



Legal Aid
Agency

High Cost Cases Solicitors and Counsels Information Pack (Non- Family)

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1. Overview

This Information Pack sets out the Legal Aid Agency's (the Agency) procedures for individual high cost cases. It sets out what actions you the solicitors and counsel, should take when you take on a new case which is going to be very high cost, or when an existing case increases in cost to become very high cost. These cases are subject to individual contracts – the 2018 Individual Case Contract (High Cost Case), and this pack provides guidance on the operation of the contract. There is a separate Pack dealing with Family and Children cases.

2. The Background

The Agency has established the Exceptional and Complex Cases Team (the ECC Team) to manage high cost cases. This document deals with individual cases, small groups of cases under a single case plan, and community actions referred to the ECC Team. Multi-party actions are subject to separate contract arrangements.

Part 6 of the Civil Legal Aid (Procedure) Regulations “Special Case Work” sets out the conditions and controls applicable to high cost civil cases. Funding will be conditional on proposals put forward by the solicitor to progress the litigation in a satisfactory manner. There must be a fully costed Case Plan and proposals for key stages. It is the solicitor's responsibility to ensure that funding is in place before carrying out the proposed work.

Typically, the process of submitting a case plan will commence when solicitors indicate that the case is high cost and ask the ECC Team to raise a case plan request on CCMS; or submit an amendment request taking the case to high cost and the ECC Team will raise a case plan request (see Section 6). A fully costed Case Plan and contract must be agreed before the costs limitation can be amended to exceed £25,000 (see Section 4).

The contract will allow progression of the case stage by stage, with an agreed price for each stage. The costed Case Plan will usually follow well established routes for litigating different types of case in the early stages, but these may change as the case develops; future events are less certain and will generally contain fewer details.

Details of what must be included in a costed Case Plan and a key stage, and how they should be used, are set out later in the pack. Procedures for funding high cost cases are set out in The Civil Legal Aid (Procedures) Regulations Part 6 and in Lord Chancellor's Guidance issued under Section 4 of LASPO.

3. What are high cost civil cases?

High cost cases are defined in the Civil Legal Aid (Procedure) Regulations, Regulation 54(3). In summary these are cases where the Director has reasonable grounds to believe that: -

- a. the actual or likely costs of the case exceed £25,000.
- b. if the case were to proceed to –
 - i. a trial or final hearing; or
 - ii. in the case of appeal proceedings before the Court of Appeal, the conclusion of that appeal,

the likely costs would exceed £75,000.

- c. the application relates to a multi-party action or potential multi-party action.
- d. the application relates to an appeal or proposed appeal to the Supreme Court.
- e. it is necessary to decide whether—
 - i. the case is of significant wider public interest; or
 - ii. the substance of the case relates to a breach of Convention rights (within the meaning of the Human Rights Act 1998),

in order to determine whether the individual qualifies for civil legal services in accordance with the criteria set out in regulations made under section 12(f) the Act.

- f. the application relates to a case which satisfies the effective administration of justice test; or
- g. the application relates to a community action.

The Civil Legal Aid (Procedure) Regulations Reg 56 provides that for the purposes of the above rules the Agency may treat different proceedings as if they were a single case if the Director decides that the proceedings are closely connected or are being heard together by the court.

In those circumstances the Agency may require a single case plan covering related or linked cases. Consistent with this paragraph 4.8 of the contract specification provides that if the Client has more than one Certificate in the case, the Agency may amend the Contract to cover both or all of them.

In any case where the Solicitor does not hold a contract with the Agency (either at all or in the category that the case falls into) and wishes to apply for an individual case contract, the request for an individual case contract should be sent to the ECC Team. All figures in this document exclude VAT. There is a separate information pack for Family and Children Act cases

4. When do the contract & case plan start?

The date of the contract is the date on which the provider communicates acceptance in accordance with its terms, by returning the signed contract, plus counsels' acceptance, to the ECC Team. This may be different from the date from which the case plan work is funded which will be as specified within the case plan itself.

