Neutral Citation Number: [2019] EWHC 461 (Admin)

Case No: CO/142/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 05/03/2019

Before:

LORD JUSTICE LEGGATT
and
MRS JUSTICE ANDREWS DBE

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Between:

R (on the application of THE INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES)	**Claimant**
- and -	
THE LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE	**Defendant**
-and-	
(1) THE LEGAL SERVICES BOARD **(2) THE NOTARIES SOCIETY**	**Interested Parties**

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- -

Nathalie Lieven QC and **Tom Coates** (instructed by the Institute of Chartered Accountants in England and Wales) for the **Claimant**
Victoria Wakefield and **Jennifer MacLeod** (instructed by the **Government Legal Department**) for the **Defendant**
Nicolas Damnjanovic (instructed by the **Legal Services Board**) for the **First Interested Party**
Charles Streeten (instructed by **Aaron & Partners**) for the **Second Interested Party**

Hearing date: 27 November 2018

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Approved Judgment

Lord Justice Leggatt and Mrs Justice Andrews:

Introduction

1. This is a claim for judicial review of a decision made by the Lord Chancellor on 21 September 2017, refusing to make orders designating the claimant as an approved regulator and licensing authority under the Legal Services Act 2007 in relation to five specified legal activities. The claimant ("the ICAEW") is a regulatory and professional members' body founded by Royal Charter that works to further the profession of accountancy.

The regulatory framework

2. The Legal Services Act 2007 ("the Act") introduced widespread reforms to the regulation and delivery of legal services. It provides for the regulation of those who carry on "reserved legal activities", defined by section 12 as:

   (a) the exercise of a right of audience;

   (b) the conduct of litigation;

   (c) reserved instrument activities;

   (d) probate activities;

   (e) notarial activities;

   (f) the administration of oaths.

3. Section 1(1) of the Act lists eight "regulatory objectives," namely:

   (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 [legal services];

   (f) encouraging an independent, strong, diverse and effective legal profession;

   (g) increasing public understanding of the citizen's legal rights and duties; and

   (h) promoting and maintaining adherence to the professional principles listed in section 1(3) (which include, among others, acting with independence and integrity).

4. One of the major changes brought about by the Act was the liberalisation of the business entities through which legal services can be delivered. The Act permitted, for the first time, the setting up of multi-disciplinary practices between lawyers and other professionals in what are commonly known as alternative business structures ("ABSs"). These are described in the Act as "licensable bodies" and defined in section 72. In broad terms they are bodies that are managed, owned in whole or in part, or controlled, by non-lawyers or by another body that has non-lawyers in control of at least 10% of its voting rights.

5. It is a criminal offence for any person (other than an exempt person) to carry on a reserved legal activity unless they are authorised to do so by an approved regulator or, in the case of a licensable body, unless they have a licence and are authorised to do so by a licensing authority.

6. The Act established the Legal Services Board ("the LSB") as the overarching regulator of persons or bodies which regulate reserved legal activities. The LSB has a duty, under section 3 of the Act, so far as is reasonably practicable to act in a way which is compatible with the regulatory objectives set out in section 1(1) of the Act, and which the LSB considers most appropriate for the purpose of meeting those objectives. The LSB must also have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principle appearing to it to represent the best regulatory practice.

7. The Act introduced arrangements for regulating ABSs as entities in parallel with, and not in substitution for, the regulation of the individual lawyers and other professionals operating within an ABS. This necessarily involves some degree of overlapping regulation, and rules are needed to resolve any conflicts between the regulatory scheme which applies to an entity and any different regulatory scheme or schemes applicable to the individuals operating within it. Sections 52-54 of the Act specifically address such potential conflicts. Thus, for example, if a conflict arises between a requirement of the regulator of an entity relating to the entity and a requirement of a different regulator in relation to any employee or manager of the entity who is authorised by it to carry on a reserved legal activity, the entity requirement prevails over the individual requirement (section 52(4)).

8. Many approved regulators and licensing authorities have signed up to a broad "Framework Memorandum of Understanding" which is intended to assist in resolving this type of conflict. This is a non-binding, aspirational document, which provides no specific or hard-edged rules or guidance. It does not fetter the actions of any individual regulator. In addition, some regulators have produced bilateral Memoranda of Understanding which seek to assist in mutual co-operation. Whilst these arrangements undoubtedly help, they cannot provide a panacea for all the complications and issues that may arise when there are multiple layers of regulation by different regulators.

9. Although increased regulatory independence was acknowledged to be a desirable step towards increasing confidence in the regulatory system and in legal professionals, Parliament stopped short of requiring that a regulator should be completely independent of the persons it regulates. Section 27 of the Act expressly recognizes

that an approved regulator may also have a representative function: that is, it may represent or promote the interests of persons regulated by it.

10. The LSB is expressly prohibited from interfering with the representative functions of such a regulator (section 29(1) of the Act). However, it may take steps for the purpose of ensuring that the exercise of the approved regulator's regulatory functions is not prejudiced by its representative functions, and that decisions relating to the exercise of an approved regulator's regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions (section 29(2)). To that end, section 30 of the Act obliges the LSB to make internal governance rules ("IGRs") setting out requirements to be met by approved regulators for that purpose.

11. The IGRs may be changed by the LSB from time to time. At the time of the decision challenged in this action, the applicable IGRs were the third version of such rules promulgated by the LSB, which came into force on 30 April 2014. Since the decision was made, the LSB has proposed and consulted on new IGRs, which are designed to further enhance regulatory independence.

12. The applicable IGRs contain several definitions that are not in the Act itself. The "principle of regulatory independence", which the IGRs require a regulator's arrangements to observe and respect, is defined as a principle that "structures or persons with representative functions must not exert, or be permitted to exert, undue influence or control over the performance of regulatory functions, or any person(s) discharging those functions". "Undue influence" is defined as "pressure exerted otherwise than in due proportion to the surrounding circumstances, including the relative strength and position of the parties involved, which has or is likely to have a material effect on the discharge of a regulatory function or functions". "Prejudice", an expression which appears in the Act but is not defined in it, is defined in the IGRs as "the result of undue influence, whether wilful or inadvertent, causing or likely to cause the compromise or constraint of independence or effectiveness."

13. A body that wishes to authorise persons or entities to carry on one or more of the reserved legal activities must apply in the first instance to the LSB under Schedule 4 of the Act (to become an approved regulator) or Schedule 10 of the Act (to become a licensing authority). A body can only apply to become a licensing authority in respect of reserved legal activities if it is already an approved regulator in respect of those activities or has applied to become such an approved regulator.

14. The Act prescribes a detailed scheme for applications, under which they are first scrutinised by the LSB to ascertain whether they meet specified statutory criteria. The application to the LSB is for two separate, but related things:

    (a) a <u>recommendation</u> by the LSB that an order be made by the Lord Chancellor designating the body as an approved regulator (or licensing authority as the case may be) in relation to the reserved legal activity or activities in question; and

    (b) <u>approval</u> by the LSB of that body's proposed regulatory arrangements (or licensing rules) <u>if such an order is made</u>.

See paragraph 3(2) of Schedule 4 and paragraph 1(2) of Schedule 10.

15. The LSB is required by paragraph 13 of Schedule 4 and paragraph 11 of Schedule 10 to the Act, respectively, to make rules specifying how it will determine such applications. Those paragraphs also specify certain provisions which such rules (the LSB's "application rules") must contain. This mandatory content of the application rules includes, among other things, a requirement that the LSB may grant an application in relation to a particular reserved legal activity only if it is satisfied that, if an order were to be made designating the body in relation to that activity, the applicant would have appropriate internal governance arrangements in place at the time the order takes effect. Furthermore, the rules made for that purpose must in particular require the LSB to be satisfied of the matters set out in section 30 of the Act.

16. The LSB is also obliged to carry out a consultation exercise before it determines an application. There are three statutory consultees: the Competition and Markets Authority ("the CMA"), the Legal Services Consumer Panel ("the Consumer Panel") and the Lord Chief Justice. But the LSB may also consult any other person whom it considers it reasonable to consult. The applicant has a right to see any advice given by the consultees, and to make written representations and (at the LSB's discretion) oral representations to the LSB about that advice.

17. If the LSB grants an application, it must recommend to the Lord Chancellor that an order be made designating the applicant as an approved regulator (or licensing authority as the case may be): see paragraph 16 of Schedule 4 and paragraph 14 of Schedule 10.

