

Mr Mahtab Grant
Legal Services Board
7th Floor, Victoria House
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London WC1B 4AD

By e-mail and post

10 February 2010

Dear Sirs,

Response to consultation paper “Alternative business structures – approaches to licensing”

The Society of Scrivener Notaries would like to like to make the following response to the above consultation paper.

Question 12

Do you agree with our approach to international issues?

As the consultation paper acknowledges, the Society and the Master of the Faculties (as notarial regulator) have already raised concerns as to the appropriateness of notaries working within Alternative Business Structures (ABS).

Notaries have a unique status within the legal system of England and Wales to the extent that they exercise a public office (albeit within the context of a liberal profession). Rules made by the Master of the Faculties oblige the notary to do nothing in the course of his practice likely to compromise his “independence or integrity” or his “ duty of care to persons in all jurisdictions who may place legitimate reliance on his notarial acts”¹. Elsewhere, the Practice Rules made by the Master contain detailed provisions to ensure the avoidance by notaries of situations where a conflict of interest might arise or their impartiality be called into question. Notaries also have a duty not share their fees except with qualified legal practitioners and, even then, subject to strict accounting requirements to prevent the commingling of notarial fees with other revenue streams.

The apparently restrictive nature of the rules mentioned above are intended to preserve the quasi-judicial nature of notarial practice and ensure that the acts of English and Welsh notaries as public certifying officers are properly accepted in overseas jurisdictions. In formalistic civil-law jurisdictions such acceptance is by no means automatic; as one current example, one might cite the reluctance on the part of land registrars in many parts of

¹ Rule 5, Notaries Practice Rules (2009)

Germany to accept for recordation the acts of English and Welsh non-scrivener notaries, a situation which leads to cost and great inconvenience to clients of the latter. This is not a situation which scrivener notaries condone or encourage, but simply reflects the perception overseas of the independent nature of scrivener notary practice. Even in the Senior Courts of England and Wales, despite recent amendments to the Civil Procedure Rules, European Community legislation requires greater force to be accorded to the acts of notaries in other EU jurisdiction than those of domestic notaries. Recent proposals in the European Parliament for a European “authentic act” – which would exclude the acts of common-law notaries – further illustrate the need to buttress the standing of English notaries by measures tending to reinforce their independence rather than vice versa.

In the United States, the notary public generally has no legal training; he or she will often work as an employee within a law firm, a bank or other financial institution; with no professional training and no perceived independence, their acts enjoy scant recognition in civil-law jurisdictions, even within the area covered by the North American Free Trade Agreement (NAFTA). This situation has induced at least two States (Florida and Alabama) to introduce a civil-law notary specialism, providing a high level notarial qualification open only to those with a legal background.

The need for notarial services within England and Wales has grown exponentially over recent years – immigration into the UK means that a substantial proportion of the population have family or property links in other jurisdictions; increasingly, UK citizens purchase properties overseas; UK companies establish branches or subsidiaries and acquire companies overseas; financial institutions make advances upon the security of foreign assets. In all these situations, the services of a notary may be needed. Where adequately skilled notarial services cannot be secured within England and Wales, persons requiring them may be compelled to travel to the jurisdiction concerned or avail themselves of the services – frequently time-consuming and expensive – of the relevant consulate in London.

Also, at a purely professional level, English and Welsh notaries need to compete with providers of notarial services elsewhere in Europe; for “large ticket” commercial transactions, the ability of clients to hold the documentary closing in London making use of the services of City notaries may lead to very substantial cost-savings; in continental Europe notarial fees are often levied on a non-negotiable *ad valorem* basis and hence provide a substantial incentive to the parties to “forum shop” – thus the documentation in respect of many financial transactions originating in Frankfurt is in fact executed before notaries in Switzerland whose fees are generally lower than their German colleagues and in most cases may be negotiated. The German courts and registrars give full faith and credit to the acts of Swiss notaries since their independence and training is perceived to be on a par with German notaries; this bonanza is currently denied to most English and Welsh notaries (with certain exceptions in favour of scrivener notaries) since they tend to be equated in German eyes with the United States notary; indeed, throughout the civil-law universe the US notary public is regarded as the archetype of the “Anglo-Saxon” notary and the scriveners had to fight long and hard to ensure acceptance of their notarial acts and be admitted to the International Union of Notaries, the world-wide body representing civil-law notaries.

For all the above reasons, the Society of Scrivener Notaries urges the continuance of the current state of affairs whereby practice rules made by the Master of the Faculties effectively prevent participation by notaries in ABS, but do, subject to certain necessary restrictions, enable notaries to enter into partnership with other legal qualified professionals.

Yours faithfully,

Jonathan Coutts
Secretary
The Society of Scrivener Notaries