

HOUSING LAW PRACTITIONERS ASSOCIATION

Wednesday 15 January 2014

Defending Possession Proceedings: One Year On

Mortgage Repossession and Public Funding

The Statutory Backdrop

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

9 General cases

(1) Civil legal services are to be available to an individual under this Part if—

- (a) they are civil legal services described in Part 1 of Schedule 1, and
- (b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).

Sch 1 Part 1

“Loss of home

33 (1) Civil legal services provided to an individual in relation to—

- (a) court orders for sale or possession of the individual's home, or
- (b) the eviction from the individual's home of the individual or others.

(2) Civil legal services provided to an individual in relation to a bankruptcy order against the individual under Part 9 of the Insolvency Act 1986 where—

- (a) the individual's estate includes the individual's home, and
 - (b) the petition for the bankruptcy order is or was presented by a person other than the individual,
- including services provided in relation to a statutory demand under that Part of that Act.

General exclusions

(3) Sub-paragraphs (1) and (2) are subject to the exclusions in Part 2 of this Schedule, with the exception of paragraph 14 of that Part.

(4) But the exclusions described in sub-paragraph (3) are subject to the exceptions in sub-paragraphs (5) and (6).

(5) The services described in sub-paragraph (1) include services provided in relation to proceedings on an application under the Trusts of Land and Appointment of Trustees Act 1996 to which section 335A of the Insolvency Act 1986 applies (application by trustee of bankrupt's estate).

(6) The services described in sub-paragraph (1) include services described in any of paragraphs 3 to 6 or 8 of Part 2 of this Schedule to the extent that they are—

(a) services provided to an individual in relation to a counterclaim in proceedings for a court order for sale or possession of the individual's home, or

(b) services provided to an individual in relation to the unlawful eviction from the individual's home of the individual or others.

Definitions

(9) In this paragraph "home", in relation to an individual, means the house, caravan, houseboat or other vehicle or structure that is the individual's only or main residence, subject to sub-paragraph (10).

PART 2

EXCLUDED SERVICES

The services described in Part 1 of this Schedule do not include the services listed in this Part of this Schedule, except to the extent that Part 1 of this Schedule provides otherwise.

14 Civil legal services provided to an individual in relation to matters arising out of or in connection with—

(a) a proposal by that individual to establish a business,

(b) the carrying on of a business by that individual (whether or not the business is being carried on at the time the services are provided), or

(c) the termination or transfer of a business that was being carried on by that individual."

Subordinate Legislation

The Civil Legal Aid (Procedure) Regs 2012 SI 3098

PART 2 Gateway Work

General

"16. (1) This Part makes provision about the making and withdrawal of determinations under section 9 of the Act about Gateway Work.

(2) Except as specifically provided in this Part, Part 3 (Controlled Work) applies to Gateway Work.

Applicants

17. (1) An individual, other than an exempted person, must apply to the Gateway (established by the Lord Chancellor under section 2 of the Act) for a determination by the Director about Gateway Work.

(2) An exempted person may apply for a determination by the Director about Gateway Work to—

(a) the Gateway; or

(b) a face-to-face provider".

The application

18. An application to the Gateway may be made by—

(a) telephone;

(b)email;

(c)electronic format made available by the Lord Chancellor for the purpose of such applications; or

(d)post.

Para 20 defines "Gateway Work" in the housing context as the provision of legal services by a specialist telephone provider or face to face provider to an individual in a "debt matter". In turn "debt matter" is defined as cases involving court orders for the sale, or orders for possession on account of a failure to make payments due under a mortgage of the individual's home or cases falling within Para 33(2).

"Exempted person" is defined as a person who has been deprived of his/her liberty, is a child or is a person who has within the previous 12 months had qualified for Gateway Work from a face to face provider and has a linked problem. "Linked problem" is defined as being a matter arising out of or related to a matter in relation to which Gateway Work was provided by a face-to-face provider.

LASPO 2012 s 4(3) Guidance

"Lord Chancellor's Guidance on Civil Legal Aid" –

<http://www.justice.gov.uk/downloads/legal-aid/funding-code/lord-chancellors-guidance.pdf>

8.10 Unless the client is an exempted person, as described above, a provider cannot provide legal help unless the matter has been assessed by the Gateway as requiring face to face advice. In most cases it is anticipated that the Gateway will be able to provide the client with legal help over the telephone/email/post. However, in certain cases the Gateway may determine that the case is such that it is not suitable for advice by telephone/email/post and that face to face advice may be required. In these circumstances the Gateway will inform the client that they may seek advice from a face to face provider and will allocate the client a CLA Reference Number confirming that they have been assessed and are eligible for face to face advice.

8.11 Any provider making a determination following an application for legal help to which Part 2 applies should therefore ensure that either the client is an exempted person or that they have a CLA Reference Number for the client confirming that they have sought advice through the Gateway but that face to face advice is required.

8.12 Part 2 of the Procedure Regulations do not apply to applications for licensed work. A provider will therefore be able to make an application for licensed work in Gateway areas of law on behalf of a client. However, an application for licensed work should not be made until all work which could have been carried out under legal help has been completed. Unless, therefore, the matter is urgent and legal representation is immediately required it would usually be expected that an application for the initial legal help should be made through the Gateway. If not, the application for licensed work may be premature.

