter dated 1st march 2004, that they were undertaking an 'Official Investigation' and that the reason for it was 'in order to conclude to the Commission's satisfaction concerns we have regarding in particular the use of and payment to interpreters and other possible breaches of the terms of your contract with the Commission'.
9. Either the explanation given by the First Defendants was accurate and truthful or it was not. If it was, the reason given does not amount to a proper or adequate reason for an Official Investigation under the terms of the contract, since that must be into 'serious professional misconduct, breaches of the Act or regulations or dishonesty' none of which was alleged in the letter. If it was not accurate and truthful, that fact by itself precludes the raid from being a valid 'Official Investigation' under the contract.
- ...
13. It follows, from the fact that there was no Official Investigation, that the raid was a breach of contract by the First Defendants, and in relation to both Defendants was an unlawful trespass, was an unlawful infringement of the Claimants rights under Art 8, and formed part of the Defendants' unlawful conspiracy described above.
14. Even if, which is denies, there was an 'Official Investigation' under way, the circumstances of the raid and the manner in which it was carried out, which was in breach of the elementary rules of natural justice and wholly disproportionate to its stated objects, made the raid a breach of contract, breach of Art 8, trespass and conspiracy....
 - (4) The raid was unlawful and in breach of the Claimants' Article 8 rights in that:
 - (a) It was not in pursuance of any Court Order or other judicial or external authorisation;
 - (b) The Defendants failed adequately or at all to explain the nature of the raid;
 - (c) The Defendants failed adequately or at all to explain the nature of the raid;
 - (d) The Defendants failed adequately or at all to identify the documents sought to be obtained by it;
 - (e) The Defendants behaved in an oppressive manner throughout;
 - (f) The Defendants failed to maintain any, or any adequate, record of the raid and searches carried out; and
 - (g) The raid was disproportionate in all the circumstances given the limited nature of the alleged breaches by the Claimants compared to the length and scale of the searches and their impact on the Claimant's legitimate business interests and ability to discharge their professional responsibilities to their clients.
- ...
- (19) On 5 March 2004 the First Defendants also removed a large number of client files from the Slough and Southall offices. The First Claimant told the Defendants that their whole operation was unlawful, that he did not consent to removal of the files and that what they were doing amounted to theft. The defendants took no notice.
15. Further or alternatively, the First Defendants' removal of original files was in any event unlawful, in breach of contract, an infringement of the clients' rights in their documents, an infringement of the Claimants rights under Art 8 and amounted to a wrongful conversion of the Claimants' goods. Further the said files were and are covered by legal professional privilege.
16. Further or alternatively the facts set out above amount to an abuse of power and to misfeasance in public office by the Defendants and by those members of their staff who took the relevant decisions, particular of whom will be provided after disclosure herein.
17. As a result of the Defendants' said unlawful actions the Claimants have suffered loss and damage equal to one week's loss of income to Asghar & Co (at least £50,000) and further loss of future income due to the loss to the Claimants' professional reputation.
18. Further the Claimants are entitled to aggravated damages resulting from injury to their feelings as a result of the raid and as a result of their and their staff's (as the attached witness statements show), without any justification having had their privacy invaded and been insulted, oppressed, bullied, browbeaten, prevented from doing their

work for their clients and by implication accused of dishonesty, and to exemplary damages arising out of the Defendants' oppressive and arbitrary action in performance of their public functions....

AND THE CLAIMANTS CLAIM

- (1) A declaration that the raid was unlawful;
- (2) An Order for delivery up forthwith of all original files misappropriated by the First Defendants;
- (3) An Order for the return to the Claimants of all copy documents and other materials unlawfully obtained from the Claimants between 1st and 5th March 2004;
- (4) An Order that the Defendants make no use of such materials in disciplinary or other proceedings or sanctions against the Claimants;
- (5) Damages, including aggravated and exemplary damages, for abuse of power, misfeasance in public office, conspiracy, breach of contract, inducement of breach of contract, conversion, trespass and breach of Art 8;"