The contract stays in force while the certificate is in force. After receipt of the signed contract the ECC Team will amend the certificate to cover both the costs and the scope of the work set out in the key stage of the case plan.

A case plan and contract must in any event be agreed before the costs limitation is amended to exceed £25,000. The solicitor may ask for time to produce the case plan, in which case the ECC Team may agree to include in the first funded stage urgent work between the amendment request being made and agreement of the case plan.

The case plan will cover defined activities and usually a defined time period. It will state the cost of the stage broken down into disbursements, profit costs and advocacy costs on an hourly basis. Once each stage has been approved, the costs limitation on the certificate will be increased to reflect the cost of the approved stage.

5. Claiming pre-contract costs

Work may have been undertaken under the certificate before a case plan is requested e.g., under Regulation 54(3)(b), Section 3 above. This should be included in the case plan as pre contract work and after approval of your contract and amendment of the certificate a bill for this work may be submitted to the Finance Team for assessment under the Civil Legal Aid (Remuneration) Regulations. The costs, once agreed, will be paid by the Agency. For costs over £25,000 a different approach will be adopted in 'party & party' costs cases, see below.

6. Seeking Full Representation funding

If you identify a case as potentially high cost at the start for any of the reasons set out in Section 3 above, when seeking Legal Representation, you should raise a case enquiry asking the ECC Team to open a case plan task in CCMS.

If you identify this after a funding certificate has already been issued, usually for the reason in Regulation 54(3)(b) set out in Section 3 above, you should also apply for an amendment on CCMS or send in a CivApp8 amendment form in CIS cases.

To submit a case plan in a CCMS case please raise a case enquiry on the Certificate, we will then open a Case Plan task to enable you to upload the plan and agreement of the plan will be dealt with via this Case Plan task.

7. What decisions are made?

First, the ECC Team will decide whether the case justifies funding or further funding under the Civil Legal Aid (Merits Criteria) Regulations. It will then make determinations on the case plan under Civil Legal Aid (Procedures) Reg 55 & 56.

If the case qualifies for legal aid, the ECC Team will consider your costed Case Plan and proposed key stage and seek to agree these with you. If agreed, an appropriate scope and costs limitation will be placed on the certificate. The agreed price for the work will be based on the appropriate charging rates, see Section 14 below.

In considering a case plan the ECC Team may obtain independent counsel's opinion, seek representations from opponents against funding, attend conferences with counsel and experts and require specific issues to be covered by them.

If the case plan is refused in an "in scope" case, there is a right to have the case reviewed by the Independent Funding Adjudicator(s) or the Special Controls Review Panel Guidance on the procedures and criteria for qualifying for legal aid is set out in the Lord Chancellor's Guidance issued under Section 4 of LASPO.

Appeals relating to case plans in out-of-scope cases, Exceptional Cases Funding matters or decisions regarding the instruction of 2 counsel/Kings Counsel are dealt with according to the procedures applicable to all appeals in those cases.

8. Preparing a case plan

There are standard costed Case Plan templates on the website (link at Annex 2) which are designed to assist you in producing a plan appropriate to your case.

They set out a description of the case, your stated objectives in pursuing it, the legal and factual issues to be investigated and resolved, your assessment of prospects of success and cost benefit/proportionality, the proposed work order, the costs of each stage; and finally, the personnel you have selected and their ability to complete the work successfully, particularly counsel and any experts.

You must in all cases include in the costed Case Plan key stages for all work to conclude the case with provision for settlement or other disposal as well as trial or final hearing, with estimates of costs for each stage.

The templates are advisory i.e., the formats themselves are not mandatory (you may use whichever appears most convenient which may for example include a spreadsheet for the costs element); but your plan must address in it the information required. If a case plan is submitted without the required information in some form or other, it may be rejected until suitably amended to include this.