Legal Aid Agency Policy Documents

“Civil Legal Advice and the gateway: Guidance for Civil Contracted Providers” LAA March 2013 - <http://www.justice.gov.uk/downloads/legal-aid/eligibility/civil-legal-advice-provider-guidance.pdf>

Grant of Legal Representation

Legal Aid (Merits Criteria) Regs 2013 SI 104

Criteria for determinations for full representation in relation to court orders for possession

61. (1) For the purposes of a determination for full representation in relation to any matter described in paragraph 33(1)(a) of Part 1 of Schedule 1 to the Act (court orders for sale or possession of the individual's home), to the extent that it relates to court orders for possession of the individual's home, the criteria in—

- (a) regulation 39 (standard criteria for determinations for legal representation) apply;
- (b) regulations 41 to 44 (criteria for determinations for full representation) do not apply; and
- (c) paragraph (2) apply.

(2) The Director must be satisfied that the following criteria are met—

- (a) if the individual is the defendant to a claim for possession, the individual has a defence to the claim;
- (b) the prospects of success are very good, good, moderate or borderline; and
- (c) the proportionality test is met.

Standard criteria for determinations for legal representation

39. An individual may qualify for legal representation only if the Director is satisfied that the following criteria are met—

- (a) the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;
- (b) the case is unsuitable for a conditional fee agreement;
- (c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings;
- (d) the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution;
- (e) there is a need for representation in all the circumstances of the case including—
 - (i) the nature and complexity of the issues;
 - (ii) the existence of other proceedings; and
 - (iii) the interests of other parties to the proceedings; and
- (f) the proceedings are not likely to be allocated to the small claims track.

Proportionality test

8. For the purposes of these Regulations, the proportionality test is met if the Director is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.

Legal Aid Agency "Frequently Asked Questions"

<http://www.justice.gov.uk/downloads/legal-aid/legal-aid-reform/legal-aid-reform-faq.pdf>

"29/05/2013 LEGAL AID REFORM IMPLEMENTATION PROGRAMME 15

(V) HOUSING AND DEBT

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87. If an individual who owns their own home faces eviction arising from mortgage possession proceedings is this a housing matter?

Mortgage possession is within scope and falls under Debt. Work relating to the eviction will be undertaken under the category that the original possession issue arose in. If eviction is on the basis of mortgage possession then this is Debt work and the client must be referred to the Gateway. Eviction as a result of possession on any other basis (i.e. rent) falls within the Housing category.

88. Where a client is a tenant in a mortgaged property and the mortgage lender is seeking possession of the property from the landlord can advice be given to the client in relation to their rights? Which category would this fall under?

This would in principle fall under the Housing category as the client's issue is regarding their tenancy. The client's problem would need to fall within Part 1 Schedule 1 of LASPO (and not excluded under Part 2 and 3) for advice to be given. The client must be directly involved in possession proceedings in relation to their home for advice to be given.

89. What happens where a creditor pays the charges for bankruptcy proceedings? Would this be classed as voluntary or involuntary bankruptcy as client could agree to it but creditor pays the actual charge?

The Act specifies that cases where the petition for a bankruptcy order against a client is made by a person other than the client would be in scope. However, providers should also be mindful of the Civil Legal Aid (Merits Criteria) Regulations 2013 which provide that legal help may only be provided where there is sufficient benefit to the client to justify work being carried out. For example, a case where a petition made

90. Bankruptcy matters where the petition for bankruptcy was issued by a creditor are in scope. Can advice be given to clients who are not being made bankrupt themselves but co-own a property with the person who is being made bankrupt e.g. a spouse or partner?

Advice in relation to a bankruptcy order against the individual is within scope; BUT a co-owner would not qualify. Such a co-owner may qualify if an order for sale of the property was sought or if they were made homeless and were making an application for re-housing.

91. When can face to face providers use delegated functions in Debt matters to grant Legal Representation?

Providers can use their delegated functions in Debt where proceedings have been issued (as opposed to threatened) to grant legal representation where the relevant scope, means and merits criteria are met. Providers are reminded that when assessing merits they must consider alternative remedies, the need for representation, prospects of success and cost benefit and any work done must be at the relevant level of funding (controlled or licensed work). Guidance on the forms of Civil Legal Services can be found in section 6 of the Lord Chancellors Guidance on Civil Legal Aid which can be found at www.justice.gov.uk/legal-aid/funding/funding-guidance. Where advice under Controlled Work would be more appropriate clients must be signposted to CLA at the earliest opportunity (unless they are an exempted person). Any delay would be contrary to s.2.49 of the 2013 Standard Civil Contract Specification and s.7.2 of the 2013 Standard Civil Contract Standard Terms relating to acting in the best interests of potential clients and contract sanctions could be applied.

92. If the possession proceedings result from a Secured Loan on the property is this still in scope for Debt work, as the results have same outcome but it is not technically a mortgage?

Possession proceedings to enforce a Secured Loan on the client's home are in scope for Debt.