EXISTENCE OF ARBITRATION AGREEMENT

8. The first issue before me is whether there is an "arbitration agreement" within the meaning of the Arbitration Act 1996 ("the 1996 Act"). Section 6 of the 1996 Act defines for the purposes of the 1996 Act an arbitration agreement as "an agreement to submit to arbitration present or future disputes (whether contractual or not)". The Act goes on to provide that, if there is such an arbitration agreement, on application by any party the court is bound to grant a stay of legal proceedings brought in respect of a matter which under the arbitration agreement is to be referred to arbitration (see section 6 of the 1996 Act).
9. The LSC wish all the claims made by the Claimants in this action to be referred to arbitration and accordingly (invoking clause 23 of the Contract) apply for a stay of the action. The Claimants do not want any of their claims to be referred to arbitration and accordingly oppose the grant of a stay. They want instead all issues to be tried in open court. To this end the Claimants raise three grounds why a stay should not be granted.
10. The first ground of objection is that upon the true construction of clause 23 of the Contract the parties have the option to proceed to arbitration but have no obligation to do so. This submission requires an examination of the scheme of clause 23.
11. The first general observation to be made is that clause 23 contemplates disputes in respect of a variety of decisions e.g. decisions whether or not to issue a Schedule (falling within clause 23.2(c)), decisions relating to contract sanctions (as to which see clauses 23.2(b) and 23.5), decisions relating to or involving alleged breaches of the Contract (as to which see clause 23.2(a)) and decisions falling outside these categories (see and compare clause 23.3 and 23.10). An example of the potential relevance of the distinction between the decisions the subject of a dispute may be found in clause 23.7. That clause provides that, where a dispute is within clause 23.2, (unlike other disputes), it may be referred direct to the Contract Review Body.
12. The second general observation is that, if the Claimants wish to dispute any decision made by the LSC concerning the Contract, they are given the option to dispute it at a series of levels proceeding from internal review by the Supplier Development Group to review by the Contract Review Body. If the decision of the Contract Review Body is not agreed, mediation is obligatory and under clauses 22 and 23, if the Claimants disagree with the decision of the Contract Review Body and mediation fails to result in full agreement, "the dispute" (see paragraph 22) or "the decision of the Contract Review Body" shall be referred to arbitration. The language makes clear that the claimants have an option whether to dispute the LSC's decision at the internal review and the review level. Only after the decision of the Contract Review Body, if that decision is disputed by either party, is resolution of the dispute by mediation or in default by arbitration.
13. It is the fact that recourse to internal review and review is optional that founds the Claimants' contention that the Contract imposes no binding obligation to submit to arbitration. In the absence of clause 23.3 the submission would be unchallengeable. But clause 23.3 makes plain that, if the Claimants do not exercise their option to pursue their rights under clause 23 and have recourse to the provisions for internal review and review in respect of any decision which they dispute, the claimants are to be taken to accept the decision and their right to dispute it is lost for ever. Accordingly there cannot be a decision which is the subject of ongoing dispute by the Claimants in respect of which the Claimants have not exercised their options to have recourse to internal review and review or (in case of disputes falling within clause 24.2) to review alone and accordingly triggered the obligation to refer to arbitration.

THE SUBJECT MATTER OF THE REFERENCE TO ARBITRATION

14. The second point taken by the Claimants is that under clause 23.23 of the Contract the subject matter of the reference to arbitration is expressed to be the decision of the Contract Review Body and not a dispute, as required by section 3 of the 1996 Act. This objection is purely semantic. It is plain (in particular from reading Clause 23.22) that what is intended in clause 23.23 to be referred to arbitration is the unresolved dispute in respect of which a decision has been given by the Contract Review Body.
15. The core dispute in this case is whether the LSC has acted in breach of the express and implied terms of the Contract and in particular whether the LSC did bring into existence the Official Investigation (whose existence they rely on to invoke the right to access to the Claimants' premises, to provision of information and to remove documents) and whether in bringing it into existence and proceeding with it (and in particular proceeding with it as they did at the Claimants' offices) the LSC acted lawfully and in good faith and in accordance with their obligations under the Contract. That is the core issue which is to be referred to arbitration.

THE LETTER OF THE 24TH MAY 2004

16. The third point taken by the Claimants is that an official of the LSC (who is a non-lawyer and a member of staff of a department in no way involved in the actions in question) in a letter dated the 24th May 2004 stated that the legal validity of the Official Investigation could not be the subject matter of the procedures laid down in clause 23. This is at best a jury point and not a good one at that. On no basis can the expression of view be relevant (as it is submitted to be relevant) on construction of clause 23 of the Contract. There is no question of any reliance having been placed by the Claimants on the passage in the letter, nor could reliance have been placed, for the LSC had already launched this application for the stay invoking Clause 23 before the letter was ever written.

