

# **VERY HIGH COST CIVIL CASES - BARRISTERS INFORMATION PACK AND GUIDANCE**

1. This Guidance, which is Guidance under para 26 of the Contract, sets out the Commission's procedures for individual very high cost civil cases. It sets out the actions you, the barrister, should take when you accept a new case which is going to be very expensive, or when an existing case increases in cost to become very expensive.
2. This pack sets out:

## **The Background**

### **The Role of Counsel in Case Planning**

### **The payment terms for Counsel:**

#### **Full Representation or Investigative Help**

#### **Litigation Support**

## **THE BACKGROUND**

### **The Funding Code, Contracts and the Special Cases Unit (SCU)**

3. The Funding Code - Section 6 "Very Expensive Cases" - includes extra criteria for very high cost civil cases. In particular, they are subject to an "affordability test" and the proposals put forward for progressing the litigation must be satisfactory. Once referred to the SCU, there must be a proper Case Plan and proposal for a fully costed stage. Each case will have an individual contract based on the agreed Case Plan and the price for each fully costed stage. The contract will allow progression of the case stage by stage, with an agreed price for each stage. The Case Plan will change as the case develops; in the early stages of a case future events will be more difficult to predict and will contain fewer details.
4. Details of what must be included in a Case Plan and a fully costed stage, and how they should be used, are set out later in the pack. Criteria for funding very high cost cases are set out in Section 6 of The Funding Code and in Section 15 of the Decision Making Guidance (Vol. 3 of the Legal Services Commission Manual).
5. The Commission has established a Special Cases Unit to manage these cases, based in the Brighton Regional Office. The SCU may manage cases from Brighton. Alternatively, the SCU will assign each case to one of ten Case Managers, drawn from the most experienced solicitors in the Regional Offices.
6. Multi-Party actions are subject to a separate contract arrangement. This document deals only with individual cases referred to the SCU, whether for Full Representation or for Litigation Support.

### **What are these cases?**

7. The Referral Criteria are set out in rule C23 of the Funding Code Procedures and paragraph 3C - 146 of the Decision Making Guidance. In summary, they are that:-
- a) in the lawyer's professional judgement, the likely cost to settlement or other disposal will exceed £25,000;
  - b) the actual cost to settlement or other disposal will exceed £25,000 (this will be identified in any case which is not identified by the other criteria when an application is made to extend a costs limitation beyond £25,000); or
  - c) in the lawyer's professional judgement, if the case were to proceed to a contested trial or hearing (or in the case of appeal proceedings, to the conclusion of that appeal stage) the likely cost under the certificate might exceed £75,000.

All figures exclude VAT. Typically, they will be public law Children Act cases covering several children and requiring experts' reports; clinical negligence cases and actions against the police. Also, all Multi-Party actions or potential MPAs and all applications for Litigation Support (which provides partial funding for very high cost personal injury claims proceeding under a conditional fee agreement) will be referred to the Unit. The Commission anticipates that only a few thousand cases each year will be subject to these provisions.

## **FULL REPRESENTATION AND INVESTIGATIVE HELP**

### **When does the Contract start?**

8. The contract starts when the SCU first limits the certificate to the work set out in the fully costed stage of the Case Plan. It stays in force while the certificate is in force. Once the contract has started, the case will be managed through a series of fully costed stages until it ends. Each fully costed stage will state the cost of the stage broken down into disbursements, profit costs and advocacy costs. Once approved, the costs limitation on the certificate will be increased to reflect the cost of the approved stage.

### **Claim for pre-Contract costs**

9. It will often be the case that at the time a contract is entered into, particularly in the circumstances in para 7 (b) above, work has been undertaken under the certificate. Either after approval of the contract or with the application, the solicitor will need to submit a claim for the pre-contract work to the Case Manager for assessment under the regime current at the time, either under the General Civil Contract or otherwise. This can take the form of time-recording records with a clear explanation of the work undertaken and a summary of the costs claimed, or an assessed bill on form CLSCLAIM1. We are keen to simplify payment for this work and avoid the need for a costs draftsman to prepare a detailed bill.
- If you are dissatisfied with the assessment of your fees there will be a right of appeal to the Costs Committee. The costs, once agreed, will be paid by the Commission within 28 days. The rates you will use are those you would expect to get on a taxation or assessment. That approach will continue throughout the life of the case in family

cases. After costs have reached £25,000 a different approach will be adopted in inter partes costs cases, see below.

### **What is Counsel's part in the Contract?**

10. The contract is between the Commission and firm of solicitors. The solicitors are required to get counsel to agree to the payment terms by completing Form BB.