18. Where such a recommendation is made, paragraphs 17 and 15 of those Schedules respectively provide that the Lord Chancellor may either make an order in accordance with the recommendation or refuse to make such an order. Where the recommendation relates to more than one reserved legal activity, the Lord Chancellor may make an order in relation to all or any of them, but if the applicant has applied to be designated as a licensing authority as well as an approved regulator, the Lord Chancellor can only make an order designating the applicant as a licensing authority for those activities for which the applicant has also been designated an approved regulator.

19. If the Lord Chancellor decides not to make an order in accordance with the whole or part of the recommendation, the reasons for that decision must be stated in the decision notice sent to the applicant.

20. If the Lord Chancellor decides to make an order, then the order must be laid before Parliament for approval, by affirmative resolution under section 206(4) and (5) of the Act in the case of a decision to designate the applicant as an approved regulator, or in accordance with the negative resolution procedure under section 206(1) of the Act in the case of a decision to designate the applicant as a licensing authority.

The ICAEW's application

21. Over the course of the last 25 years the ICAEW has been a designated regulator under various statutes in the areas of audit, insolvency and investment business, subject to

oversight by the Financial Reporting Council, the Insolvency Service and the Financial Conduct Authority. In 2014, it was designated as an approved regulator and licensing authority under the Act for the reserved legal activity of probate. The unexpected level of demand for accountancy firms to provide probate services led to the ICAEW deciding to apply to be designated as an approved regulator and licensing authority under the Act for the other five reserved legal activities. The application was initially submitted to the LSB on 20 July 2016, although it was subsequently modified.

22. As regards the first three activities (rights of audience, conduct of litigation and reserved instrument activities) the application was restricted to legal services "relating to taxation". The purpose of seeking the designation was said to be to enable accountancy practices to complement their existing services relating to taxation by offering related legal services. Whilst some of the big accountancy firms had sought and obtained authorisation from the Solicitors Regulation Authority ("SRA") to offer these services, other firms had eschewed going down that route, as it would entail compliance by the firm with two different regulatory regimes.

23. Paragraphs 4.42 to 4.44 of the ICAEW's application dealt with how the ICAEW proposed to ensure that firms accredited to provide legal services "relating to taxation" would differentiate between those reserved legal activities that they would be entitled to carry out and those that they would not. The ICAEW had instructed counsel to draft definitions for this purpose and it was proposed that these definitions be incorporated into the ICAEW's legal services regulations, to seek to make clear what services could and could not be provided by accredited firms.

24. In December 2016, the ICAEW amended its application so as to restrict its ability to authorise individuals to carry out the reserved legal activities of exercising rights of audience and conducting litigation to "qualified lawyers only", i.e. persons who were already authorised as individuals by another approved regulator to provide such services. The reasons given for this amendment were that the ICAEW would have had to offer relevant legal training courses for any individuals it wished to authorise to carry out these activities, and such courses are expensive to develop. The ICAEW (and the professional course providers it consulted) thought it an unacceptably high commercial risk to incur such expenses before knowing the fate of its application for authorisation and whether there would be sufficient demand for training courses provided by the ICAEW if the application were granted.

25. This amendment to the application meant that, for any firm accredited by the ICAEW to exercise rights of audience or to conduct litigation, there would necessarily be one regulator for the entity (the ICAEW) and <u>at least</u> one other regulator for the individuals within it who were responsible for providing the services in question.

26. Section 11 of the application addressed the ICAEW's internal regulatory governance arrangements. The ICAEW's Charter provides that the body responsible for determining its overall objectives, strategy and budget is the ICAEW Council. The ICAEW Council is supported by the ICAEW Board, which is responsible for overseeing all matters relating to the development and implementation of ICAEW strategy, policy, operational plans and resources. Both these bodies cover both regulatory and representative matters and have no requirements for lay participation. In addition, there are four departmental boards, one of which is the ICAEW

Regulatory Board ("IRB"), which is at the apex of the ICAEW's regulatory structure. The IRB is responsible for overseeing the development of ICAEW policy in all areas of regulation (except probate), professional standards and discipline.

27. The IRB was created as a result of recommendations made by a regulatory governance review group, which reported to the ICAEW Council in December 2013. The ICAEW's previous Professional Standards Board was reconstituted in a way which gave it a greater degree of independence from the rest of the ICAEW in both substance and appearance, and was renamed as the IRB. Unlike the other departmental boards, the IRB does not formally report to the ICAEW Board. However, in discharging its role and responsibilities the IRB discusses matters with the ICAEW Board and the other departmental boards. It is chaired by a lay person appointed by an independent panel, and no member of the ICAEW Council or Board is permitted to serve on it. It now comprises equal numbers of lay representatives and ICAEW members.

28. There are three regulatory committees under the IRB to which the ICAEW's regulatory functions in the various areas it regulates have been delegated. Following the ICAEW's designation under the Act as an approved regulator and licensing authority in relation to probate activities, a fourth regulatory committee named the Probate Committee was established, to which the ICAEW's regulatory functions in respect of probate matters were delegated. Unlike the other regulatory committees, the Probate Committee was not made answerable to or subject to supervision by the IRB. Its members are selected by a separate appointments panel. It has an equal balance of practitioners in the regulated areas and lay members, and is chaired by a lay member, who has a casting vote.

29. Although the Probate Committee is obliged to consult with the IRB and other stakeholders on matters of policy, or if amendments to the ICAEW's probate regulations are proposed, it has the ultimate responsibility for determining those matters. Neither the ICAEW Council nor the ICAEW Board nor the IRB nor any other committee may intervene directly in the Probate Committee's work. The Probate Committee sets its own fee rates for probate accreditation and any increase in those rates must be approved by the LSB. The Probate Committee may communicate directly with the LSB and can inform the LSB if it considers that its independence is being compromised in any way. There is no internal appeal against a decision of the Probate Committee; instead, an appeal lies directly to the First-tier Tribunal of the General Regulatory Chamber.

30. If the ICAEW considers that the Probate Committee is not discharging its functions appropriately, it must notify the LSB. It may request the LSB to take appropriate action to ensure that the Probate Committee does discharge its functions in accordance with the ICAEW's probate regulations and the regulatory objectives set out in the Act. To date, there appear to have been no concerns raised about the way in which the Probate Committee has performed its functions.

31. In its application, the ICAEW stated in paragraph 11.7 that it considered that the approach undertaken to date in relation to the Probate Committee was in keeping with the principle of regulatory independence and the outcomes sought by the LSB's IGRs. The application went on to describe the ICAEW's plan to increase the number of members of that committee from 10 to 12, and to rename it the Legal Services

Committee ("LSC"). It stated in paragraph 11.48 that the IRB would have no power to overturn or determine the regulatory decisions of the LSC and that, despite being situated within the ICAEW's existing governance structures, the future LSC, like the Probate Committee before it, would have full autonomy and independence in dealing with matters in relation to legal service practitioners, and would have the freedom to report matters as necessary to the LSB.

32. Paragraph 11.49 of the application stated:

> "The IRB is however charged with ensuring that ICAEW's regulatory body runs the processes that underpin the licensing and disciplinary work effectively and efficiently. The IRB is therefore responsible for the quality assurance procedures and quality and efficiency of the work of the regulatory board. This will include such matters as remuneration, appraisal and discipline of persons appointed to the regulatory board. …"

33. The ICAEW submitted that its proposed governance arrangements were proportionate, as they would allow cost savings and synergies to be achieved through sharing services with the ICAEW's representative arm (such as IT, human resources and procurement) – areas which do not infringe on the ability to regulate independently. If the ICAEW were required to fully separate its legal services regulatory function, it was estimated that this would increase the cost base, and therefore fees, by around 30%.

34. The ICAEW's application ran to 125 pages plus 33 annexures, including the responses to a public consultation. It is not the easiest of documents to comprehend, and the reader's task is not assisted by the inconsistent use of terminology. For example, the LSB is referred to as "the LSB" in paragraphs 11.25, 11.29, and 11.48, but in paragraphs 11.49 and 11.55 it is referred to as "the Board", an expression used earlier in the application to denote the ICAEW Board (see, for example, paragraphs 3.17 and 11.46). It is only by cross-referencing to the text of the IGRs referred to at the end of paragraphs 11.49 and 11.55 of the application that it becomes apparent that "the Board" referred to in those paragraphs is the LSB.