DECISION ON STAY

17. I accordingly hold that the LSC are entitled to a stay in respect of all matters in the action which under the Contract ought to be referred to arbitration. Clause 23(24) requires an expeditious arbitration. There is however first required under Clause 23 a decision by the Contract Review Body. The LSC assure me that such a decision can be obtained expeditiously and it should be. The arbitration should likewise proceed with all expedition.

THE SCOPE OF THE STAY

18. It is quite clear that all the non-contractual claims pleaded by the Claimants in the action have the closest possible connection with the Contract and the rights and duties of the parties thereunder and at the very least that critical issues in respect of each of those causes of action will be the subject of the arbitration. The claims made against the LSC in the action of conspiracy, misfeasance in public office and inducement to commit breach of conduct all rest on the good faith of the LSC which is the key issue in the arbitration. Likewise the claim in trespass and conversion all turn on whether there was an "*Official Investigation*" which is a core issue in the arbitration. The Article 8 claim is pleaded as a claim in contract. In a word the resolution of the contractual claims cannot sensibly or practically be divorced from the resolution of the non-contractual claims.
19. These considerations make plain that all proceedings in this action against the LSC ought to be stayed until the determination in the arbitration proceedings. There should be no question of overlapping issues proceeding to trial at the same time in the arbitration and in court proceedings.
20. The parties however invite me to go further to decide whether and if so how far the determination of the non-contractual issues in the action fall within the jurisdiction of the arbitrator. This is a matter of construction of the clause 23 and in particular the phrase in Clause 23 1. and 2.: "*all disputes between you and us concerning alleged breaches of this Contract*".
21. In my judgment, the expression "disputes concerning alleged breaches of the Contract" is very wide. No authority or text book has been cited to me which has considered the meaning of any such expression or the word "concerning" in this context. I am accordingly neither assisted nor trammelled by any such guidance. The use of the expression makes plain that the jurisdiction of the arbitrator is not confined to the consideration of the parties' causes of action for breach of the contract. It is only necessary to establish jurisdiction that the dispute concerns what is alleged to be a breach of contract, but not that the dispute is exclusively concerned with what are alleged to be breaches of contract. If the determination of a claim in tort by the Claimants requires determination whether one or other party has committed a breach as part of the Contract, the arbitrator has jurisdiction to determine the claim in tort. The arbitrator has jurisdiction to determine whether a party has not merely acted in breach of the Contract but committed a tort. By use of the expression "*disputes concerning alleged breaches of the Contract the parties have made plain their intention that there shall be one-stop adjudication for all disputes in which the issue of breach of contract arises and that the occasion shall not arise for the determination of the issue of breach of contract which the parties have agreed in the arbitration clause shall be determined by arbitration being determined in some other way*". In a word the provision for arbitration is not to be by-passed without the consent of the parties by raising that issue and having it determined as an issue in court proceedings however framed.
22. Each of the claims which the Claimants are seeking to pursue in this action (as is apparent from the Particulars of Claim) have not merely peripherally but at their heart the issue whether the challenged actions of the LSC constituted breaches of the Contract. In my judgment all the claims constitute "disputes concerning alleged breaches of the Contract", and accordingly the arbitrator has jurisdiction in the arbitration to determine each of them. I should add that I am relieved that I can reach this conclusion, for it is clearly in the interest of all parties that the present acrimonious dispute is resolved urgently.

CONCLUSION

23. I accordingly grant the stay sought by the LSC and provide the guidance requested by both parties.

Mr Hugo Page QC and Mr Ivan Hare (instructed by Asghar & Co, 112-114 The Broadway, Southall, Middlesex UB1 1QF) for the Claimants
Mr Martin Chamberlain (instructed by The Legal Services Commission, 2nd Floor, 29/31 Red Lion Street, London WC1R 4PP) for the First Defendant
Mr Nicholas Peacock (instructed by The Law Society, 113 Chancery Lane, London WC2A 1PO) for the Second Defendant