Because of the potential impact of the Statutory Charge, it is essential that clients are sent copies of costed Case Plans and key stages and given an explanation how they might be affected, even if 'party & party' costs are ordered in part, how any monetary award might be reduced by the amount payable to you under the contract in addition to costs recovered from the other side, see Section 25 below.

9. Clinical Negligence Funding Checklist

Case Plans are required in all cases which meet the criteria set out in Section 3 above; except only in Clinical Negligence cases for which the ECC team has developed a Funding Checklist (link at Annex 2).

10. What stages will normally be applied?

Clearly, the stages must reflect the type of case, the usual case management requirements of the courts and the opportunities for continuation of funding to be considered. At Annex 2 you will find outlines of the stages frequently expected in two common case types. You may propose other stages appropriate to the category of work and the individual case, for example, exceptionally detailed investigation work at the start of a case in order to justify its funding etc.

Normal stages are set out for the two most common categories of high cost case:

- Judicial Review/Public Law cases.
- Claims against public Authorities

11. Seeking Investigative Representation Funding

It may be that a costed Case Plan and key stage will be required to complete the investigative work in a case if this is substantial. The costed Case Plan beyond the

investigative stage would be expected to include options for the outcome, the major steps in the litigation and the likely costs. In such cases, options for concluding the case may include settling on acceptance of liability, proceeding to a hearing on quantum alone, as well as proceeding to full trial on disputed liability.

12. When do contract rates apply?

Whether or not it is done under a contract, work up to the first £25,000 (excluding VAT) of solicitors' costs, disbursements and counsel's fees are payable at the prescribed rates set out in Civil Legal Aid (Remuneration) Regulations.

If the first £25,000 of costs includes less than £5,000 in solicitors' costs, the work done by solicitors up to £5,000 (excluding VAT) will still be payable at prescribed rates. The same rule will apply to counsel, see section 17 below.

These thresholds are set at the point at which the solicitor and counsel are expected to accept part of the financial risk of pursuing the case in cases where 'party and party' costs can be expected to be ordered.

13. How are stages priced?

The stage price will comprise solicitors' costs, counsel's fees, experts' costs and other disbursements. After the initial "risk assessment stage" in 'party & party' costs cases, contract rates will apply as set out in Section 14 below. You must specify the number of hours required to carry out each of the activities in the Case Plan.

There will be no separate payments for letters, telephone calls etc. The payment will be for the direct hours spent on the case by fee earners. This is intended to be simpler for both parties. In 'party & party' costs cases solicitors and counsel will be paid at published contract rates exceeding the high cost case threshold of 25,000.

If counsel is planned to do any work in a Key Stage, the solicitor must include them in preparing the stage plan and draw their attention to the terms covering payment and the payment rates and obtain their signature to the Counsel's Acceptance Form. Once the Key Stage is negotiated the solicitor must supply the barrister with a copy of the fully costed Stage or the information in it.

Experts' reports and other disbursements will be paid under the prescribed rates in the Civil Legal Aid (Remuneration) Regulations.

14. What are the contract hourly rates?

The contract rates vary depending on whether the case is expected to result in an order for 'party & party' costs. In all cases the agency will pay costs up to £25,000 in line with current remuneration rates as set out in the Civil Legal Aid (Remuneration) Regulations. In cases where 'party and party' costs can be expected to be ordered, costs in excess of £25,000 will be paid at risk rates.

Risk rates are £70 per hour for solicitors, £50 per hour for junior counsel (barristers in independent practice of less than 10 years call) or led senior and £90 per hour for senior counsel (barristers in independent practice of 10 years call or more) and King's Counsel. There will be no enhancement. Travel time when approved will be paid at one quarter of the relevant rate (see Annex 1).

In cases where 'party & party' costs are not expected to be paid, e.g., cases before Special Immigration Appeals Commission, the Agency will pay in line with current remuneration rates as set out under the Civil Legal Aid (Remuneration) Regulations throughout. The Agency will also pay at these rates in a successful case which is being appealed or to defend an appeal against an interim order.