### **What is Counsel's role in Case Planning?**

11. Where counsel is to be instructed in a case we would expect them to agree the relevant work set out in the Case Plan. In money cases counsel's payment will be at 'risk rates'. They will therefore need to consider the case papers and decide whether to take on the case given their own assessment of prospects of success and payment.
12. The use of leading or senior counsel will need to be justified in the light of the nature of the case, the degree of complexity as to fact and law, the amount of quantum and any other particular requirement for specialist expertise. See Code of Conduct of the Bar para. 503.
13. The use of two counsel will also need to be justified as in the clients interest. For examples, where there is the need to note evidence in court, or consider significant documentation, or carry out extensive research. See Code of Conduct of the Bar para. 503.
14. To support counsel in deciding whether to take on the case the first £5,000 of counsel's fees are "ring-fenced" at the current remuneration rates rather than the reduced 'risk rates'.

### **What about the effect of the possible variation in hearing length on the price of a full hearing stage?**

15. For a stage including the full court hearing the stage price will be increased if the court hearing overruns. Counsel will have to propose the likely hearing length in the Case Plan if the judge has not at that time allocated the time for the hearing. It is expected that the Woolf reforms will reduce the frequency of overruns.

### **What payment terms apply to Counsel for Full Representation or Investigative Help?**

16. After the initial "risk assessment" stage, the contract rates vary depending on whether the case is expected to result in an order for inter partes costs.
17. For cases where inter partes costs are expected to be paid, for example, clinical negligence or personal injury cases the Commission will pay at the following rates: junior counsel £50 per hour and senior counsel £90 per hour. There will be no mark-up.

18. For cases where inter partes costs are expected to be paid but the case has only borderline prospects and is only to be funded because of overwhelming importance to the client, wider public interest or because of human rights issues, which a solicitor would not pursue at risk, for example, judicial review of a mental health detention decision, the Commission will pay a 30% uplift to the prescribed rates to reflect the additional financial risk, i.e. £65 and £117 per hour respectively.
19. For cases where inter partes costs are not expected to be paid, for example, Children Act and family cases, the Commission will pay in line with current remuneration rates as set out below. The Commission will also pay in line with current rates if an appeal in a successful case is being defended or to defend an appeal against an interim order.
20. Brief and refresher fees will be assessed against the hours and hourly rates for the preparation, conferences and hearings planned for the case. The fees will reflect the skill level of the barrister undertaking the work and the complexity of the case. Where leading and junior counsel are instructed appropriate rates will be applied for the work set out in the Case Plan for each to undertake.
21. Family Graduated Fees will be paid for all cases which qualify under the scheme. These cases will fall into three group depending on the circumstances of the case:
  - a) Cases which are planned to fall within the FGF scheme and in the event conclude within the scheme. These will be paid under the scheme. Counsel will be paid the fees set out in the case plan on the basis of the FGF scheme.
  - b) Cases which are planned to fall within the scheme, but in the event conclude outside the scheme. For example, if a hearing in the High Court concludes in fifteen days rather than the planned ten days. The fees would be negotiated after the event and counsel will be paid as if the FGF scheme had never applied. When the solicitor reports at the end of the hearing with the actual costs, counsel should propose their fees. If these fees cannot be agreed with the Case Manager there will be a right of appeal to the Costs Committee.
  - c) Cases which are planned to fall outside the FGF scheme, but in the event conclude within the scheme. For examples, if the case settles or runs short. Counsel will have a choice of payments. Counsel can choose between the FGF scheme payment, including any early settlement payment, and the contract payment for actual activities within the case plan that have been completed. For example, counsel may have completed a conference and their preparation before the case settled on the first day. The agreed case plan prices would be paid, if counsel so opted, for the conference, preparation and first day of the hearing. When the solicitor reports at the end of the hearing with the actual costs, counsel should nominate on which basis they wish to be paid.

### **What happens if a Case Plan or payment rates cannot be agreed?**

22. If the Case Plan cannot be agreed with the Case Manager there is a right to have the Case Plan reviewed by the Funding Review Committee. Any failure to agree the Case Plan is likely to be on the basis of the proposed work, the proposed stages, the competence of the personnel selected to undertake the work, or the hourly rates to be paid. The Committee can consider all these aspects of the Plan within the constraints of the standard contract terms and procedures. Ultimately, the Commission has power to refuse or withdraw funding altogether if the proposals for progressing the litigation do not appear to be satisfactory.