Evidence from the notarial bodies

35. At present, all notaries are appointed by the Master of the Faculties of the Archbishop of Canterbury, who is an approved regulator under the Act. In the course of the public consultation which preceded the ICAEW's application, the Master of the Faculties wrote to the ICAEW expressing concerns about its proposal to regulate notaries and to license the provision of notarial services by firms led by accountants. His main concerns were: (i) what he described as the "inevitable impact" on the exercise of independent judgment of the persons providing notarial services; (ii) the risk that notarial acts would not be given the same recognition and status in foreign jurisdictions as at present; and (iii) the risk that the respect and prestige enjoyed by English and Welsh notaries abroad would be diminished. The Master of the Faculties subsequently repeated these concerns to the LSB.

36. The Notaries Society, which represents the majority of notaries in England and Wales and has appeared in the present proceedings as an interested party, also wrote to the

ICAEW, and subsequently made submissions to the LSB jointly with the other body that represents notaries (the Society of Scrivener Notaries), objecting to the proposal. Amongst other matters, their submissions referred to a decision issued by the General Directorate of Registries and Notaries of Spain relating to the rejection by a Spanish Property Registrar of a power of attorney attested by an English notary and stating (erroneously) that English notaries are not legally qualified. It was pointed out that this misunderstanding, which may be partly explained by conflation of English notaries with US notaries (who do not have to be lawyers), is widespread in civil law jurisdictions and that allowing the accountants' professional body to regulate firms employing English and Welsh notaries was likely to exacerbate this situation. The submissions also appended a letter from the President of the International Union of Notaries, who expressed the opinion that the appointment of an additional regulator of persons providing notarial services in England and Wales would cause confusion in overseas jurisdictions and would adversely affect the smooth circulation of English and Welsh notarial acts – to the disadvantage of members of the public.

37. In its application, the ICAEW emphasised that, while it was the ICAEW's intention to accredit both firms and individuals to carry out notarial activities, such individuals would have to be qualified notaries in their own right and would also be individually regulated by the Master of the Faculties. The ICAEW also said that it did not agree with the Master of the Faculties that enabling accountancy-led firms regulated by the ICAEW to provide notarial services would compromise a notary's independence or affect a notary's recognition, status, respect and prestige abroad.

The advice of the statutory consultees.

The CMA

38. The CMA's advice was, in essence, that provided the LSB was satisfied that the ICAEW's proposed regulatory arrangements were appropriate and afforded adequate protection for consumers, then granting the application was unlikely to restrict or distort competition within the market for reserved legal services. Indeed, it could strengthen competition for the relevant services and help to reduce cost and delays. The CMA noted concerns expressed by other parties relating to the potential for confusion about the scope of taxation services and certain other specific queries. It said that the LSB was best placed to evaluate the ICAEW's assurances on how these matters would be addressed, but the CMA considered that the positive effects of new entry into the market were likely to outweigh these concerns.

The Consumer Panel

39. The Consumer Panel was "broadly supportive" of the ICAEW's application but expressed concerns about how the proposed regulatory regime might operate in practice and how the limitations on its scope would be communicated to consumers. It acknowledged that safeguards had been put in place to protect the regulatory independence of the LSC, but stated:

> "While these safeguards were appropriate when the ICAEW was applying solely in respect of probate, now that there will be a broader offering of services to consumers we are concerned

> that this will not stand the test of time, and as such continue to support the principle of full regulatory independence."

40. The Consumer Panel also emphasised the need for a clear distinction concerning what work a provider can and cannot do and noted that the ICAEW was proposing to rely for this purpose on "information remedies" such as written notices issued at the time of engagement of a service. The Consumer Panel said that it had seen no evidence or research conducted by the ICAEW into who its consumers are, or how effective the proposed remedies would be, and urged the ICAEW to carry out further work to better inform its approach.

The Lord Chief Justice

41. After referring to, and echoing, the concerns voiced by the Consumer Panel, the Lord Chief Justice began his own advice by reiterating concerns which he and his predecessor had previously expressed about the risks of regulated persons shopping around for the least restrictive regulatory regime. He stressed the importance of maintaining the highest professional standards of conduct and ethics in relation to litigation, which he described as "one of the twin foundations of the pre-eminence of London as an international centre for dispute resolution". Against that background, he expressed serious concerns about the ICAEW's application in relation to the conduct of litigation, rights of audience and, by association, notarial activities.

42. The Lord Chief Justice said that it seemed to him to be entirely premature for the ICAEW to seek designation as an approved regulator in relation to these reserved legal activities when it had no immediate intention or ability to offer qualifications and, subsequently, individual authorisations in respect of them. He pointed out that the ICAEW itself acknowledged that the demand for the qualifications would still remain "very uncertain" even if its application were approved. As the application currently stood, the ICAEW could only seek to authorise and regulate non-ICAEW-qualified individuals (such as solicitors and barristers). This would mean that it could not authorise (as opposed to license) entities to undertake the relevant activities, given its expectation that mainly accountancy-led practices would seek accreditation.

43. The Lord Chief Justice went on to point out a lack of clarity in the application and proposed regulations concerning whether a qualified lawyer working within an ICAEW licensed entity would (i) continue to be regulated by the regulator connected to their own profession (such as the Solicitors Regulation Authority or the Bar Standards Board), or (ii) be authorised and regulated by the ICAEW; or (iii) be required to hold dual authorisation; or (iv) be authorised by the ICAEW, but with conduct matters being left to the professional regulator. He then set out potential problems or objections in relation to each of these scenarios.

44. The Lord Chief Justice concluded as follows:

> "Regardless of the intended approach to the non-ICAEW qualified individuals, as the substance of the ICAEW qualification regime will be determined at some future point, I do not see how I can properly advise as to the likely impact on the courts and tribunals of England and Wales. I appreciate that designation as an approved regulator is a statutory

> prerequisite to designation as a licensing authority: however, for the above reasons and due to the complexity and confusion that could result, I must strongly oppose the application."

45. The Lord Chief Justice, however, added that these concerns did not arise in relation to reserved instrument activities "restricted to services relating to taxation" and the administration of oaths. He observed that those designations seemed a far more appropriate next step for the ICAEW to take as it builds capacity as an approved regulator and licensing authority in respect of reserved legal activities.

The LSB's recommendation

46. On 23 June 2017 the LSB wrote to the Lord Chancellor formally recommending that the ICAEW be designated as an approved regulator and licensing authority with respect to all the reserved legal activities. It set out its reasons for the recommendation in a decision notice.

47. In terms of governance and independence, the LSB said that, because the ICAEW was not an "applicable approved regulator" as defined in the IGRs, it did not have to comply fully with the requirements of those rules (and thus, for example, it did not need to have a lay majority on the governing body of the committee carrying out the regulatory function). The LSB observed that the LSC (as the Probate Committee would become) would be a new committee with expanded terms of reference and membership, and said it was satisfied that the arrangements for the proposed LSC would allow the ICAEW to exercise the regulatory functions in a way that was not prejudiced by its representative functions.

48. The LSB noted that the current Probate Committee's "low profile" might contribute to the perception that probate regulation was not wholly independent from the ICAEW. It said that, if the application was granted and more legal services were delivered through the ICAEW, the ICAEW's regulation of those activities "should be subject to enhanced scrutiny and in particular there needs to be greater transparency about the nature of the governance arrangements." The LSB also noted the ICAEW's agreement that "the new LSC will need to have a higher profile than the Probate Committee" and acknowledged that "there is scope for the LSC to adopt a much more robust profile going forward". The LSB said that it was, however, encouraged by the ICAEW's commitment to enhance the role of the LSC and that the LSB would maintain closer oversight of how independence operates in practice at the ICAEW through bi-annual meetings with the Chair of the LSC.

49. As regards the conduct of litigation, the exercise of rights of audience and reserved instrument activities, the LSB noted that the ICAEW proposed to restrict the scope of its regulation to "taxation services". The LSB saw nothing in the definition of such services which caused it concern. It said that it did have a more general concern about how practitioners and consumers would know what was in scope and that there might be a risk of firms straying beyond tax matters. But it considered that the robustness of the definition and the policing of the boundaries would only be tested if ICAEW-accredited firms were permitted to provide the relevant services. The LSB was satisfied that the ICAEW had appropriate arrangements in place to exercise effective oversight.

