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Your Ref

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Dear Ian

### **Disciplinary Jurisdiction of the Courts**

You asked for my advice on how CILEX Fellows might be brought within the disciplinary jurisdiction of the courts and, in particular, what steps would need to be taken for CILEX Fellows to become “officers of the court”.

### **Background**

This question has arisen because, in a letter to the Legal Services Board of 26th January 2011, the Lord Chief Justice (as a statutory consultee) suggested that “The disciplinary jurisdiction exercised at present by the courts in respect of solicitors and barristers ought to be extended to include ILEX Members”. The Lord Chief Justice then expanded upon that suggestion in the following terms:

*“(3) Courts to have disciplinary oversight of ILEX Members*

*It is also a matter of concern that the court will be unable to provide the same degree of regulatory and disciplinary oversight of ILEX members in independent practice as litigators or advocates as it presently does over solicitors and barristers. In enacting the 2007 Act Parliament modernised the regulation of the legal profession but left unchanged the court’s residual disciplinary jurisdiction over solicitors, as officers of the court, contained in s50 of the Solicitors Act 1974. In addition, it left unchanged the judiciary’s visitorial jurisdiction over members of the Bar. The present applications provide for no similar degree of residual control by the judiciary; residual control which is carried out to further the public interest and the proper administration of justice in the courts. It is imperative to reconcile the degree of regulatory and disciplinary oversight proposed by the present applications with that which exists for solicitors and barristers. It is difficult to see how, without the introduction of comparable residual regulatory and disciplinary scrutiny by the courts and judiciary, such regulation may reach the same standard as that applied to solicitors and members of the Bar.”*

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## The inherent jurisdiction

As the Lord Chief Justice indicates, the court's disciplinary jurisdiction in respect of solicitors and barristers is a "residual" one. It arises from the inherent jurisdiction of the courts to control the conduct of those appearing before them and, in respect of the legal professions, first developed at a time when there were no other regulatory arrangements in place for lawyers.

In the case of solicitors, the jurisdiction of what are now defined as the Senior Courts was preserved by s.50 of the Solicitors Act 1974. That section permits those courts to exercise the same jurisdiction over solicitors as any of the 19<sup>th</sup> century superior courts might have exercised in relation to a solicitor, attorney or proctor prior to the amalgamation of those courts under the Supreme Court of Judicature Act 1873. However, as the Court of Appeal held (Denning MR) in *R & T Thew Ltd v Reeves (No 2)* [1982] 3 All ER 1086, "the punitive jurisdiction of the court itself is now rarely if ever exercised" and "Nowadays it would usually be inappropriate for any judge to exercise this punitive jurisdiction of his own motion"... which "should be avoided in all but the most exceptional cases".

The scope of the jurisdiction was concisely explained in Lord Denning's judgment, an extract of which is set out below (emphasis added in respect of the quotations set out above):

### ***"The jurisdiction over solicitors***

*The jurisdiction of the court over solicitors was much considered by the House of Lords in Myers v Elman [1939] 4 All ER 484, [1940] AC 282. It originated in early days because a solicitor was an officer of the court. His name was entered on the rolls of the court. He was subject to the discipline of the court. This disciplinary jurisdiction was exercisable in two ways: either by punishing him or by making him pay compensation.*

*In so far as it was punitive, the court could strike a solicitor off the roll of the court or it could suspend him. In so far as it was compensatory, it could order him to pay costs; sometimes the costs of his own client, sometimes those of the opposite party, sometimes it may be of both (see [1939] 4 All ER 484 at 508, [1940] AC 282 at 318 per Lord Wright).*

*Both these disciplinary powers are preserved by s 50 of the Solicitors Act 1974.*

### **The punitive jurisdiction**

*The punitive jurisdiction of the court itself is now rarely if ever exercised.* *It is left to the Solicitors Disciplinary Tribunal. If a judge thinks that a solicitor may have been guilty of conduct deserving punishment, he reports the matter to the Law Society. It will then be considered by the Professional Purposes Committee. They will decide whether to charge him before the Solicitors Disciplinary Tribunal or not. The tribunal can strike him off the roll, suspend him or fine him; see s 47 of the 1974 Act.*

*Nowadays it would usually be inappropriate for any judge to exercise this punitive jurisdiction of his own motion.* *He would have to give notice to the solicitor so as to give him an opportunity of answering the charge: see R v Smith (Martin) [1974] 1 All ER 651, [1975] QB 531. And then, when the charge was heard, the judge would appear to be both prosecutor and judge. That is a role which does not become him well: see Balogh v Crown Court at St Albans [1974] 3 All ER 283 at 288, [1975] QB 73 at 85. It should be avoided in all but the most exceptional cases.*

### ***The compensatory jurisdiction***

*The compensatory jurisdiction is also preserved, but with this difference; it is retained by the courts themselves. The Solicitors Disciplinary Tribunal has no power to award compensation to anyone. Our old books all show that if a solicitor for one side has done something wrong, which has caused useless costs to the other party, he could be ordered personally to compensate the other party. That other party made his application at the conclusion of the case or soon after it. He would apply to the court for an order that the solicitor on the other side do pay the costs. He would do it by motion in the Chancery court or by a motion or application for a rule in the courts of common law. It was a summary jurisdiction without pleadings. All that was necessary was a notice telling the solicitor what was alleged against him and giving him an opportunity of answering it."*

Unlike solicitors, barristers are not officers of the court and the disciplinary role of the judiciary in respect of the Bar is, as the Lord Chief Justice indicated, "visitorial"; the judges act as Visitors to the four Inns of Court and determining appeals from decisions of their disciplinary tribunals.

