

Application by the Association of Commercial Attorneys

October 2007

**A report by the Office of Fair Trading
to the Scottish Government on the likely competition effects
of
the Association of Commercial Attorneys becoming a body
authorised to grant rights to conduct litigation and rights of
audience under sections 25 - 29 of the Law Reform
(Miscellaneous Provisions) (Scotland) Act 1990**

OFT 957

This is a web only publication.

Crown copyright

© Crown copyright 2007

This material may be freely reproduced except for sale or advertising purposes.

CONTENTS

<i>Chapter</i>		<i>Page</i>
1	General summary	1
2	The application and its likely competition effects	2
3	Conclusions	10

1 GENERAL SUMMARY

- 1.1 The advice below concerns an application by the Association of Commercial Attorneys ('ACA') to be designated as a body authorised to grant its members rights of audience and rights to conduct litigation. The advice is given on the basis of information supplied to the Office of Fair Trading ('OFT') by the Scottish Government in July 2007.
- 1.2 Under sections 25- 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (as amended) ('the Act'), if a body wishes to grant rights of audience or rights to conduct litigation it must apply to the Lord President of the Court of Session and the Scottish Government.
- 1.3 The President and the Scottish Government must seek the advice of the OFT who shall consider whether granting the application would have, or be likely to have, the effect of restricting, distorting or preventing competition to any significant extent.
- 1.4 ACA is a professional body that seeks to make an application to enable its members to acquire rights to conduct litigation before the Civil Courts of Scotland. Its application for authorised status contains disciplinary rules and procedures and qualification regulations that, together, govern the practice of its members.
- 1.5 For the reasons discussed in the following paragraphs, we believe that the designation of ACA as an authorised body would not have or be likely to have the effect of restricting, distorting or preventing competition to any significant extent. On the contrary, it is likely to increase competition in the provision of litigation and advocacy services associated with construction disputes. That said, we note that some of ACA's rules may require further clarification in order that entry is not restricted.

2 ACA'S APPLICATION AND ITS LIKELY COMPETITION EFFECTS

Construction Industry Litigation

- 2.1 The Construction industry in the United Kingdom has a turnover of some £340 billion pounds and employs around 1.3 million people. Construction contracts involve employers, main contractors and sub-contractors, working closely with professionals such as architects, quantity surveyors and consulting engineers. These contractual relationships can become complex and claims and disputes can occur frequently.¹
- 2.2 The Construction Industry traditionally deals with major high value claims by using solicitors in addition to industry specialists. For low value disputes, however, the involvement of a solicitor makes the cost prohibitive and pursuing a claim is not financially worthwhile.²
- 2.3 ACA believes that there is a need for industry specialists with a thorough knowledge of the industry, an appropriate technical background and a sound understanding of the law who can pursue such disputes through the Sheriff Courts.
- 2.4 ACA states³ that if the dispute is of a technical nature, it is considered prudent for a client to instruct both a solicitor and industry specialist(s) if there is likelihood of the case proceeding to court. The case, which may have taken the specialist(s) months to prepare, has to be considered by the solicitor: this takes time and results in additional cost to the client.
- 2.5 ACA believes that the client's interests are better protected by allowing a single legally-qualified industry specialist to be known as 'a Commercial Attorney' to conduct litigation thereby retaining the acquired technical knowledge and industry experience in the court and resulting in significant cost savings.⁴
- 2.6 Previously many construction disputes were arbitrated and/or

¹ Based on information provided by ACA

² Based on information provided by ACA

³ Paragraph 2.1.1 of its Application

⁴ Paragraph 2.1.2 of its Application

adjudicated and the same Commercial Attorney who had prepared the claim could pursue the matter in arbitration or adjudication. ACA says that the current trend is for the Standard Form Construction contract to require final determination of disputes by a Court. Clients therefore have no option but to involve solicitors. ACA considers that a client should have a choice as to whether to use a solicitor or Commercial Attorney in Court proceedings as in arbitration and adjudication proceedings.

ACA's Application

2.7 ACA is an association established for the purpose of carrying on civil litigation. Its application is to enable properly qualified persons known as "members/fellows" who are neither Advocates nor practising solicitors to conduct litigation before the civil courts of Scotland.

2.8 Individuals seeking membership require a LLM in Construction law from Strathclyde or Robert Gordon University or an equivalent qualification.⁵ A member must have 'sufficient litigation experience'⁶ and:

- a professional qualification, or
- a construction qualification, or
- 10-15 years construction experience.

2.9 ACA has applied for various rights to conduct litigation and rights of audience. It specifically states that its application is for the purpose of enabling its members to acquire rights to conduct litigation in civil and commercial matters, including disputes as to negligence in the Sheriff Court. Specifically⁷:

- the right to conduct litigation, to draft and prepare a writ in matters of contract disputes, negligence claims, reparation and personal injury claims in Ordinary Cause actions primarily based on construction, building and engineering disputes.⁸ ACA envisages that some of its members may build on their experience in these areas and allow their practice to develop.