50. With regard to the application to regulate notarial services, the LSB noted the public interest arguments raised by the Master of the Faculties and by the notaries' representative bodies, in particular their concerns that independent judgment could be compromised and that the respect and prestige enjoyed by English and Welsh notaries abroad would be diminished. However, the LSB said that it considered that these were these low risks given that all notaries working in ICAEW-accredited entities would be authorised by the Master of the Faculties. It considered that there were adequate safeguards in place to ensure, so far as reasonably possible, that the independent judgments of notaries working in such firms would not be compromised.

51. The LSB also referred to the issues and concerns raised by the Lord Chief Justice but said that, on balance, having carefully considered his advice, it was of the view that there were "effective controls and mitigations" to address the significant issues he had raised.

The Lord Chancellor's decision

52. In his decision notice, the Lord Chancellor explained that, after considering the recommendation and supporting documentation, he had decided not to make the relevant orders. He set out five reasons for his decision under the following headings: governance and independence, the Lord Chief Justice's objections, taxation services, notarial services and complementary activities.

Governance and independence

53. The Lord Chancellor's first reason was that he did not consider that the ICAEW's proposed governance arrangements would either be, or be seen to be, sufficiently independent of its representative functions. In particular, he was concerned that the proposed LSC and the IRB would neither be, nor be seen to be, suitably independent from the ICAEW's main Board and governing Council. In support of this conclusion, the Lord Chancellor referred specifically to three passages in the ICAEW's application; to the concerns expressed by the Consumer Panel that the safeguards currently in place for probate services would not stand the test of time now that there would be a broader offering of services to consumers; and to the LSB's own expressed concerns about the lack of a fully robust and proactive approach taken by the ICAEW's Probate Committee.

The Lord Chief Justice's objections

54. Secondly, whilst acknowledging that the LSB and the ICAEW had thoroughly considered the Lord Chief Justice's concerns, the Lord Chancellor said he believed that the Lord Chief Justice had raised valid and material points. In particular, he agreed with the Lord Chief Justice that it seemed premature to designate the ICAEW as an approved regulator in relation to the exercise of rights of audience and the conduct of litigation when it had no immediate intention or ability to offer qualifications or individual authorisation. The Lord Chancellor said:

> "It does not appear to be in the public or consumer interest to encourage a situation where an individual providing reserved legal activities would need to be regulated by a separate legal services regulator to the entity that they worked within. Such

> an approach would not appear to be beneficial as it would add complexity to the regulatory landscape by encouraging layers of legal services regulation which in turn may increase the likelihood of regulatory conflict and ultimately lead to consumer confusion in the case of misconduct."

Taxation services

55. The Lord Chancellor's third reason for deciding not to make an order related to the ICAEW's proposal to restrict its regulation of the exercise of rights of audience, the conduct of litigation and reserved instrument activities to "taxation services". The Lord Chancellor said that he shared concerns raised by the Consumer Panel and echoed by the Lord Chief Justice that such a limitation would likely be difficult to manage in practice and challenging to communicate to consumers. He believed that the limitation would add complexity to the regulatory landscape and lead to consumer confusion, which he did not believe to be in the public interest.

Notarial services

56. With regard to notarial services, the Lord Chancellor referred to the concerns raised by the two professional bodies which represent the notarial profession and reiterated by the President of the International Union of Notaries. The Lord Chancellor said that he had paid particular attention to their concerns that the ICAEW's regulation of entities providing notarial services could lead to the independence of English and Welsh notarial acts being questioned, and in a worst case scenario not being recognised, in other jurisdictions. He said that he was not convinced that the ICAEW's application provided sufficient evidence or analysis to demonstrate that there would not be such an adverse impact.

Complementary activities

57. Finally, the Lord Chancellor addressed the ICAEW's contention, which formed a large part of its rationale for seeking the designations, that there was a natural link between the additional reserved legal activities and the current services offered by accountancy firms, with the activities purportedly complementing each other. The Lord Chancellor said that there was a material distinction between the tax work which accountancy firms currently undertake and the additional reserved legal activities they were seeking to undertake. He pointed out that it is one thing for accountancy practices to be expert in taxation, but quite another for them to be proficient in the conduct of civil or criminal litigation in the courts.

The claim for judicial review

58. In its claim for judicial review, the ICAEW challenges the lawfulness of each of the five reasons given by the Lord Chancellor for his decision. It recognises that the decision was based on each reason individually (as well as collectively) so that, as regards each of the five reserved activities for which the Lord Chancellor declined to make an order, the challenge to his decision will only succeed if each of the reasons relevant to that activity is shown to have been legally erroneous or inadequate.

59. That said, it is clear from the decision letter (including the penultimate paragraph) that the Lord Chancellor attached particular importance to the first reason – that the ICAEW's proposed governance arrangements were not sufficiently independent of its representative functions. Moreover, unlike other reasons given, this reason potentially applies to the whole of the ICAEW's application and its suitability to regulate all the reserved activities. It is unsurprising in these circumstances that the ICAEW's challenge to this reason for the Lord Chancellor's decision was put at the forefront of its case.

Governance and independence: alleged critical error of law

60. The primary ground on which the Lord Chancellor's first reason is challenged is that it is said to have involved an error of law – variously described by counsel for the ICAEW in their skeleton argument as "critical", "serious" and "fundamental". The alleged error is that, in concluding that the ICAEW's proposed regulatory arrangements were insufficiently independent of its representative functions, the Lord Chancellor is said to have applied his own test of independence which was different from, and more demanding than, the test which, on the ICAEW's case, he was legally bound to apply. The ICAEW contends that, on the proper interpretation of the Act, the sole standard of regulatory independence which it is permissible for the Lord Chancellor to apply in assessing an applicant's proposed governance arrangements is whether those arrangements comply with the IGRs made by the LSB pursuant to section 30 of the Act.

61. As mentioned earlier, section 30 requires the LSB to make IGRs setting out requirements to be met by approved regulators. Section 30, and the IGRs made pursuant to it, do not directly apply to a body, such as the ICAEW, which is not at present an approved regulator in relation to a particular reserved activity but is applying to become one. Nevertheless, the application process requires the applicant to seek the LSB's approval for its proposed regulatory arrangements (see paragraph 3(2) of Schedule 4) and the LSB may grant the application only if it is satisfied that the applicant, if designated as an approved regulator, would have appropriate internal governance arrangements in place (see paragraph 13(2)(a) of Schedule 4). It is therefore logical that the test of regulatory independence which the LSB applies in deciding whether to grant applications (contained in the LSB's application rules) is the same as the test that the LSB will apply if the application is granted and the applicant is designated as an approved regulator.

62. It is worth noting, however, that the starting-point for the LSB's assessment of whether the ICAEW's proposed internal governance arrangements were sufficiently independent of its representative functions was its conclusion that the ICAEW was not an "applicable approved regulator" and, as a result, did not have to comply fully with the LSB's IGRs. This was essentially because the persons whose legal activities the ICAEW proposed to regulate were not persons whose primary reason for being regulated by the ICAEW was their qualification to practise a reserved legal activity. In those circumstances the LSB applied less onerous requirements to the ICAEW than those which an "applicable approved regulator" would have to meet. Notably, the ICAEW (unlike, for example, the Law Society) was not required by the LSB to have a majority of lay persons on its regulatory board.

63. In any event, there is nothing in the Act which states that, in deciding whether to make an order designating an applicant as an approved regulator, the Lord Chancellor must use the LSB's rules as the sole benchmark of regulatory independence and is bound to accept that the applicant's regulatory functions are sufficiently independent of its representative functions provided he is satisfied that its proposed governance arrangements comply with the LSB's rules.

64. Ms Lieven QC on behalf of the ICAEW submitted that such a requirement is nevertheless implicit in the scheme of the Act. She argued that for the Lord Chancellor to apply a different and more onerous standard of regulatory independence to an applicant for designation as an approved regulator from the standard applicable to those who are already designated as approved regulators under the Act would create an illogical inconsistency and lead to arbitrary and inconsistent decisions.

