

ILPA to the Legal Services Commission re the High Cost Cases Contract- submissions further to the meeting on 13th September 2012

The Immigration Law Practitioners' Association attended the meeting on this topic on 13 September 2012 and is grateful for the opportunity to make further comments in writing although disappointed not to be invited to participate in the next round of face to face discussions.

ILPA's membership includes both barristers and solicitors at all levels of seniority. We are grateful to the Bar Council Legal Aid subcommittee for the detailed written paper (appended hereto). We have sought in this paper to indicate our views on the proposals therein and to supplement it with further thoughts.

As discussed at the meeting on 13 September we do suggest that a user-friendly guide to these cases be produced, as problems were reported with less experienced practitioners not being sure what to do.

We do not think that high cost cases can be limited to particular firms. Clients need to be able to choose their representative. Practitioners gain expertise the more of these cases that they do.

We wish to underline the importance of an independent appeals mechanism.

We have no objections to, and no further comments on:

- Clause 5 -** the Bar Council's proposed amendment C.
- Clause 7-** the Bar Council's proposed amendment E.
- Clause 15-** the Bar Council's proposed amendment J.
- Clause 17-** the Bar Council's proposed amendment L.
- Clause 30-** the Bar Council's proposed amendment P.

Clause 2 and clause 6

We support the Bar Council's proposed amendments A and B. We share the desire of the Br that rates should not continue to be reduced in real terms given that they were set almost a decade ago. That said we recognise that these rates have not been reduced following the changes introduced in October 2011. In our view however, as the costs of running large case continues to mount, the incentive for highly specialised practitioners to undertake the work will be reduced if the rate of pay offered remains relatively low. In turn this may mean that responsibility for high value cases is delegated to more junior staff which is not necessarily going to provide the Commission with as much value for money in the longer term .

Clause 6

We question whether provision is already made for the mischief the Bar Council's amendment D purports to address.

Clause 9

In ILPA's view it should be unnecessary to specify both barrister and clerk, as all should go via the clerk. Other than that we have no objection to the Bar Council's proposed amendment F.

Clause 11

The Bar Council's proposed Amendment G does not appear workable in that we do not understand how a solicitor could complete a claim I for a case which is on-going and for which s/he might end up with a costs order and is still working on the file? There are enormous practical difficulties of getting a part case billed. We do not think that the proposed time limits would work. We do not see what the penalty for non-compliance is or question what a fair penalty might be.

Given the difficulty that the Commission has experienced to date in giving sufficient priority to very high cost cases, the catch up element between the preparation and submission of a case plan and its approval can often be more than six months. To minimise the difficulty for all parties, we suggest an amendment along the following lines, as tabled at the meeting on 13 September (slightly modified herein):

11. ...as appropriate.

11.1 Normally we should expect a claim for payment on account to be made after the stage case plan has been approved. However, where more than three months has elapsed since the date on which the case plan was submitted and the case plan has yet to be agreed, we shall allow claims for payment on account to be made for the full value of any disbursement and 50% of any profit costs claimed, subject to our right to recoup these sums if the work sought within the case plan (including the instructions of any expert or other expense) is subsequently refused.

Clause 12

We have no objection to the Bar Council's amendment H although we should favour the sanctions for non-compliance being spelt out.

Clause 14

Clause 14- the Bar Council's proposed amendment I. Our concern is that we have seen situations in which the Commission has made errors in recoupments and recouped from solicitors the payments made to counsel, leaving counsel and solicitors to sort this out. If this problem has been addressed then we have no difficulty with the amendment.

Clause 16

We propose the following as a starting point for discussions:

If you elect to receive payment on an inter partes basis but there are costs incurred that are not recovered from the other side, we will normally not make payment unless one of the following exceptions apply:

- (i) The work is specifically not recoverable on an inter partes basis*
- (ii) The order for costs is expressed as a percentage of the total costs unless the court orders a reduction as a result of conduct on the part of the solicitor and or barrister (in which case payment will not be paid apportioned as between the party whose conduct has been criticised)*

In this event we may require you to provide a transcript of any relevant hearing and the costs of any such transcript will be recoverable as a disbursement if it is clear that the reason for the costs order of less than 100% was not conduct-based

For the avoidance of doubt, that not all issues succeeded at trial is not a conduct issue that would result in payment being withheld. However, in any case where the order for costs is less than 50% the onus will be on the supplier to explain why legal aid costs payable at the contract rate should be recoverable under this provision.