⁵ Paragraph 4.2.1

⁶ Paragraph 4.4.1

⁷ Paragraph 3.0

⁸ See section 3.0 'Statement of Proposed Rights'

The right to instruct Counsel or a suitably qualified agent with rights of audience in sheriff court proceedings

- the right to appear in undefended actions in ordinary cause actions
- rights of audience and rights to conduct litigation in Summary Cause actions relating to all matters but excluding family law
- rights of audience and rights to conduct litigation in Small Claims Actions relating to all matters.

Likely effect on competition

- 2.10 We consider first the likely effect on competition of ACA members being authorised to conduct litigation and exercise rights of audience in an area that is at present the preserve of solicitors and Advocates.
- 2.11 ACA members will be instructed by clients to deal with construction disputes where there are no court proceedings. ACA members may be involved in arbitration, adjudications and other ways of dispute resolution. Where the matter cannot be resolved, however, and Court proceedings have been issued, clients must instruct solicitors and Advocates, as appropriate. ACA's proposals will enable its members to conduct a wide range of Civil Court work.
- 2.12 To the extent that ACA members will be able to conduct work currently reserved to solicitors and Advocates, granting ACA's application should increase the number of professionals who may offer litigation and advocacy services associated with the civil proceedings described in paragraph 2.9 above. This may be expected to stimulate competition in the market for legal services relating to those fields. Consumer benefits that may flow from an increase in competition include an increased choice of service providers and the possibility of reduced costs.
- 2.13 In addition, consumers may benefit from the need to instruct fewer professionals in relation to such proceedings. For example, we understand from the ACA that the current situation requires that a solicitor be instructed in court proceedings although ACA members will typically do much of the preparation for the proceedings. If ACA had Civil Court rights to conduct litigation that would no longer be necessary.

2.14 Although for these reasons granting the ACA's application is likely to have a positive effect on competition, these pro- competitive effects may be limited if the ACA's rules are unduly restrictive. The OFT's report, *Competition in Professions*⁹, identified three broad categories of restriction that may typically relate to professional rules: restrictions on entry, restrictions on conduct and restrictions on methods of supply. We consider ACA's rules under these categories.

Restrictions on entry

2.15 The entry requirements are set out in section 4 of the Application, there are to be three types of members:

- Associate - an individual who is seeking by training, education and/ or experience to qualify as a Member
- Member - an individual deemed by the ACA to be suitably qualified and given a practicing certificate
- Fellow - a Member suitably qualified and who can therefore mentor and train others to become Members.

2.16 To become a Member, candidates must:

- have a legal qualification which must be a LLM in Construction Law (Dispute Resolution Module) obtained at either Strathclyde or Robert Gordon's university or an equivalent
- have a professional or construction qualification or significant construction experience¹⁰
- have sufficient litigation experience as assessed by the Admissions Board.¹¹

2.17 Overall, these entry qualification arrangements may impose requirements that go beyond what is necessary to ensure an appropriate standard and contain requirements which are unclear or ambiguous thus deterring potential applicants and limiting the pro-competitive benefits which may flow from the grant of the application.

2.18 In relation to requirements which go beyond what is necessary, it is

⁹ OFT 328 Competition in Professions, published March 2001. The report is available on the OFT website at www.of.gov.uk

¹⁰ An example is given of 10 - 15 years experience

¹¹ Paragraph 4.4.1 of its Application

questionable whether 10 to 15 years' construction experience is not unduly onerous.

- 2.19 To avoid any potential problem with unclear or ambiguous requirements we suggest that the ACA should consider listing other suitable LLM establishments so as not to deter potential applicants and that it should provide further guidance on what is considered 'sufficient' experience of litigation.

Restrictions on conduct

- 2.20 ACA's Rules of Conduct contains rules that govern the way in which its Members may practise. These do not raise competition concerns.

Restrictions on methods of supply

- 2.21 From the information provided in the application, it does not appear that ACA rules prevent Members from forming partnerships (or other business structures) with either other bodies or with other professionals.

3 CONCLUSIONS

- 3.1 In summary, designating ACA as a body authorised to grant rights of audience and rights to conduct litigation would not have or be likely to have the effect of restricting, distorting or preventing competition to any significant extent. On the contrary, it is likely to increase competition in the market for the supply of legal services relating to construction disputes.
- 3.2 However, some of ACA's rules may restrict the number of applicants. Such rules may therefore lessen any increase in competition which would otherwise result from the grant of the application. In the light of the findings of the OFT's report *Competition in Professions*, we would like ACA to review the rules that we have identified in paragraphs 2.16 – 2.19 above.

Alan Williams
Director, Markets and Projects - Services
Office of Fair Trading, October 2007