65. We recognise the force of the argument based on consistency but it does not, in our view, justify reading into the Act a particular and precise requirement of the kind contended for by the ICAEW which Parliament has not seen fit to specify. The Act is a detailed and intricately crafted piece of legislation. It prescribes three stages to the process of designation as an approved regulator, of which approval by the LSB of the applicant's proposed governance arrangements and the making of a recommendation by the LSB is only the first. A decision by the Lord Chancellor to make, or refuse to make, an order in accordance with the LSB's recommendation, and the approval of Parliament for any such order, are further and separate stages of the process. If the legislative intention had been to oblige the Lord Chancellor – let alone Parliament – to apply a specific set of rules in making his decision, or to limit his consideration to whether the LSB has correctly applied its own rules, then it is reasonable to expect that the Act would have said so expressly. In circumstances where it does not, we see no justification for imputing to Parliament an intention to impose such an obligation *sub silentio*.

66. It does not follow that the discretion of the Lord Chancellor is completely unfettered. In accordance with the general principle established by *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and subsequent cases, the Lord Chancellor's decision-making power must be exercised in a way which will promote the policy and purposes of the Act. In terms of regulatory independence, the relevant statutory policy and purpose are expressed in sections 29 and 30, being the purpose of ensuring (a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and (b) that decisions relating to the exercise of an approved regulator's regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions. The very fact, however, that the LSB is required to make rules setting out requirements to be met for this purpose, and that those rules may be amended from time to time, shows that there is scope for judgment and differences of opinion about what particular requirements the internal governance arrangements of a body should have to satisfy in order to ensure that the statutory objectives are achieved.

67. There is nothing in the Act which precludes the Lord Chancellor from exercising his own judgment on that question. Indeed, as the person given responsibility under the statute for deciding whether or not to make an order designating an applicant as an approved regulator, he is bound to do so. He must form his own view of whether the

internal governance arrangements of the applicant are sufficiently independent to fulfil the statutory policy and purpose expressed in sections 29 and 30. In forming that view, the Act does not require him to endorse judgments or decisions which the LSB has made either in making or in applying its IGRs.

68. Considerations of consistency could be relevant in other ways. It is possible, for example, that to apply to an applicant for designation as an approved regulator criteria or requirements which are manifestly much more onerous than those applicable to bodies which are already designated as approved regulators could give rise to a challenge based on principles of fairness in public administration. The argument made by the ICAEW, however, is the more far-reaching one that, correctly interpreted, the Act imposes a statutory obligation on the Lord Chancellor, in deciding whether or not to make an order for designation, to assess regulatory independence solely by reference to the LSB's own rules. For the reasons given, we do not accept that such an obligation can be found in the Act.

69. Some of the submissions made on behalf of the ICAEW, as we understood them, went further in their criticism of the Lord Chancellor's approach than complaining that he did not apply the LSB's IGRs. It was also suggested that, in considering the ICAEW's application, the Lord Chancellor applied a standard of independence which was different from, and inconsistent with, the standard embodied in section 30 of the Act itself. Thus, Ms Lieven QC highlighted the Lord Chancellor's statement in his decision letter that he was "keen to ensure that, as envisaged by the [Act], the regulation of the legal services sector is not <u>influenced</u> by the representative functions of approved regulators" (emphasis added). Ms Lieven submitted that the use of the word "influenced" indicates that the Lord Chancellor misunderstood what the Act envisages, as the test embodied in section 30 and paragraph 13(3) of Schedule 4 requires only that the exercise of a body's regulatory functions is not or would not be "prejudiced" by any representative functions – which she submitted is a lesser standard.

70. We do not consider that there anything in this semantic distinction. As Ms Wakefield on behalf of the Lord Chancellor pointed out, the IGRs themselves define "prejudice" in terms of "undue influence". Furthermore, the proposed new IGRs, promulgated by the LSB since the Lord Chancellor's decision was taken and which are said to be drawn "more explicitly" from the Act, define the "overarching duty" of each approved regulator as being to ensure that decisions are not "influenced" by representative functions. In any case, the Lord Chancellor went on in his decision letter to explain his concerns as being that the proposed LSC and the IRB would not be, or be seen to be, "suitably independent" from the ICAEW's main Board and governing Council; that the ICAEW's proposed regulatory framework provided the IRB, which itself had a close relationship with the representative arm, with "substantial influence" over the proposed LSC; and that he was not convinced that the proposed LSC would be seen to be "sufficiently independent" from the wider ICAEW. In the conclusion of this section of the decision letter he again used the phrase "sufficiently independent". When the relevant part of the letter is read fairly and as a whole, we see no reason to conclude that, when the Lord Chancellor used the word "influence", he meant something other or less than communication of a kind which was liable to prejudice the exercise of regulatory functions and/or prevent

decisions relating to the exercise of such functions from being taken independently of decisions relating to the exercise of representative functions.

71. Ms Lieven also submitted that the concern expressed by the Consumer Panel that the ICAEW's governance arrangements would not "stand the test of time" – which the Lord Chancellor said that he found "particularly persuasive" – was premised on the position of the Consumer Panel that there should be complete separation between regulatory and representative functions, which would go beyond what the Act requires. She argued that this shows that the Lord Chancellor was applying a higher, aspirational standard of independence than that prescribed by the statute as well as the LSB's IGRs.

72. We have quoted (at paragraph 39 above) the passage in the advice of the Consumer Panel on which the Lord Chancellor particularly relied. It is unclear exactly what the Consumer Panel meant by the "principle of full regulatory independence" which it said that it continued to support. But it is reasonable to understand the concern that safeguards that were appropriate to protect regulatory independence "when the ICAEW was applying solely in respect of probate" would not "stand the test of time" now that "there will be a broader offering of services to consumers" as premised on what the Consumer Panel saw as the expected direction of travel within the existing legislative framework rather than on any expectation that new legislation will be enacted (of which there is no hint in its advice).

73. The essential concern of the Consumer Panel, as we read its advice, was that governance arrangements that were sufficiently independent to provide effective regulation when the only reserved legal activity regulated by the ICAEW was the limited one of probate would be insufficient if the regulated activities increased significantly in scope and nature. This was a concern which the LSB itself appeared to endorse in its decision notice. It cannot be said that such a view was one that no reasonable adviser or decision-maker could hold. The activities, in particular, of conducting litigation and exercising rights of audience in courts are considerably more complex and raise much more wide-ranging and challenging regulatory issues than preparing papers for probate. It is certainly not irrational to consider that more robust and transparent arrangements for protecting of regulatory independence are needed before a body which performs representative as well as regulatory functions is allowed to expand its remit from regulating only probate activities to regulate the conduct of litigation and exercise of rights of audience as well.

74. In our view, therefore, the Lord Chancellor was entitled to regard the advice of the Consumer Panel as supporting the conclusion that the ICAEW's proposed governance arrangements were not sufficient to satisfy the standard of regulatory independence embodied in section 30 of the Act, and it cannot be inferred from the fact that he found the view of the Consumer Panel persuasive that he was applying a test of independence that was inconsistent with the current statutory regime.

75. In sum, we see no evidence that the Lord Chancellor made an error of law in his approach to the issue of governance and independence, as alleged by the ICAEW.

Governance and independence: other alleged errors

76. The ICAEW made a number of further challenges to the lawfulness of the reasons given by the Lord Chancellor for concluding that the ICAEW's proposed internal governance arrangements were not sufficiently independent of its representative functions. In particular, it was submitted that the concerns expressed by the Lord Chancellor about aspects of those arrangements as described in the ICAEW's application showed that he had "fundamentally misunderstood" the proposed structure, with the result that his decision was premised on a material error of fact. It was also submitted that it was irrational for the Lord Chancellor to rely on concerns expressed by the LSB in its decision notice about the low profile and lack of a fully robust approach on the part of the ICAEW's Probate Committee, when the LSB had not itself regarded those concerns as a reason to reject the ICAEW's application. In the alternative, it was argued that the Lord Chancellor did not adequately explain why he did not accept the LSB's assessment that its concerns were met by the ICAEW's commitment to enhance the role of the LSC, combined with the closer oversight which the LSB intended to exercise.

Alleged mistake of fact

77. In making the first of these arguments, the ICAEW relied on the principle that a mistake of fact giving rise to unfairness is a basis for challenging the legality of a decision. As held by the Court of Appeal in the leading case of *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044, at para 66, in order to succeed in such a challenge, it must ordinarily be shown that: (1) the decision-maker made a mistake as to an existing fact; (2) the mistake is "established" in the sense that it is uncontentious and objectively verifiable; (3) the claimant was not responsible for the mistake; and (4) the mistake played a material, though not necessarily decisive, part in the reasoning for the decision.

