

Chapter 29 Financing the Case

FUNDING OPTIONS

[29.1]

The legislative framework relating to the funding of those suspected or charged with offences is in a state of considerable flux. The Ministry of Justice has announced prospective cuts of up to £2bn from its budget ; £350m from Legal Aid. The Legal Services Commission [LSC], who administers publicly funded defence fees, have cut fees over the past few years. The reduction in fees has had the effect of reducing the number of experienced lawyers willing to conduct such cases at all or such lawyers taking work on a case by case basis. At the time of writing the proposals for wholesale changes are set out in the consultation paper *Proposals for the Reform of Legal Aid*, which can be found at: <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>

Summary of current options

[29.2]

The relevant options for funding currently available are:

A. *Very High Cost Case (VHCC)*— these are publicly funded cases expected to last more than 40 days (and some expected to last 25–40 days) at trial for litigators and more than 60 days for advocates. They are managed under individual contracts. Work is negotiated in approximately three month stages with a Legal Services Commission [LSC] contract manager. Case plans and stage plans are agreed, which provide litigators and advocates with the maximum number of hours and the maximum hourly rate that they may claim for specific items of work. There have been changes from July 2010 which will have the effect of reducing the number of such cases.

B. *Graduated litigator fee/graduated fee* – this public funding system assesses the fee based upon case type, offence type, trial length and the number of pages of prosecution evidence. The fee is fixed irrespective of the amount of work spent on it.

Publicly funded defendants will be subject to means-testing. The applicant completes the relevant application form (CDS 14 and/or CDS15) and submits it to the magistrates' court for processing along with any required supporting evidence.

There are two levels of means tests:

The initial means test: the applicant's gross annual household income is weighted to take account of family circumstances. The result of this is the applicant's *adjusted income*. If the applicant's *adjusted income* is:

£12,475 or less: they pass the initial means test and are eligible for legal aid (subject to passing the Interests of Justice test);

£22,325 or more: they have failed the means test and are ineligible for legal aid;

More than £12,475 and less than £22,325: a full means test will be carried out to determine eligibility.

Crown Court Trials

The Crown Court scheme is a means test which consists of calculating both available income and capital.

Income

The income threshold levels applied to Crown Court means testing is the same as in the magistrates' court. No income contribution is required if: the applicant passes the initial income means test; or the applicant's annual disposable income is £3,398 or less.

The applicant will be required to make an income contribution (maximum number of six) if their annual disposable income is more than £3,398.

C. *Privately funding own defence* – a suspect pays for his own defence having agreed a basis on which to do so with his lawyers. The ability to do this will be predicated on the fact that the funds have not been restrained by the court. Moneys can be released from restrained funds to pay lawyers, but the amount paid will be payable at a rate commensurate with publicly-funded work. Note, however, that the law specifically prevents funds from being

released to provide legal advice in relation to the restraint order. This can be funded by either a genuinely independent third party or, in rare cases, legal aid.

Note that it is not permissible to fund a case through a combination of legal aid and private funding at the same time.

D *Third party or insurance cover* – There are an increasing number of company-based insurance policies which cover legal costs, including the personal defence of directors suspected or charged with criminal offences, and there may be a further growth in this area. However, insurance for privately funding the entirety of a serious fraud prosecution will remain relatively rare. There is increasing use of a mix of privately funding the early stages of a case, when legal aid is only available for attendance at caution interviews, and public funding of the later stages.

ADVICE AND REPRESENTATION PRE-CHARGE

Interviews

[29.4]

One of the most important aspects of a suspect's case is what is said at interview by the suspect. The account put forward may persuade the investigating authorities not to charge or to rely upon the suspect as a witness for the prosecution. If the suspect is charged, the account in interview will be scrutinised and compared to the account given at trial to see whether there are any inconsistencies. If no account is given, it may be held against the suspect.

Broadly speaking, there are two sorts of interviews: firstly, there are compulsory interviews (such as those pursuant to s 2, Criminal Justice Act 1987) designed to assist an investigation in which it is a criminal offence not to answer questions, and secondly, an interview under caution where a suspect can decline to answer questions.

Prior to interviews in fraud cases, the investigating authorities are usually in possession of a substantial amount of documentation which they have examined with a view to forming the basis of the interview. Often, such documents have been created over a number of years. It is extremely difficult for any suspect to recall the circumstances of the creation of such documents without advance consideration. Accordingly, the authorities disclose such documents prior to the interview to enable instructions to be given by the suspect. Such disclosure is good practice and consistent with the Lord Chief Justice's Protocol on the Control and Management of Heavy Fraud Cases and other Complex Criminal Cases. The client needs time to go through the disclosed documents, set out their recollection and identify how best to deal with the interview process. It is often the case that a suspect will decline to answer questions but will wish to set out their case in the form of a statement prepared in advance.