We do not suggest that this is a final version and regret that we have not been invited by the Commission to participate in the further discussions. We should welcome any further discussions to try and tease out the purpose and effect of such an amendment, if this will assist

Clause 23

We are not sure that we have understood the Bar Council's amendment M as we do consider that payment for counsel from the Legal Services Commission would be payable to the solicitor, therefore we do not see the problem arising. Insofar as the problem does exist we have no objection to the amendment.

Clause 26

The Bar Council's proposed amendment N. We agree that the Bar Council should be consulted.

Clause 27

We consider that the matters sought to be addressed by the Bar Council's proposed amendment O require further work. It is necessary to think about situations in which costs get claimed other than at the end of a fully costed stage and about whether the time limit proposed is workable and whether it makes the urgent transfer of papers difficult. We also need to think about what should happen where the same counsel is being instructed by the new solicitor. No provision exists under the current contract requiring a supplier whose client has transferred to another firm to supply the Commission or the other firm with data enabling the Commission

or the other firm to understand the financial limits reached or exceeded or the extent to which a contract is finalised.

We suggest an amendment along the following lines (tabled at the meeting on 13 September):

If this contract ends...and you must as a minimum provide the following information within 21 days of any such transfer:

- (i) The latest costs plan agreed*
- (ii) the current financial limit (if further amendments have been made beyond the case plan)*
- (iii) details of all and any claims for payments on account separated as between profit costs, disbursements and VAT*

Clause 28

We suggest the following amendment, which we tabled at the meeting of 13 September 2012:

When this contract ends, you must... nominate. In the event that the case is transferred to another supplier, any unresolved case plan must be submitted to the Legal Services Commission within one month and any for payment must be made for work done within three months of the date of transfer or 28 days of the date of any such stage case plan being agreed, whichever is the later.

An issue raised at the meeting on 13 September was whether there weans an advantage to including the inter partes rate in the case plan contract. For the reasons set out at the meeting, we are of the view that such a proposal would not benefit either the bar or solicitor firms in seeking to recover full costs, where the work undertaken exceeds the contract hours, having regard to the indemnity principle under CPR 43.2

ILPA
20 September 2012

APPENDIX 1 BAR COUNCIL PROPOSED AMENDMENTS

Civil Contracts Consultative Group

11 July 2011 meeting

CIVIL HIGH COST CASE CONTRACT

*Proposed Amendments from the Bar Council's
Civil Legal Aid Sub-Committee*

1. For the past decade the Legal Services Commission (LSC) has been using a *pro forma* template contract document for procuring work from solicitors in Very High Cost Civil Cases (i.e. normally, those cases in which the costs to be incurred in pursuing the claim are expected to exceed £25,000).
2. The version of the template in use for most of that period was dated 23 January 2001. The current revised version is dated 31 January 2011 and reflects revisions made by the LSC without consulting stakeholders.
3. The LSC has produced two practitioner guides for those providing legal services under the contract: *Very high cost civil cases – solicitors information pack and guidance* and *Very high cost civil cases – barristers information pack and guidance*. These were last revised by the LSC in November 2003.
4. In the light of ten years experience in the operation of the contract, the Bar Council now proposes a series of drafting amendments. The suggestions are largely driven by experiences of difficulty and hardship among the barristers instructed by solicitors who are working under the contracts.
5. In the attachment to this paper each proposed amendment is shown, followed by a short explanation of why it is sought. The sequence of the amendments follows the structure of the template contract. *To make sense of the amendments the reader will need access to a copy of the current template contract.*
6. This paper has been prepared for initial discussion at the LSC's Civil Contracts Consultative Group meeting scheduled for 11 July 2011.
7. It may be convenient, after initial discussion by CCCG, for the LSC to canvas the views of other stakeholders on these proposed amendments. A final discussion could then be scheduled for the autumn CCCG meeting (12 September 2011).
8. It would be hoped that a revised form of contract, containing these and any other amendments, might be available for use no later than 1 January 2012.