78. On behalf of the ICAEW it is alleged that the Lord Chancellor "fundamentally misunderstood" the ICAEW's proposed internal governance arrangements in two respects. First, complaint is made that he took a statement in the ICAEW's application (at paragraph 3.17) that the IRB "discusses matters" with the ICAEW Board and relevant departmental boards to indicate that "there is, and will continue to be, a close relationship between ICAEW's regulatory board and other areas of the ICAEW involved in representative functions." The ICAEW maintains that this was wrong. Second, the Lord Chancellor was "further concerned", on the basis of other statements quoted from the application, that the ICAEW's proposed governance arrangements gave the IRB "substantial influence over regulatory matters and the proposed [LSC]." It was submitted on behalf of the ICAEW that neither passage quoted by the Lord Chancellor, when read in context, supports that conclusion at all.

79. Both these points are, at the very least, contentious and, as it seems to us, plainly matters of opinion and evaluation rather than of objectively verifiable fact. As such, the first two requirements identified in the case of *E* for a challenge based on a mistake of fact are not satisfied.

80. Paragraph 3.17 of the ICAEW's application referred to the IRB's position "at the apex" of the ICAEW's regulatory structure and to its responsibility for "overseeing the development of ICAEW policy in all areas of professional standards, including

discipline." It went on to state that, "[i]n discharging its roles and responsibilities, the IRB discusses matters with the ICAEW Board and relevant departmental boards." The Lord Chancellor was entitled to assume that these statements were accurate and meant just what they said. Although a suggestion was made in the ICAEW's statement of facts and grounds served at the start of these proceedings that the phrase "discusses matters with" simply meant "informs", that suggestion was no longer maintained at the hearing. The argument advanced was that the Lord Chancellor was wrong to think that the fact of such discussion indicated that there was a close relationship between the regulatory and representative arms of the ICAEW, which could be regarded as incompatible with the principle of regularity independence.

81. Ms Lieven argued that all unitary bodies (i.e. those like the ICAEW, or the Law Society, which have both regulatory and representative functions) need to have some dialogue between the regulatory arm and the representative arm on matters of corporate responsibility. Even though the regulatory functions are delegated within the organisation, the unitary body must retain responsibility for supervising and monitoring the regulatory arm to ensure compliance with the Act and, in this context, there is nothing untoward in the IRB having discussions with the ICAEW Board and other relevant departmental boards.

82. The difficulty with this explanation is that the ICAEW's application contains no suggestion that the matters which the IRB discusses with the representative arm of the ICAEW are limited to matters of corporate governance. The clear impression given is that the matters discussed may relate to any aspect of how the regulatory arm of the ICAEW discharges its roles and responsibilities. We certainly do not accept that discussion of that kind is a necessary consequence of the fact that the ICAEW is a unitary body, nor that it is consistent with the separation of functions required by the Act for the main Board of such a body to supervise or monitor the way in which the regulatory arm is exercising its functions in order to ensure that it is complying with the Act.

83. It cannot be said to be irrational to treat the fact of such discussion as suggesting that the ICAEW's internal governance arrangements are not sufficient to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions, as the Act requires. Furthermore, the inference which the Lord Chancellor drew as to there being a close relationship between the IRB and the representative side of the ICAEW does not seem a surprising one given that, as Ms Wakefield pointed out, the ICAEW had itself perceived a need to segregate the Probate Committee / LSC from the IRB – the reason for that presumably being that the IRB was felt to be too close to the representative arm of the body to satisfy the requirement of independence in regulating reserved legal activities.

84. In these circumstances we can see nothing wrong with the conclusion that the Lord Chancellor drew from paragraph 3.17 of the ICAEW's application, let alone any misconception which could be said to amount to a mistake as to an established fact.

85. The Lord Chancellor's perception that the IRB was not suitably independent of the areas of the ICAEW involved in representative functions focused attention on the adequacy of the arrangements made to separate the regulation of legal activities by the

Probate Committee / LSC from the IRB, whose main responsibility is the general regulation of accountants.

86. Ms Lieven submitted that the passages quoted in the Lord Chancellor's letter from paragraphs 3.21 and 11.49 of the ICAEW's application, if correctly understood, provided no support at all for his expressed concern that the proposed arrangements gave the IRB "substantial influence" over (legal) regulatory matters and the proposed LSC. Ms Lieven submitted that paragraph 3.21 had nothing to do with the relationship between the IRB and the Probate Committee /LSC, but dealt with the ability of the IRB to take an overview of the quality of the processes underpinning decisions taken by the Investigation Committee, the Disciplinary Committee and the Appeal Committee which, unlike the Probate Committee, remained under its remit.

87. Ms Lieven further submitted that the statutory scheme could not operate properly without a unitary body having some responsibility for overseeing the efficiency and quality of its regulatory processes, which was the subject of paragraph 11.49 of the application. The application had previously made it clear that the IRB has no power to overturn the decisions, membership or function of the Probate Committee, and that the Probate Committee is financially independent of the representative arm. She said that the LSB had met with representatives of the ICAEW and understood its governance structure, whereas the Lord Chancellor did not have the same level of involvement, which would explain why he did not fully understand what was being proposed.

88. Whilst she accepted that paragraph 3.21 of the application does not directly refer to the LSC or the Probate Committee, Ms Wakefield on behalf of the Lord Chancellor pointed out that the Investigation Committee and the Disciplinary Committee would both consider cases relating to the supply of legal services, as is confirmed in paragraph 3.48 of the application. Moreover, the Probate Committee and its proposed successor were deliberately excluded from the type of direct supervision by the IRB described in that paragraph.

89. Paragraph 11.49 of the application stated that the IRB would be responsible for the quality assurance procedures and quality and efficiency of the work of the regulatory board [i.e. the LSC]. This would include such matters as remuneration, appraisal and discipline of persons appointed to the LSC. The fact that it has a say in their remuneration or appraisal or discipline would still – Ms Wakefield submitted – put the IRB in a position to be able to exert significant influence over them. Given that the view could reasonably be taken that the IRB itself was insufficiently independent of the ICAEW Board and Council – indeed, that was the very reason for separating the Probate Committee from the IRB in the first place – the concerns expressed by the Lord Chancellor were justifiable.

90. Whether the concerns expressed by the Lord Chancellor were justified or not is not for this court to judge. It is sufficient to say that they cannot be characterised as irrational, and that it is impossible to infer that they were based on any factual mistake about the nature of the ICAEW's governance arrangements, let alone a mistake as to an established fact which was uncontentious and objectively verifiable.

Reliance on concerns of the LSB

91. The other aspect of the Lord Chancellor's reasoning challenged by the ICAEW is his reliance on concerns expressed by the LSB in its decision notice as giving reasonable cause to fear that the proposed LSC would not be seen to be sufficiently independent from the wider ICAEW. The Lord Chancellor referred to the views expressed in the LSB's decision notice that "the current Probate Committee's low profile might contribute to the perception that probate regulation was not wholly independent from the ICAEW" and that "there is scope for the LSC to adopt a much more robust and proactive role going forward." Counsel for the ICAEW emphasised that the LSB did not simply express these concerns without suggesting any remedy. It proposed that the LSC should be of a higher calibre and profile than the current Probate Committee and that the LSB should monitor its progress. In other words, the LSB suggested a scheme for the future LSC which would address perceived weaknesses of the existing Probate Committee.

92. The ICAEW contended that it was irrational in these circumstances for the Lord Chancellor to rely on the LSB's concerns about the lack of a fully robust and proactive approach taken by the existing Probate Committee. This was to assume that the remedial measures proposed by the expert regulator would not be effective, without any evidence to support that assumption. Alternatively, it was at least incumbent on the Lord Chancellor to give reasons for concluding that the remedial measures proposed by the LSB could not be relied on to ensure that the proposed governance arrangements would not be seen to be sufficiently independent, which he failed to do.

93. Ms Wakefield stressed that it was no part of the Lord Chancellor's case to suggest that the Probate Committee was not providing adequate regulation of probate activities. However, she submitted that the Lord Chancellor was entitled to attach weight to the LSB's own views, which fitted in with the view of the Consumer Panel, that, if the ICAEW were to be approved to regulate more reserved legal activities, there would need to be greater transparency about the nature of the governance arrangements and the new LSC would need to adopt a much more robust and proactive role. Whilst the Lord Chancellor was obviously aware of the proposed changes (to which reference was made in his decision letter), which consisted principally of some changes to the composition of the Committee and a plan for the LSB to maintain closer oversight, he was not obliged to assume that these measures would be successful in remedying the perception of lack of independence and other weaknesses acknowledged by the LSB.