15. How are enhancements assessed on work not covered by contract rates?

You will need to propose and justify the enhancement to be applied in accordance with the general Cost Assessment Guidance in Section 12: Enhancement of Costs (available on our website). This sets out the tests as follows:

12.3 The [2018 Standard Civil Contract] Specification provides a two stage process for enhancements. The first stage is a threshold test - whether any enhancement should be allowed.

12.4 The 'relevant authority' - the costs officer or caseworker assessing the case - must be satisfied (Paragraph 6.13) that:

- a) the work was done with exceptional competence, skill or expertise.
- b) the work was done with exceptional speed; or
- c) the case involved exceptional circumstances or complexity.

If the assessor is satisfied that this test is met then it will be appropriate to go on to the second stage to consider the amount of any increase.

12.5 The second stage has its own set of criteria, namely that the 'relevant authority'

shall have regard (Paragraph 6.15) to:

- a) the degree of responsibility accepted by the fee earner.
- b) the care, speed and economy with which the case was prepared; and
- c) the novelty, weight and complexity of the case.

For counsel, the tests for applying an enhancement are contained in Regulation 7 of the Remuneration Regulations, and further guidance is set out in the Specification.

16. What is Counsel's part in the contract?

The contract is between the Agency and the firm of solicitors. The solicitors are obliged to draw counsel's attention to the terms covering payment and our Payment Rates and obtain counsel's signature to the Counsel Acceptance Form. Once the Key Stage is negotiated the solicitor must supply counsel with a copy of the fully Costed Stage or the information in it.

17. What is Counsel's role in case planning?

Where counsel is to be instructed in a case, we would expect counsel to agree their work and hourly rates set out in the costed Case Plan. In cases where 'party & party' costs are likely to be ordered counsel's payment will be at 'risk rates'. In cases where party and party costs are unlikely to be ordered and enhancements to hourly rates sought Counsel will need to justify those rates in the case plan. 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

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 606. Prior authority will need to be obtained from the ECCT team

The use of two counsel will also need to be justified as in the client's 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. 606. Prior authority will need to be obtained from the ECCT.

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. If there are two counsel instructed the 'ring-fence' will be shared £2,500 to each counsel. If it becomes necessary for a new counsel to be instructed

for reasons outside the control of the conducting solicitor, the new counsel would obtain a further 'ring-fence' of £2,500

18. Effect of a possible variation in hearing length on full hearing stage price.

For a stage including the full court hearing the stage price will be increased if the court hearing over-runs. You will need to propose in the Costed Case Plan the costs per day of hearing over-runs for solicitors and counsel. The contract price will be based on the judge's allocation of time for the hearing. When pricing a stage including a full court hearing, but prior to the judge's fixing the hearing length, an estimate should be used.

19. What happens if a case plan and key stage cannot be agreed?

If the Costed Case Plan cannot be agreed with the ECC Team in an "in-scope" case the decision can be appealed to the Independent Funding Adjudicator or SCRIP in accordance with the Civil Legal aid (Procedure) Regulations.

The Independent Funding Adjudicator (IFA) can usually consider all aspects of the Plan within the constraints of the standard contract terms and procedures. The IFA will not be able to review the Case Plan on the basis of the solicitors' failure to provide the information required by the Agency in its required format.

Appeals relating to Case Plans in out-of-scope cases, Exceptional Cases Funding matters or decisions regarding the instruction of 2 counsel/Kings Counsel are dealt with according to the procedures applicable to all appeals in those cases.

Ultimately, the Agency has power to refuse or withdraw funding altogether if the proposals for progressing the litigation do not appear to be satisfactory consistent with the Civil Legal Aid (Merits Criteria) Regulations.