### **What happens at the end of a Stage?**

23. The solicitor must submit a report setting out the work completed, the outcome of the stage including any key documents, reports and opinions generated, and the fully costed stage plan for the next stage. A record of your actual costs incurred, including time spent, must be submitted for finalising the stage payment.
24. You can include applications for 'exceptional expedition' mark-up for work which was undertaken urgently and at additional cost which was not reasonably foreseen.
25. The Case Manager will decide whether funding should continue to the next stage and agree a new stage plan. This will be based on your opinion as counsel. Again, there are rights of review against termination of funding or failure to agree a fully costed stage plan for the next stage.
26. Once a contract is in force, full payment of solicitor's profit costs and counsel's fees will be made at the end of each fully costed stage and, if a stage will last more than six months, payments on account will be made after each six month period on a pro rata basis [unless pro rata payment would bring payment excessively in advance of costs being incurred]. Disbursements over £100 will be paid as they are incurred.

### **What happens at the end of the Case?**

27. At the end of the case, if you are awarded full inter partes costs no further payments are due from the Commission and all payments made under the certificate are repayable to the Commission.

### **What happens if the case stops part way through a stage?**

28. It is possible that the case may be stopped. The client may become financially ineligible for funding or information may become available that shows the client has not made full disclosure about the case. This could lead to discharge or revocation of the client's certificate, which would lead to automatic termination of the contract.
29. In such circumstances the solicitor will be paid their costs for the proportion of work undertaken in the stage plan.

**What happens if the Inter Partes Costs Order does not cover all my fees?**

30. If the court decides not to order the costs in full against the opponents, application can be made to the Commission. The Commission will consider such applications, taking into account their value and the reasons given by the court for not ordering them in full. Normally payment would only be made where the court excludes them on principle. If the court does not order the costs in full because they are considered excessive it would not be reasonable for these costs to be paid by the fund.
31. It is possible that the case will be won but the Court will award costs in respect of those issues it has accepted and deny costs in respect of those issues it has not accepted. In these circumstances the Commission will pay, at the contract rate, for all or some of the work where costs have not been awarded inter partes. The inter partes bill must be taxed or agreed. Any agreement must be approved by the Commission because it could affect the Commission's and client's liability. A transcript of the judgment must be obtained for the Commission to consider the court's view on all arguments put forward. The Commission will pay, at the contract price, for work in support of arguments run that the court has obviously taken seriously. If necessary, the Commission will seek an opinion from independent counsel and, in any event, the Commission's decision on what costs to allow at the contract rate will be appealable to the Costs Committee whose decision will be binding on the Commission.
32. Where costs are not recovered in full the statutory charge is likely to apply. Your client must be informed of the estimated or actual financial cost to them of not receiving costs in full on any proposed settlement or outcome at trial (see para 18 above). If you seek to settle the case with not all costs being recovered from the opponent and with a claim against the fund, the agreement of the Case Manager to the proposed settlement must be obtained in advance.

## **LITIGATION SUPPORT**

### **What is Litigation Support?**

33. Litigation Support is available for very expensive personal injury cases where the case is proceeding under a conditional fee agreement and the costs (solicitor's profit costs and counsel's fees at prescribed rates excluding other disbursements) will exceed £15,000 OR disbursements will exceed £5,000 (excluding counsel's fees). It is expected that solicitors will fund the first £15,000 and the Commission will fund costs over and above this sum. The solicitor will be expected to have obtained £100,000 of insurance cover for the client against the other side's costs. This is so that the Community Legal Service Fund is not liable for the costs of other parties.
34. Note: Investigative Support funding is available, as a pre-cursor to Litigation Support funding, where the prospects of the case are unclear and the costs of investigations are high, such that most firms would be unable to fund the investigation in full. This is when the costs of investigating the strengths of the claims exceed either of the following thresholds: (a) disbursements (including any counsel's fees) are or are likely to exceed £1,000; or (b) investigative costs at prescribed rates, that is £70 per hour other than disbursements have reached or are likely to exceed £3,000. It is required that the likely damages must exceed £5,000 to receive Investigative Support funding.

### **How do the Contract terms differ from a Full Representation Contract?**

35. The same individual case contract applies to both Litigation Support and Full Representation. The terms are identical, except where set out below:

### **What can be funded?**

36. Disbursements (excluding counsel's fees) above £5,000 and/or costs (solicitor profit costs and counsel's fees at prescribed rate) above £15,000.

### **Which rates apply?**

37. The published rates which will apply to the contract are: £90 per hour for senior counsel where the complexity of the case justifies the use of senior counsel, and £50 per hour for other counsel. Travel time is paid at 25% of the above rates.