94. We agree with Ms Wakefield's submissions. As already discussed, the Lord Chancellor was not bound to share the LSB's view of what governance arrangements were sufficient to achieve the objectives of the Act and was entitled to scrutinise and form his own judgment about the adequacy of the ICAEW's proposed arrangements. It cannot be regarded as irrational for the Lord Chancellor in reaching his overall conclusion to attach greater weight to the concerns expressed by the LSB in its own decision notice than the LSB did itself. Particularly when what was required was a predictive judgment about the adequacy of proposed future arrangements if the remit of the ICAEW were to be substantially expanded, the Lord Chancellor was not bound to assume or to endorse the LSB's judgment that the proposed arrangements would

prove to be sufficiently robust and transparent. He was entitled to take a more cautious approach.

95. As for the argument that the reasons given for disagreeing with the LSB's view were inadequate, it is important not to overstate the extent of the duty of a decision maker to give reasons for a decision. The classic exposition of the content of the duty is that of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at para 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision…
>
> A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

96. The decision challenged in this case is the Lord Chancellor's decision not to designate the ICAEW as an approved regulator and licensing authority for additional reserved legal activities. The Lord Chancellor's view that the proposed governance arrangements for regulating such activities would neither be nor be seen to be sufficiently independent of the representative functions of the ICAEW was one of five reasons given for the decision. Furthermore, the Lord Chancellor set out in his decision letter a number of particular matters on which he relied in support of this particular conclusion. It was not necessary in order to enable the reader to understand why the Lord Chancellor made the decision that he did to descend to a greater level of detail. As Lewison LJ observed in *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169, at para 40, there is no duty on a decision-maker to give reasons for his reasons.

97. In any case, the nature of this particular disagreement with the view of the LSB was not capable of much, if any, further elaboration. Just as the LSB was relying on no more than its own judgment that the proposed changes to the ICAEW's governance structure would be sufficient to dispel the perception of a lack of independence, the Lord Chancellor's lack of confidence in the sufficiency of those changes did not lend itself to fine analysis.

98. In these circumstances, we see no merit in the complaint that the Lord Chancellor has failed to provide an adequately reasoned decision, let alone any reason to suppose that the ICAEW has been prejudiced in any way by the fact that more particularity was not given under this particular head.

Need to consider activities separately

99. The only point emerging from the challenge to the adequacy of the Lord Chancellor's reasons for this ground of his decision which appears to us to have merit is that they leave it unclear whether the Lord Chancellor gave separate consideration to each of the additional reserved legal activities which the ICAEW was seeking approval to regulate. Even if the Lord Chancellor was not persuaded that he should make orders designating the ICAEW as an approved regulator and licensing authority for all the additional activities, he needed to consider the alternative possibility of making orders which covered one or more of the activities but not others.

100. The decision letter does not suggest that, in the Lord Chancellor's view, the ICAEW's governance arrangements are insufficiently independent to protect the public interest and the interests of consumers in relation to probate activities, for which the ICAEW was already an approved regulator. Furthermore, as already mentioned, his counsel, Ms Wakefield, stressed that it is no part of the Lord Chancellor's case to assert that the Probate Committee was not performing its role adequately. It is also clear from the decision letter that the Lord Chancellor attached considerable weight to the advice of the Consumer Panel to the effect that, while appropriate to protect regulatory independence in circumstances where the ICAEW's role as an approved regulator was limited to probate, the safeguards currently in place could not be relied on if ICAEW's role as a legal services regulator was significantly expanded. As mentioned earlier, the Lord Chancellor said that he found this advice "particularly persuasive given that the remit of the proposed [LSC] would be larger and substantially different." That description of the LSC's prospective remit is undoubtedly accurate if the ICAEW were to be designated as an approved regulator in relation to all five additional reserved legal activities. But it is not apparent that the remit of the LSC could be described as "substantially different" if it were to be extended also to include another one or perhaps more of the reserved activities which do not involve litigation and which might be considered not dissimilar for this purpose to the probate activities for which the ICAEW is already designated: namely, reserved instrument activities, notarial activities and the administration of oaths.

101. Bearing these points in mind, it is not evident from reading this part of the decision letter whether the Lord Chancellor has separately considered whether to exercise his powers to make an order in relation to one or more of those activities only, even though he thought it wrong to make an order in respect of all the additional reserved activities. Indeed, there seems to us to be a real risk that he did not give separate consideration to this potential outcome. If he did, then the Lord Chancellor did not explain why he rejected it. In that respect, and that respect only, we consider that the first reason given for refusing to make an order designating the ICAEW as an approved regulator and licensing authority was inadequate.

The Lord Chief Justice's objections

102. The second reason given by the Lord Chancellor for deciding not to make an order was his agreement with the Lord Chief Justice that it was not in the public or consumer interest to encourage a situation where individuals providing reserved legal activities would need to be regulated by a different regulator from the entity within which they worked. In their skeleton argument counsel for the ICAEW submitted that this reasoning involved a second "critical", "serious" and "fundamental" error of law

as it entirely misunderstood and indeed frustrates the statutory scheme. They emphasised that enabling the creation of ABSs that employ a variety of professionals is a key feature of the Act which necessarily means that individuals employed by an ABS to provide legal services may be regulated by a separate regulator from the entity itself. The fact that such regulatory layering is specifically envisaged by the Act is shown by the fact that the Act includes provisions aimed at preventing and resolving conflicts between different regulatory regimes. They submitted the Lord Chancellor must either have failed to appreciate or must have decided to override this statutory policy.

103. This argument was not put at the forefront of Ms Lieven's oral submissions and, in our view, it does not withstand scrutiny. Certainly, the Act contemplates the possibility that reserved legal activities performed by individuals working within an ABS may be subject to two (or more) separate regulatory regimes and, where this occurs, seeks to mitigate the potential for and impact of regulatory conflict. But it does not follow that Parliament regarded such multiple and potentially conflicting regulation as desirable. Regulatory complexity is not something that the Act is designed to encourage (quite the reverse). Such complexity cannot be in the interests of consumers, especially if it gives rise to potential confusion as to who the relevant regulator is. Whether it is a price worth paying depends on an assessment of the extent to which such detriment is likely to result from the approval of a particular body to regulate particular reserved legal activities and whether it outweighs any likely benefits.

104. The particular feature of the ICAEW's proposals which the Lord Chancellor made it clear that he considered objectionable was that the ICAEW was seeking approval to regulate the exercise of rights of audience and the conduct of litigation (and also the performance of notarial activities) by individuals simply as a passport to being allowed to regulate entities and without any present intention of actually exercising its powers to regulate any individuals who were conducting these reserved legal activities within the entities that it would license. It was therefore not merely an unwelcome possibility that some of the individuals delivering the relevant legal services would be regulated by a different regulator or regulators from that of the firm within which they worked. It was inherent in the ICAEW's proposals that this would *necessarily* in every case be so.

105. There is nothing in the scheme or policy of the Act which precluded the Lord Chancellor from regarding this situation as contrary to the public interest and to the interests of consumers and as one which he did not think it right to sanction. Just because the Act envisages that circumstances may arise in which there will be regulation by different bodies, it does not follow that the Lord Chancellor is compelled to accredit a regulator whose proposals would inevitably give rise to regulatory layering and additional complexity.

106. It was further suggested that the Lord Chancellor misunderstood the scope of the objections raised by the Lord Chief Justice and treated them as applicable to all five activities. We see no reasonable basis for that suggestion. While the Lord Chancellor's decision letter refers to the Lord Chief Justice as having "strongly opposed" the application, this does no more than quote the words used by the Lord Chief Justice himself at the end of the penultimate paragraph of his advice. The Lord Chancellor's decision letter then immediately goes on to identify the particular points

raised by the Lord Chief Justice which the Lord Chancellor considered valid and material – being the points about regulatory layering and complexity to which we have just referred. There is no reason to suppose that the Lord Chancellor failed to appreciate that the Lord Chief Justice's concerns did not arise in relation to reserved instrument activities and the administration of oaths, when this had been made abundantly clear by the Lord Chief Justice. In any case no reliance has been placed by the Lord Chancellor in these proceedings on the Lord Chief Justice's objections as a justification for the refusal to make an order designating the ICAEW as an approved regulator in relation to these two reserved activities.