20. Can the agreed stage price be increased?

The costed Case Plan will be specified in terms of prices for steps within a stage rather than detailed activities. It will not be possible for the Agency to identify minor changes in work from the Costed Case Plan below the level of a step. This is because it is not intended that minor increases in work result in an increase in the stage price, for example, writing an additional letter.

Hence the 5% tolerance has been applied by Paragraph 4.4 of the Contract

Specification. You will have to demonstrate and justify the increase over the original step price. Demonstrating that any proposed work is over and above that originally included in the price may be difficult. It is worth setting out examples to explain.

If an additional party is unforeseeably joined in proceedings, then the work in reviewing that party's arguments will not be in the Costed Case Plan at all. The decision on authorising additional work should be straightforward, as the work was clearly not included in the stage price.

If a solicitor applies for an increase due to writing a large number of letters to the opponents, it is unlikely that they will be able to demonstrate the work was not foreseeable and not included in the original stage price. This will more than likely not result in an increase in price.

To take a more marginal example if, in a judicial review case, the price of the step covering: 'receipt of respondents' evidence' was based on five statements being received from defendants which need to be reviewed, but in practice it turns out to be ten statements, additional work would be authorised if it were made clear this was the basis for the original price.

Any such 'significant planning assumptions' which significantly affect the key stage price should be explicitly stated. This will be useful to both parties in setting out the basis for the stage price and in agreeing any subsequent variation to the price. If these planning assumptions prove inaccurate it would justify the solicitor applying for an increase in the stage price. In this example additional work on the five statements would be authorised if the planning assumption was clearly set out from the start.

Finally, it is not intended that minor increases are aggregated across several steps within a stage to achieve the required 5% minimum increase. It is expected that applications will be made separately for increases in different steps within a stage in the case as they arise. Any request for increases to agreed stages should be made as soon as practicable.

21. Changing the team working on the case

We expect material changes to the team running the case to be reported. For example, if the expert or counsel were replaced with one of significantly less relevant experience, the Agency would expect this to be reported. The ECC Team could then decide if the case team were capable of managing the contract. Alternatively, if staff of the same experience were brought onto the team, but this would lead to disruption or delay to the case, we would expect this to be reported.

22. Making an urgent change to an agreed case plan.

If urgent work not covered by the Case Plan is needed a change can be requested – by submitting an amendment request and a case enquiry requesting renewal of the case plan task and telephoning the Customer Services line asking them to highlight the urgency with the ECC Team.

23. What happens at the end of a stage?

After completion of the funded stage, when requesting further funding you must submit a revised case plan setting out the work completed, the outcome of the stage including any key documents, reports and opinions generated, and your fully costed Key Stage Plan for the next stage.

If the stage includes a full hearing which overran, you can provide details of the overrun to justify an increase in the Key Stage costs. You will need to get agreement to any changes to a Stage from the ECC Team before you can bill.

The ECC Team will decide whether funding should continue to the next stage and agree a new stage plan. Again, there are rights of review against termination of funding or failure to agree a fully costed stage plan for the next stage.

If the actual cost is 95% (or above) of the price, the agreed price is payable. If the actual cost is between 50% and 95% of the price, the actual cost plus 5% of the price is payable. If the actual cost is 50% (or below) of the price, only the actual cost is payable. Costs will be assessed by the Agency, with the usual rights of appeal.

There will be no detailed assessments by the court, other than ‘party & party’ costs. Payment will be made within the standard service standards which the Agency will publish from time to time.

24. What happens if the case stops part way through a stage?

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.

In such circumstances the solicitor will be paid their costs for the proportion of work undertaken in the stage plan.

25. What are the contract payment terms?

Once a contract is in force, full payment of solicitor’s profit costs and counsel’s fees

may be made at the end of each fully costed stage and, if a stage will last more than six months, payments on account can be claimed after each six months. Disbursements over £100 will be paid as they are incurred.

At the end of the case, if you are awarded full 'party & party' costs and you elect under the contract to accept those costs no further payments are due from the Agency and all payments made under the certificate are repayable to the Agency.