However, although the discipline of barristers has, with the concurrence of the judiciary largely been left to the Bar for many centuries (for an explanation see, for example, *Re S (a barrister)* [1969] 1 All ER 949), in addition to that visitorial role the judiciary retains the power to punish barristers for contempt of court as part of its inherent jurisdiction to control proceedings and the conduct of those before them and, in particular, to prevent abuse of process.

### **The modern regulatory regime**

The regulation of the legal professions, or perhaps more correctly those persons who are authorised to perform reserved legal activities, has changed significantly in recent years and is now largely controlled by the Legal Services Act 2007 (the **2007 Act**).

That Act permits the regulators of each of the legal professions (including CILEX) to continue to exercise regulatory functions, but subject to approval by the Legal Services Board established under the 2007 Act. Further, Section 1(1) of the 2007 Act sets out regulatory objectives which (by virtue of s.28 of that Act) each approved regulator must promote in discharging its regulatory functions. Those objectives are (emphasis added):

- a. protecting and promoting the public interest;
- b. supporting the constitutional principle of the rule of law;
- c. improving access to justice;
- d. protecting and promoting the interests of consumers;
- e. promoting competition in the provision of services [by authorised persons];
- f. encouraging an independent, strong, diverse and effective legal profession;
- g. increasing public understanding of the citizen's legal rights and duties;
- h. promoting and maintaining adherence to the professional principles.

The “professional principles” which form part of those objectives and which apply to authorised persons, including CILEX Fellows undertaking reserve legal activities, are (again, emphasis added):

- a. that authorised persons should act with independence and integrity,
- b. that authorised persons should maintain proper standards of work,
- c. that authorised persons should act in the best interests of their clients,
- d. that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- e. that the affairs of clients should be kept confidential.

Further, section 188 of the 2007 Act (duties of advocates and litigators), which applies to any authorised person who exercises a right of audience before any court or conducts litigation, provides that:

*“(2)A person to whom this section applies has a duty to the court in question to act with independence in the interests of justice.*

*(3) That duty, and the duty to comply with relevant conduct rules [of the approved regulator by which the person is authorised] imposed on the person by section 176(1), override any obligations which the person may have (otherwise than under the criminal law) if they are inconsistent with them.”*

That obligation to act in the interests of justice is reinforced by CILEX’s own Code of Conduct which, as its first Principle requires Fellows to “uphold the rule of law and the impartial administration of justice” and which expands upon that Principle in the following terms (again, emphasis added):

*“You must uphold the constitutional principle of the rule of law. You must act lawfully and must not knowingly breach the law. You must be familiar with and comply with the law as it applies to you.*

*You have a duty to uphold the impartial administration of justice. You also have a duty to act in the best interests of your client. However, your primary and overriding duty is to the courts. You must not knowingly allow the court to be misled. You must obey court orders and do nothing which would place you in contempt of court.”*

Of course, in addition to these new arrangement, nothing in the Act affects to court’s inherent power to prevent contempt of court and to punish contemnors.

## **Conclusion**

I am aware that CILEX is not averse to residual jurisdiction being extended to CILEX Fellows, but I would suggest that the combination of new regulatory arrangement under the 2007 Act, CILEX’s own code of conduct and the inherent jurisdiction of the courts to deal with contemnors should be sufficient to address the concerns raised by the Lord Chief Justice.

If the residual jurisdiction was to be extended then, as the arrangements which exist in relation to the Bar have developed by custom over hundreds of years, it is unlikely that they could be extended to include CILEX. The consequence is that the only viable option would be to include CILEX Fellows within the ambit of being officers of the court.

Solicitors are officers of the court by virtue of section 50 Solicitors Act 1974, a saving provision which prevented the extinguishment by that Act of the court's common law jurisdiction over solicitors. This is consistent with the general principle that, when Parliament legislates on a particular matter, any common law or prerogative arrangements relating to the same matter are extinguished and cannot be apply, unless of course there is a saving provision (as in this case) in the legislation.

As all legal professions are now or will be subject to the statutory regime of the 2007 Act, it is unlikely that CILEX Fellows could be made officers of the court other than by means of legislation. Although being an officer of the court was originally a common law concept, it was specifically saved by statutory means (but only in respect of solicitors) by the Solicitors Act. Thus, in my opinion, CILEX Fellows could only be made officers of the court by mean of primary legislation.

Yours sincerely

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**For and on behalf of Bircham Dyson Bell LLP**

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