*Bar Council's Civil Legal Aid Sub Committee
4 July 2011*

AMENDMENT A

Clause 2

Replace the second sentence with:

“Work under this contract by solicitors and barristers is payable at the rates for the financial year in which the work is planned to be undertaken as revised annually and as published on a dedicated page on the LSC website”

Reason

The present wording refers to “published...payment rates” and to thresholds and ring-fence provisions in them.

There is no identifiable single current publication which complies with that wording.

The amendment ensures that in future there will be such a publication and, further, envisages a revised table of rates for each financial year.

This will meet the difficulty that the rates were set in 1999/2000 and have not been revised for over a decade. The rates for 2011/2012 and thereafter need to be new negotiated, fixed and published.

We would propose that the rates for 2011/2012 comprise the 1999/2000 rates up-rated only in so far as would reflect the rate of annual increase in salaries paid to LSC staff since 1999/2000.

AMENDMENT B

Clause 6

Revise and re-word the present clause in light of Amendment A.

Reason

The present clause refers to “published...payment rates” and requires revision for the same reason as given in Amendment A

AMENDMENT C

Clause 5

At the end of the first sentence (*This Contract does not create any right enforceable by any person not a party to it*) add:

“other than a barrister instructed by you to carry out work specified in a Fully Costed Stage”.

Reason

The contract is between the LSC and the solicitor. However, the contract envisages that legal services under it will often be provided by barristers.

As presently worded, the contract excludes such a barrister from having any enforceable rights under the contract.

That cannot have been intended because the contract expressly addresses matters directly relating to the instruction of counsel under it and barristers are required to sign a "Barrister Acceptance Form" imposing obligations upon them in undertaking work under the contract.

The amendment is necessary to ensure that barristers can enforce their rights under the contract against either of the parties.

AMENDMENT D

Clause 6

At the end of clause 6 add:

"If the case plan identifies work to be undertaken by counsel, you must confirm that counsel has agreed to undertake the work described and has agreed to your proposed costing thereof."

Reason

At present, a case plan can be submitted containing a Costed Stage which envisages work by counsel but which counsel in the case has neither seen nor agreed.

AMENDMENT E

Clause 7

After the first sentence insert:

"If we agree only a modified form of your proposals, we will provide you with a copy of the modified form which we have agreed showing in typescript the date and effect of the modification"

Reason

The present wording of Clause 7 deals only with *agreement* to proposals as submitted. It does not embrace the common practice of the LSC agreeing proposals only as modified by the LSC.

At present, the practice is for those Costed Stages which are submitted by solicitors to be so modified by manuscript amendments which are usually undated and sometimes indecipherable.

AMENDMENT F

Clause 9

At the end add:

“You must also supply the barrister (and the barrister’s clerk) with a copy of a Fully Costed Stage - as agreed by us - when instructing counsel to undertake any work covered by such a stage”.

Reason

As presently drafted, the requirements of this Clause (which are honoured in the breach) do not entitle counsel to see the work that has been agreed in each relevant Fully Costed Stage.

Since only such work will be paid, it is vital that counsel knows what work can be undertaken and what has been agreed as to payment for it.

AMENDMENT G

Clause 11

(1) In the first sentence, after “a reasonable period” insert:

“(not being greater than 2 months from the start date)”.

(2) In the fifth sentence add at the end:

“(within one month of the completion of that stage)”.

Reason

The clause as presently drafted is intended to prompt immediate payment of previously incurred costs and then the costs incurred for each completed stage. This opportunity for enhanced cash flow is used by the LSC to explain and justify the otherwise sub-market rates payable.

In practice, solicitors are failing to apply for payments promptly or at all, preferring to retain – for their own reasons – their practice of billing cases when they conclude and not earlier.

This windfall to the LSC has continued for a decade largely to the prejudice of barristers. The amendments are intended to ensure prompt claims and prompt payments.

AMENDMENT H

Clause 12

(1) Omit the last sentence.

(2) Add in its place:

“Your choice, and thus your form CLSCLAIM1 or CLSCLAIM2, must be notified to us within 3 months of the end of the case.”

(3) Add at the end:

“You must pay counsel the costs attributable to his or her work within 28 days of receipt of payment from the paying party together with any amount due to counsel under Clause 13.”

Reason

Since the contract was initially drafted, LSC practice has changed. It is now not uncommon to see several sets of proceedings embraced by one certificate.

The first amendment will enable solicitors (and barristers) to seek separate payment in respect of the different work covered under different parts of such a certificate.