26. Interim partial payment of costs

If the opponent makes an interim partial payment of costs, they may be transferred to your office account as costs only with the agreement of and held to the order of the Agency. Otherwise, the Agency will require payment to it of all interim costs pending reconciliation of costs at the end of the case.

27 Party and party costs order does not cover all of the costs or fees.

In cases where costs normally follow the event, if the court decides not to order the costs in full against the opponents, application can be made to the Agency. The Agency 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 expressly excludes them in full in the costs order. 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.

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 Agency will pay, at the contract rate, for all or some of the work where costs have not been awarded. The 'party & party' bill must be assessed by the court or agreed. Any agreement must be approved by the Agency because it could affect the Agency's and client's liability.

A transcript of the judgment must be obtained for the Agency to consider the court's view on all arguments put forward. The Agency will pay, at the contract price, for work in support of arguments reasonably pursued in accordance with the contract. If necessary, the Agency will seek an opinion from independent counsel. The Agency's decision on what costs to allow at the contract rate will be appealable to the Independent Cost Assessor whose decision will be binding on the Agency.

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 Section 8 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.

28. Review

At the end of the case, you and the Case Manager may review how the case has progressed to identify whether there is any scope for improving the management of similar cases, or future liaison between you and the ECC Team.

Annexes

Annex 1 – Hourly rates in contracted cases

Representative	Prescribed Rates (costs under £25,000)	Risk Rates (costs over £25,000)
Solicitors	Civil Legal Aid (Remuneration) Regulations 2013. Rates as Schedule 1 Enhancements as Reg 6(3).	£70/hr
Junior Counsel	Civil Legal Aid (Remuneration) Regulations 2013. Rates as Schedule 2. Enhancements Reg 7(3)	£50/hr
Senior Junior Counsel	Civil Legal Aid (Remuneration) Regulations 2013. Rates as Schedule 2. Enhancements Reg 7(3)	£90/hr
King's Counsel	Civil Legal Aid (Remuneration) Regulations 2013. Rates as Schedule 2.	£90/hr
Counsel's Ring- Fence	2013 Individual Case Contract (High Cost Case) Specification, paragraph 7.5	£5,000 for single counsel or shared equally if 2 barristers instructed.
Travel rate	As regulations above	¼ of above hourly rate
Experts Fees	Civil Legal Aid (Remuneration) Regulations 2013 Rates as Schedule 5.	CLA (Remuneration) Regulations 2013. Rates as Schedule 5.

Annex 2 – Standard stages for case categories

• Claims against Public Authorities

It is expected that these cases would proceed in the CPR multi-track so the standard CPR stages will normally be used as key stages - Investigation and pre-action protocol, other pre contract work: Issue to Mutual Exchange, Part 36/JSM; case management conference allocation; then Trial. It is expected that each of these stages will take 6 months to a year. See Non-Family case plan template, link below.

• Judicial Review/Public Law cases

Most Judicial Review proceedings are unlikely to be high cost. However, in complex matters a case plan may be required at or following the oral permission stage: -

- Permission Stage (assume both written & oral applications)
- Substantive Hearing (conference, preparation, attendance)
- Appeal to Court of Appeal (given novel and complex issues)

Following the substantive hearing, any appeal required would be treated as a separate stage. See Judicial Review (costs only) template, link below.

• Template Case Plans; Contract Documents

Please refer to the template case plans for non-Family (all case types) and Judicial Review (stages/costs only, analysis as per non-Family) and the Clinical Negligence Funding Checklist, and the Solicitors' and Barristers' Information Pack at this link:

<https://www.gov.uk/government/publications/high-cost-cases-non-family-civil>

Please refer to the 2018 High Cost Case Contract and Counsels Acceptance forms and the 2013 Individual Case Contract (High Cost Case) Specification at this link:

<https://www.gov.uk/government/publications/civil-high-cost-case-contracts>

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