Unfortunately, the fee available for advice prior to interview is limited to representation during interview itself. The fee does not reflect the seniority or experience of the person attending upon the client. There is no fee available for taking instructions from the client and advising how best to present the case. In such circumstances, clients frequently choose to pay privately to ensure that their case is properly prepared at this important stage of the investigation.

PROVISIONAL REPRESENTATION ORDER

Plea discussions are now a more common feature in the prosecution of serious fraud. They are governed by the Attorney General's Framework of March 2009 and aim to provide early resolution in certain cases. Prosecuting agencies select cases they think suitable for plea discussions and send an offer letter to the defendant's representative. If the offer is accepted, plea discussions may begin.

Legal aid is now available for funding plea discussions, under a Provisional Representation Order (PRO) (see SI 1995 of 2009). The scheme is operated by the LSC's Complex Crime Unit ("CCU"). The LSC encourages firms to apply for a PRO by using the application form available on its website (www.legalservices.gov.uk). It details various documentation that should be supplied with the application, but note in particular that the application should include a signed authority (with original signature) confirming the client's wish to (a) enter into plea discussions, and (b) to be represented by the litigator concerned.

Litigators do not currently have to be a member of any panel to sign up to a PRO.

A PRO does not cover court hearings, but notwithstanding there is an application procedure (by completing the Counsel Extension Pro-Forma) to extend the order to include the involvement of either junior counsel, a QC, or a QC leading a junior. In determining whether a PRO should be extended in this way, the LSC will seek to follow the principles of Regulation 14 of the CDS General Regulations 2001.

A PRO may last up to three months, and can be extended for a further three months by application to the CCU if there are reasonable grounds to expect that a further period will lead to an agreed plea. (SI 1995/09, s4(2) and Individual Case Contract paragraph 2.8). The onus of proving this lies with the defence.

As with VHCC's (see below), work must be preauthorised and agreed following the submission of a task list. Part of the justification of the PRO scheme is the reduction of costs and this means that the LSC is unlikely to agree to requests that, for instance, put the prosecution to proof of all aspects of their case. Template task lists for the sort of work that will be permissible are available on the LSC website.

Any claims for payment should be backed up by evidence of work done in the form of attendance notes or similar. The current system requires the solicitor to claim on the advocate's behalf.

THE LEGAL SERVICES COMMISSION VERY HIGH COST CASE CONTRACT SCHEME

[29.6]

The main exception to fixed/graduated fees is in relation to Very High Cost Criminal Cases (VHCCs).. From July 2010 this regime applies to cases due to last over 40 days (as far as litigators are concerned) and over 60 days (as far as advocates are concerned). There are only around 100 or so cases a year that are treated as VHCCs – roughly 0.1% of volume. The scheme operates differently from a graduated fee scheme, in that defence teams agree (with their contract manager) an overall case plan and then three-month blocks of work (stage plans), which establish the number of hours to be spent doing various tasks (for example, reading pages of evidence, taking instructions, etc.) at a set hourly rate for each task. In this way, defence costs can be more tightly managed, with regular opportunities for the contract manager to question the work being negotiated.

The maximum hourly rates for the various categories of case (which reflect the complexity or 'weight' of cases, split between fraud and non-fraud) are set out in the LSC's VHCC contract. Participants must apply for accreditation. We have set out the criteria in the Appendix below.

The full details of the scheme can be found on the LSC's website. Under obligations set out in the VHCC Panel Members and VHCC Panel Advocates Contracts and in the CDS (VHCC) Regulations 2007 all defence teams (including those who are not VHCC Panel Members) must now submit a VHCC Notification Request Form to the Complex Crime Unit of the LSC for any case where the trial is likely to last for 25 days or more. This must be done within five days of either the PCMH or the defence team having identified that the case will be or is likely to be a VHCC.

There are currently two schemes in operation, and the choice of scheme is based on the date of the Representation Order. Both schemes offer the same rates of pay.

(a) for Representation Orders dated on or after 14 July 2010, litigators and advocates instructed on Very High Cost Cases (VHCCs) operate under an individual case contracting arrangement. In order to be awarded an individual case contract a firm and advocate must go through the e-accreditation scheme set out on the LSC's website. Part of this process requires solicitors' firms to show that they have a suitably qualified 'Supervisor'. Once a firm or advocate is accredited they generally speaking remain so until the LSC changes the accreditation scheme. There is no deadline for applying for accreditation under this scheme.

(b) Cases started on or after 08 January 2008 or which have Representation Orders dated between that date and 14 July 2010 operate under the old VHCC Panel Scheme. In order to undertake this work, the litigator may also need to be on the Specialist Fraud Panel. These panels are now closed to new applicants. Cases operating under the VHCC panel contracts will continue to do so until their conclusion.

