

Arturo John

TESCO LAW: THE SHAPE OF THINGS TO COME?

Will Clementi Be Good for Consumers but Bad for Lawyers?

The modern world has empowered Kev and Bev to become demanding, knowing consumers. They like no-frills airlines and buy on ebay. They want an NHS and educational system that offer them choice, and they want legal services that are accessible, modern and user-friendly¹.

Having concluded in its Report on the Legal Services Market that the legal profession needed to devise new structures to meet these demands, the Government has charged Sir David Clementi with establishing a regulatory framework to promote consumer-driven and competitive legal services. One proposed tool is the multidisciplinary practice that would allow lawyers to work in partnership with other professions such as accountants and estate agents. Yet more radical is the Government's consideration of external ownership of legal practices, allowing lawyers to work within a company and provide that company's customers with in-store legal services - the so-called "Tesco law" - offering improvements in access, choice, service quality and price through existing commercial portals that are intended to be recognised, successful, customer friendly and fiercely competitive: "Stack'em high and sell'em cheap!"

In this brave new world of Tesco law, lawyers would also benefit, enabling them to provide legal services to the public while simultaneously working within an organisation that offered greater management opportunities, steadier employment routes, better terms and conditions and new prospects for trainees. Crucially, family-

¹ See A. Rawnsley, "The Battle to Win Over Bev and Kev", Sunday Observer 20 June 2004

friendly policies would help reduce the high proportion of women leaving the profession. The set-up could even address the present lack of ethnic-minority recruitment.

However, let us not forget the consumer. Professional services inherently represent a transaction in which the knowledge gap between provider and consumer places the latter in a highly vulnerable position, particularly so in the legal and medical professions. Consumer interest therefore requires the legal profession to hold core values of confidential and impartial service. The public, moreover, requires the legal profession to act with independence from Government and integrity in the interests of justice and democracy.

When applying these values to multidisciplinary practices, it becomes clear that commercial considerations in selling “package deals” can clash with a lawyer’s duty of impartial service. Furthermore, post-Enron, multidisciplinary practices have been ruled out by the US in its Sarbanes-Oxley Act, while demand from the UK’s City firms has all but disappeared.

Tesco law poses even greater risks to the consumer and general public. Confidentiality is threatened unless owners are denied the right to speak to clients and audit their own business. This hardly seems feasible. The lawyers employed are subjected to commercial pressures that run counter to their duty to provide impartial service to the consumer. A Tesco lawyer’s continued employment rests on his owner, giving the latter inevitable influence without the counter-balancing regulatory safeguards ensured in a legal partnership.

The Lord Chancellor, Lord Falconer, has committed the Government to countering aggressive and litigious claims farmers. Yet the introduction of Tesco law conflicts with any such commitment. Lawyers seek to meet consumer demands, businesses aim to *create* demand. Tesco law can only therefore exacerbate the compensation culture Lord Falconer is attempting to fight.

Meanwhile, Lord Falconer looks forward to Tesco lawyers “cherry-picking” straightforward and profitable areas of work on the grounds that this simply offers a better deal to consumers with simple needs. In response, niche firms may thrive in urban areas, but market towns and rural areas may be left without a legal community. With this in mind, it is worth remembering that large financial organisations, be they banks or supermarkets, are notoriously efficient at establishing oligopolies or local market dominance after an initial loss-making period. These organisations require considerable Government anti-trust supervision. The same level of direct regulation for Tesco lawyers would manifestly breach the principle of lawyers’ independence. Yet not to do so would reverse any initial gain in competition, prices and quality.

Nevertheless, opposition to Tesco law does not represent a total rejection of all modernisation. One sound proposal, that of legal disciplinary practices, would bring into partnership lawyers from different professions and also non-legal managerial staff - such as IT specialists and Human Resources managers – involved in facilitating the provision of legal services. Allowing non-lawyers a greater stakehold in the practice, while maintaining majority-management by the legal professions, would go some way to meeting the Government’s objectives whilst safeguarding the legal

profession's core values. There are barristers who want to deal directly with consumers through such practices and compete against established solicitors' firms. Others meanwhile will remain at the independent, self-employed referral profession. Consistency and the assurance of certain standards would also require *all* legal disciplinary practices managers to come under the scope of a lead regulator, most likely the Law Society.

In modernising the overall regulatory framework, one possibility is to emulate the Financial Services Authority through the creation of a service-based Legal Services Authority. However, considerations of flexibility, cost, time-efficiency and, most important of all, the professions' independence, point towards the creation of a Legal Services Board, with both lay and professional members - appointed in accordance with the Nolan principles - whose role it should be to ensure the satisfactory administration by each professional body of its own regulatory functions, these being to a certain extent separated from the each body's representative role. The Board must also close regulatory gaps by requiring unregulated providers of legal services, such as claims consultants, to form their own professional bodies or come under the regulation of an existing body. Naturally, the devil lies in the detail.

The points expressed are not easy to sell to a public that is often distrustful of the legal profession. But the truth is that, contrary to common perceptions, Tesco law offers many lawyers real benefits, but runs counter to the interests of the public and of the individual consumer. It is by putting those interests before their own that lawyers display the true nature of their profession: one of values and not mere rules.