The second amendment will force the solicitor to address the facts that the case is over and that costs must be addressed. At present, barristers gain no benefit from the shortfall entitlement in Clause 13 because it can be avoided by the simple method of not sending the LSC either of the forms mentioned in Clause 12.

The third amendment deals with the cases in which the solicitor elects to take costs from the paying party (rather than claim under the contract), and is paid, but does not then pay counsel promptly or at all.

AMENDMENT I

Clause 14

(1) In the first sentence, after “certificate” insert:

“paid to you”.

(2) After that sentence add:

“If the costs recovered by you include amounts for counsel, you must notify us when counsel have been paid by you so that we may then recover any payments we have made to them.”

Reason

Under the present wording, receipt by solicitors of costs paid by the paying party triggers an immediate recoupment of all amounts paid under the contract - including amounts paid to barristers.

Under the amendment, recoupment from barristers will not occur until they have actually had the recovered monies from the solicitor.

AMENDMENT J

Clause 15

At the end of the Clause add:

“and any costs recovered must in any event be ring-fenced in your Client Account until all payments due to us and to any counsel instructed by you in respect of a Fully Costed Stage are paid by you.”

Reason

This amendment ensures that monies paid to the solicitor by the paying party are protected from creditors (in the event of insolvency) by being held in a client account until the LSC and counsel are paid.

AMENDMENT K

Clause 16

Replace the present wording of the Clause with

“If you wish to choose to take payment from the other side, you may apply in writing to us to authorise payment (at the contract rates and subject to clause 17) for contract work in respect of which, for any reason, costs are not recoverable or recovered from the other side. We will grant such authorisation only when it is fair and reasonable in all the circumstances to do so”

Reason

There may be a whole range of circumstances in which a costs order (or costs agreement) falls short of securing - from the paying party - amounts for payment in respect of *all* the work undertaken by solicitors and counsel under the contract.

The present wording encompasses only one circumstance – an issues-based costs order under which the successful assisted person recovers only a part-costs order.

Experience has shown that there are a number of other circumstances in which it would not be just for litigators or advocates to forgo payment for work undertaken in accordance with the contract.

For example:

- (1) the paying party may have been ordered to pay *all* the costs but on assessment by the Court these exclude “legal aid only” work properly undertaken under the contract; or
- (2) the paying party may have been ordered to pay all or most of the costs but it may not prove possible to recover all of those costs (e.g. because they are then set-off against some other liability or the paying party becomes insolvent).

The new wording enables a wider range of circumstances to be embraced by an application to the LSC to pay for contract work in respect of which payment is not recovered from the other side

AMENDMENT L

Clause 17

(1) In the second sentence omit the words:

“and whether it achieved any specified goals”.

(2) In the third sentence replace “If, at” with “If, within 3 months of”

Reason

The first amendment omits words which have not proved useful in practice.

The second introduces an element of finality at the end of a case.

AMENDMENT M

Clause 23

Add at the end:

“No power of set-off shall be exercisable in respect of counsel’s fees for work under a Fully Costed Stage.”

Reason

Neither party should be able to set-off monies - due between them - against counsel's fees.

AMENDMENT N

Clause 26

After "the Law Society" insert "and the Bar Council"

Reason

Very often the bulk of work conducted under the contract falls on counsel.

It is only right that the Bar Council should be consulted about any guidance concerning the meaning and operation of the contract.

AMENDMENT O

Clause 27

Add at the end:

"We will settle any fees payable to you and counsel under this contract within 28 days of the date of transfer of the case papers. The transferee firm will then become responsible for recovering your costs, and the costs of any counsel you have instructed, from any paying party if they make an election to recover from another person rather than under the contract. If they make an election which incurs a shortfall for you or counsel they shall meet the shortfall in accordance with Clause 13."

Reason

If a case is transferred to a new contractor during the life of the contract, the previous contractor and counsel should be promptly paid.

If costs are later recovered, there can only be one assessment so that the contract must provide for previous solicitors and counsel's fees to be recovered by the new contractor in that assessment.

AMENDMENT P

Clause 30

Omit “the goals to be achieved and the end date”

Reason

The present definition of “Fully Costed Stage” mandates the inclusion of these items.

At present, most approved Stages omit either or both items.