Taxation services

107. The ICAEW's challenge to the Lord Chancellor's third stated reason for his decision was put on the basis that the Lord Chancellor did not adequately explain why he was not satisfied with the ICAEW's proposals to restrict its regulation of the conduct of litigation, the exercise of rights of audience and reserved instrument activities to "taxation services". As mentioned earlier, the LSB had said that it was content with the definition of "taxation services" proposed in the ICAEW's application but expressed a concern about how practitioners and consumers would know what was in scope and that regulated entities or individuals might offer services which strayed beyond the boundaries of the definition. The LSB took the view that it would only be possible to ascertain whether this would prove to be a real problem in practice if firms accredited by the ICAEW were permitted to offer "taxation services" and the situation was then monitored. It said that it was satisfied that the ICAEW had appropriate arrangements in place to exercise effective oversight of this. In other words, the LSB was willing to take a risk that the boundaries might not be observed, because it felt that the risk could be identified and controlled.

108. Citing *Horada v Secretary of State for Communities and Local Government* [2016] EWCA Civ 169, Ms Lieven submitted that there was an obligation on the Lord Chancellor to give full and proper reasons for disagreeing with that assessment and that he failed to do so.

109. We do not accept this submission. *Horada* was a case in which it was impossible to discern why the Secretary of State disagreed with a recommendation made by a planning inspector. This case is very different. The Lord Chancellor explained why he disagreed with the approach advocated by the LSB. He said that he shared the concerns expressed by the Lord Chief Justice and the Consumer Panel that the limitation to "taxation services" would be difficult to manage in practice and challenging to communicate to consumers. He also said that the limitation "would add complexity to the regulatory landscape and lead to consumer confusion" which he did not believe would be in the consumer or public interest. Those were his reasons; they were clear, and they were adequate. They applied equally to each of the three reserved legal activities for which the ICAEW planned to restrict the scope of its regulation to "taxation services". They enabled the ICAEW and any other reader of the decision to understand full well why he did not believe that regulation that was limited in this way would further the regulatory objectives.

110. Ms Lieven contended that the Lord Chancellor should have specifically addressed points made in the ICAEW's responses to the advice given by the Lord Chief Justice and the Consumer Panel, which emphasised the sophisticated nature of the clients

likely to use the relevant services and the existing familiarity of accountants with where the boundaries lie between reserved activities and other activities. However, again, it was not necessary to descend to this level of detail in order for the Lord Chancellor to explain why he considered the proposed limitation on the scope of the ICAEW's regulation to be contrary to the public and consumer interest. In any event, the regulatory boundary which the ICAEW was proposing to introduce was an entirely new one, intended to carve out a regulated area within certain reserved legal activities which the ICAEW had not previously been authorised to regulate at all. It was self-evident that this was not a boundary with which either existing clients or service providers were familiar.

Notarial services

111. The fourth reason given by the Lord Chancellor related solely to notarial activities. Again, the challenge to this aspect of the decision was confined in argument to the adequacy of the reasons given by Lord Chancellor. Ms Lieven contended that the Lord Chancellor had failed adequately to explain why he disagreed with the LSB's assessment that the risks identified by the notaries' representative bodies were "low" and insufficient to justify refusing to designate the ICAEW as an approved regulator of notarial activities.

112. Again, we do not accept this contention. In opposing the ICAEW's application, the notaries' representative bodies had not merely expressed their concerns (shared by the Master of the Faculties who is himself an approved regulator) that allowing the ICAEW to regulate the provision of notarial services would give rise to a risk of the independence of English and Welsh notarial acts being questioned in other jurisdictions. They had provided evidence in support of their concerns, including the letter from the President of the International Union of Notaries and the evidence of the Spanish decision mentioned earlier (see paragraph 36 above). The ICAEW had provided no contrary evidence of its own. Nor did the LSB point to any evidence to support its assessment of the risks as "low". That evaluation appears to have been based on nothing more than an assumption or hope that the continued involvement of the Master of the Faculties as the approved regulator of individual notaries would be sufficient to avoid any adverse impact on the status of English and Welsh notarial acts in other jurisdictions.

113. In these circumstances the Lord Chancellor was entitled to take the view that the arguments and evidence adduced by the professional bodies, which clearly raised a matter of public interest, were sufficiently cogent to put an onus on the ICAEW to rebut them. He was also entitled to take the view that the ICAEW had not provided sufficient evidence or analysis to do so. The Lord Chancellor explained in clear terms that this was his view, and there was nothing deficient in his explanation or reasoning.

Complementary activities

114. The final reason given by the Lord Chancellor addressed the ICAEW's rationale for making the application, and its contention that there was a natural link between the additional reserved legal activities which the ICAEW was seeking approval to regulate and the services currently offered by accounting firms. The Lord Chancellor considered that there is a material distinction between the services that accountancy

firms already provide, even in the area of taxation, and additional reserved legal activities which could involve, for example, conducting complex litigation.

115. Ms Lieven made two points about this: first, that it was already the case that the additional reserved activities (except for notarial activities) were being carried out by three of the four biggest firms of accountants, albeit that those firms are licensed to undertake these activities by the Solicitors Regulation Authority; and, second, that there was some evidence of demand for accreditation by medium-sized accountancy firms. She contended that these were relevant considerations which the Lord Chancellor failed to take into account.

116. However, both these points were specifically brought to the Lord Chancellor's attention before he made his decision, and there is no basis for concluding that he did not consider them and take them into account. It is unnecessary for a decision-maker to refer to every aspect of the evidence in giving reasons for his decision. Neither of the points highlighted by Ms Lieven in any way precluded the Lord Chancellor from reasonably taking the view that there was a material difference between services currently regulated by the ICAEW and the additional reserved legal activities.

117. Having said this, it is not clear – and seems unlikely – that the Lord Chancellor's rejection of the ICAEW's argument about activities purportedly complementing each other was or would have been regarded by him as a sufficient reason by itself to refuse to designate the ICAEW as an approved regulator and licensing authority in relation to any of the relevant additional activities. This part of the letter goes chiefly to rebut a matter on which the ICAEW had placed substantial reliance rather than providing a positive reason for refusing its application. Furthermore, the example given suggests that the Lord Chancellor was on this issue concerned principally with the ICAEW's proposal that it should be approved to regulate activities relating to litigation, rather than more straightforward activities such as the administration of oaths.

Conclusions

118. It follows from the conclusions reached above that the claim for judicial review must be dismissed in so far as it challenges the Lord Chancellor's decision not to make orders designating the ICAEW as an approved regulator and licensing authority under the Act in relation to the exercise of rights of audience, the conduct of litigation, reserved instrument activities and notarial activities.

119. As regards the exercise of rights of audience and the conduct of litigation, the Lord Chancellor was entitled to reach the decision that he did for the first, second and third reasons that he gave (both individually and in combination with each other and with his fifth reason). As regards reserved instrument activities, the Lord Chancellor was entitled to reach the decision that he did for at least the third reason that he gave. As regards notarial activities, the Lord Chancellor was entitled to reach the decision that he did for at least the second and fourth reasons that he gave.

120. The second, third and fourth reasons given by the Lord Chancellor do not apply to the final reserved legal activity included in the ICAEW's application, which was the administration of oaths. As we have discussed, it is not clear that separate consideration was given, as it needed to be given, to whether the Lord Chancellor's

concerns about regulatory independence, which formed his first reason for refusing to make the orders recommended by the LSB, justified declining to make orders limited to this activity alone. At all events the decision letter does not explain why the governance structure which was considered acceptable for the purpose of regulating probate activities, coupled with the enhanced monitoring regime suggested by the LSB, would not be adequate to protect the interests of consumers and the public if the remit of the proposed LSC were to be extended so as to include the administration of oaths (but not the other additional reserved legal activities). The same applies to the question of complementarity with existing activities.

121. We have considered section 31(2A) of the Senior Courts Act 1981 but we are unable to conclude that it is highly likely that the outcome would have been the same if the Lord Chancellor had specifically addressed in his decision letter the question whether it was appropriate to make orders limited to designating the ICAEW as an approved regulator and licensing authority under the Act in relation to the administration of oaths.

122. Therefore, we consider that the appropriate course for us to take is to quash the decision in so far (but only in so far) as it concerned the administration of oaths and remit it to the Lord Chancellor for reconsideration. To that very limited extent, this application for judicial review succeeds; the decision otherwise stands.