Both these schemes will apply the 2008 panel rates (£145 per hour for a Level A litigator on a category 1 VHCC).

VHCC Contract Features:

The basic features of the contracts scheme can be summarised as follows.

(a) Operating through one of the above two schemes is essentially the only method available for publicly funding a case defined as a VHCC.

(c) As stated above, as soon as a solicitor is instructed, he is expected to assess whether the case may qualify as a VHCC and to notify the Commission as soon as practicable in writing. (Any issue of whether a case is a VHCC is determined by the Commission (Criminal Defence Service (Funding) Order 2001, SI 2001/855.)

(d) Those working on a case are divided into either Grade A, B or C fee-earners, with qualification for each dependent on a combination of the number of hours worked on comparable cases and the number of years' qualification.

(e) The case will then be classified as fraud or non-fraud by the Commission and allocated to one of four case categories (1 to 4), which will determine the fee levels payable to the contracted parties. The LSC sets various criteria against which the case is judged and categorised, details of which can be found on the LSC website.

- Fraud cases can only be categorised as 1 to 3.
- Category 1 pays the most (up to £145 per hour for a grade A solicitor or Leading Counsel), with Category 3 and 4 cases paying approximately a third less for the same level of fee earner.
- Only a handful of cases a year will ever qualify for category 1. Recent changes have had the effect that most fall into category 3, some into 2 and virtually none into category 1.
- The classification and categorisation of the case can be appealed within the contract scheme appeals procedure.

(f) The LSC will appoint a contract manager who will manage each 'stage', which is generally a period of three months. A task list is agreed for each stage, which lists the work that the parties are permitted to carry out. Any work done that is not on this agreed list (which can be added to by agreement during the stage) will not be paid for.

Advocates operating under the VHCC scheme

[29.7]

Advocates should be alert on receipt of instructions to establish whether the case is one that has been, or should have been, reported to the Commission as a potential VHCC. If a case should have been reported but has not, advocates working under the representation order may not be paid for any of the work they do.

Case plans

[29.8]

The solicitor is the case manager and is regarded by the LSC contract manager as ultimately responsible for the allocation of tasks in the defence team, and so the advocate must engage in detailed discussions with the solicitor over the formulation of the case plan at the very earliest stage to ensure that the advocate's role is properly allowed for within it. The advocate instructed in a case after the case plan has been agreed between the solicitor and the contract manager should be particularly careful to check that the advocate's part of the case plan is acceptable. To complete the case plan effectively, the fullest information possible as to the likely shape of the prosecution case should be solicited from the prosecution agency. The advocate should automatically be sent a copy of solicitor's contract and remuneration rates. Template or specimen case plans to assist in the identification of tasks are available, and detailed guidance is available in *Counsel's Manual for Very High Cost Cases*, which can be obtained from the Criminal Bar Association or Bar Council.

The case plan is important to the case category allocated, and so particular attention should be paid to features determinative of that element in any decision whether or not to contract. It will usually be better for the case plan to incorporate a separate plan dealing with the work of the advocate. The advocate should be present when the case manager and contract manager meet to discuss the advocate's part of the case plan. A full justification of the nature of the task and the benefit or consequences of it to the defence case, as well as the estimated time it will take, will be required and the advocate should anticipate that the contract manager may have limited experience of serious fraud cases. Tasks that can be foreseen but are not yet quantifiable should be identified as such. The case plan should in any event include outline plans for necessary work right up to the end of the trial, and each stage plan will be likely to cover a period of three months. An important issue in the decision to contract or not, which should be established with clarity before the contract is signed, is whether, and on precisely what terms, the contract will cover the advocate's travel and hotel expenditure.

Stage plans and task lists

[29.9]

Commented [E1]: Sean: are the next two sections (ie Case Plans and Stage Plans and Task Lists) designed only to apply to the section above headed "Advocates operating under the VHCC scheme"? I seem to remember you including these.

Stage plans and task lists are mandatory and the advocate and solicitors are expected to collaborate over the stage plan but submit individual task lists. The first such plan will almost certainly need to be agreed at the first meeting with the contract manager and usually before the contract is signed, but subsequent plans may be agreed without a meeting. Much of the material at 29.8 above applies with equal force to each detailed stage plan and task list as the case progresses. The advocate's task list will be expected to describe in detail each activity to be undertaken over the period covered by the stage plan, and to identify the hours it will take. At the preparation of each stage plan it will be necessary to keep under review the appropriate case category, as it may alter during the life of the case and it is important that an application is made to the contract manager as soon as it does, as any changes will take effect from the date of the application. The case category can change in either direction and the advocate is highly unlikely to be able to withdraw from a case after contracting if the case is re-categorised following a change in circumstances.

GRADUATED LITIGATOR'S FEE

[29.5]

All publicly-funded non-VHCC cases are paid pursuant to a graduated fee system. The advocate is paid according to the category of case, number of witnesses, number of prosecution pages of evidence ("PPE") and days of trial. The litigator is paid according to a similar scheme. The fee is fixed irrespective of how much work is performed upon it. The scheme enables a firm to make an assessment of the economics of taking on such a case.

In order to act under this scheme, a firm of solicitors will have to have a General Criminal Contract with the LSC. Pages that qualify as "PPE" are as designated in paragraph 1 of schedule 1 of the Criminal Defence Service (Funding) Order 2007, as amended by the Criminal Defence Service (Funding) (Amendment) Order 2007. They currently include: all witness statements, documentary and pictorial exhibits, records of interviews with the assisted person, and records of interviews with other defendants, which form part of the committal or served prosecution documents or which are included in any notice of additional evidence. They do not include any document provided on CD-ROM or by other means of electronic communication. Note that they do not include unused material either.

The advocate must complete and submit the relevant PPE form.

Commented [E2]: Sean: do you (by any chance) know if this is still the case???

THIRD PARTY FUNDING AND INDEMNITY POLICIES

[29.10]

Insurance cover is increasingly common for criminal investigations. Cover is often provided under Directors and Officers policies. The point at which cover starts, and the point at which it stops, varies from policy to policy. Some for instance will cover the period up to charge but cease at that point; others will cover a full trial, and within those categories there is sometimes a limit on the amount that the policy provider will pay out regardless of what stage the case gets to.

The Serious Fraud Office recently introduced changes whereby companies are encouraged to volunteer the fact that they have engaged in corporate criminal activity (a process known as "self-reporting"). There is particular room for dispute over whether the policy bites if a company is volunteering information, particularly if any resulting investigation is seeking a civil rather than a criminal resolution. Some insurance companies are addressing this change in procedure. It is therefore essential to read the policy carefully. Another area ripe for a coverage dispute in the self-reporting regime is whether or not the company knew about the criminal activity at the time the policy was taken out (given that they are volunteering the information to the authorities), and whether it ought to have been declared.

In the event of a problem, there are lawyers who specialise in advising on, and where necessary challenging, whether funding should be provided under a policy.

COSTS

[29.11]

Convicted Defendants – a convicted defendant may be required to pay the costs of the prosecution and, if publicly funded, to pay the costs of funding his own defence. Section 17 of the Access to Justice Act 1999 governs Recovery of Defence Costs Orders (RDCOs) and the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001 (as amended) apply.

Acquitted Defendants – a successful defendant whose defence was privately funded would ordinarily expect his reasonably incurred costs to be repaid from central funds or from the prosecuting authority (through a 'Defence Costs Order'). The MoJ sought to restrict such payments to rates available for publicly-funded work. This policy was successfully challenged in the High Court and will require legislation before it can come into effect. Solicitors should in any event make it clear to their clients at the start that they will not necessarily be reimbursed the full amount of their costs even if they are successful.

The MoJ has issued a consultation paper inviting consideration of whether to abolish or cap costs payable by the state to successful defendants. See: www.justice.gov.uk/publications/award-costs-central-funds.htm.

USEFUL FURTHER GUIDANCE

[29.12]

Useful further sources to counsel and solicitors considering entering into a VHCC contract in a serious fraud case can be found on the LSC's website at www.legalservices.gov.uk and *Counsel's Manual for Very High Cost Cases* can be obtained from the Criminal Bar Association or the Bar Council.

Appendix

Fraud VHCC

Category 1: all 4 criteria from Block A are met, and all 4 a's from Block B

Category 2: 2 criteria from Block A are met and at least 2 a's or b's from Block B

Category 3: All other fraud VHCCs

Category 4: non-fraud VHCCs only

Block A

1. The defendant's case is likely to give rise to:

- (a) national publicity; and
- (b) widespread public concern;

Commented [E3]: Again, I think you raised this when we last met. Do you know the latest?

2. The defendant's case requires highly specialised knowledge;
3. The defendant's case involves a significant international dimension;
4. The defendant's case requires legal, accountancy and investigative skills to be brought together.

Block B

1. The value of the fraud as described in the indictment and/or the prosecution case statement/summary exceeds:

- (a) £10m
- (b) £2m

2. The volume of prosecution documentation, which consists of:

witness statements

exhibits

interview transcripts

pre-interview disclosure/advance information

Notices of Further Evidence ("NFEs") exceeds:

- (a) 30,000 pages
- (b) 10,000 pages.

Unused material will not be considered for the purposes of this criterion, nor will evidence which has yet to be served.

3. The total costs of representing the defendant(s) are likely to exceed:

- (a) £500,000
- (b) £250,000.

4. The length of the trial is estimated at:

- (a) over 60 days