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94. As a face to face debt provider could I sign up a child for legal help advice whose parents are subject to mortgage possession proceedings as an exempted person?

No. The child is not the proper client in this matter – it will be the parent (as owner and mortgagor) who will be the party to any proceedings. The child should not be considered the client in order to avoid the provisions of Part 2 of the Civil Legal Aid (Procedure) Regulations 2012 and therefore this is gateway work and must go through the CLA gateway.

95. Can advice be given to a client in relation to the validity of a mortgage where this arises out of possession proceedings? For example if a mortgage provider is seeking possession of the client's home due to mortgage arrears but the client is challenging the validity of the mortgage (the example given was that they're disputing that the signature on the mortgage agreement is theirs). Yes as long as this argument is part of the defence for possession proceedings.

96. Where a client is threatened with homelessness as a result of mortgage possession could this be dealt with as a homelessness matter under housing as opposed to a possession case under Debt?

The facts of the individual case will determine which route is appropriate, subject to the appropriate merits criteria. If the provider is attempting to avoid possession this would be Debt. However, if the provider is making an application to the local authority for re-housing on the basis of threatened homelessness this would be housing. Clients that require advice on mortgage possession must be signposted to CLA at the earliest opportunity (unless they are an exempted person). Any delay would be contrary to 2.49 of the 2013 Standard Civil Contract Specification.

97. A client lives abroad but has a mortgage with a UK bank/building society for the property that they live in abroad and this property is being repossessed due to mortgage arrears. Is this in scope of legal aid?

Possession proceedings involving the client's main home are included in paragraph 33, Part 1, Schedule 1 of LASPO. However, Section 32 of LASPO is clear that only matters of English and Welsh

law are in scope.

98. Do providers have to wait for housing possession proceedings before providers can grant legal aid?

Providers do not need to wait for housing possession proceedings to be issued before providing advice under legal help, as long as the client has received formal written notification that proceedings will be issued (such as a section 8 or section 21 notice) unless there is some intervention. An application for legal representation will not be granted before proceedings have been issued at court by the opponent.

99. In mortgage/ rent possession can Legal Help only be undertaken where there is a full or partial defence?

Whilst you cannot get Legal Representation without a full or partial defence there is no such requirement for Legal Help.

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102. If a mortgage possession case is at court, can a provider attend the court hearing and claim as a Housing Possession Court Duty Scheme (HPCDS) case?

A provider can advise a client under the Housing Possession Court Duty Scheme (HPCDS) where they hold a 2013 Standard Civil Contract in the Housing and Debt categories and have an Exclusive Schedule for the HPCDS and the provider is attending court under the HPCDS. Where a client contacts a provider for advice on a possession matter before the date of a possession hearing any attendance at court would be outside of HPCDS and must be done under the provider's 2013 Standard Civil Contract.

Don't Forget the Statutory Charge!

LASPO s25

Charges on property in connection with civil legal services

(1) Where civil legal services are made available to an individual under this Part, the amounts described in subsection (2) are to constitute a first charge on—

(a) any property recovered or preserved by the individual in proceedings, or in any compromise or settlement of a dispute, in connection with which the services were provided (whether the property is recovered or preserved for the individual or another person), and

(b) any costs payable to the individual by another person in connection with such proceedings or such a dispute.

(2) Those amounts are—

(a) amounts expended by the Lord Chancellor in securing the provision of the services (except to the extent that they are recovered by other means), and

(b) other amounts payable by the individual in connection with the services under section 23 or 24.

The Civil Legal Aid (Statutory Charge) Regs 2013 SI 503

Reg 1 "statutory charge" means the charge created by section 25(1) of the Act (charges on property in connection with civil services);

Reg 4 statutory charge does not apply to Controlled work

Enforcement of the statutory charge

21. The Lord Chancellor may enforce the statutory charge in any manner which would be available to a chargee in respect of a charge given between parties to proceedings.

22. (1) The Lord Chancellor may postpone the enforcement of the statutory charge if—

(a) by order of the court or agreement, it relates—

(i) to property to be used as a home by the legally aided party or the legally aided party's dependants; or

(ii) where the relevant proceedings are family proceedings, to money to pay for such a property;

(b) the Lord Chancellor is satisfied that the property referred to in paragraph (1)(a) will provide appropriate security for the statutory charge; and

(c) the Lord Chancellor considers that it would be unreasonable for the legally aided party to repay the amount of the charge.

24. (1) The Lord Chancellor may review a decision to postpone the enforcement of the statutory charge at any time and where on doing so considers that the conditions in regulation 22(1) are no longer satisfied, the Lord Chancellor must enforce the charge.

(2) Where after a review the Lord Chancellor further postpones enforcement of the statutory charge—

(a) it may be postponed on such terms and conditions as to repayment by way of interim payments of either capital or interest, or both, as appear to the Lord Chancellor appropriate; and

(b) interest shall continue to accrue in accordance with regulation 25.

25. (1) Where interest accrues under regulation 22(5)(a)—

(a) that interest shall accrue from the date when the charge is first registered;

(b) that interest shall continue to accrue until the amount of the statutory charge is paid;

(c) the applicable rate shall be 8% per annum; and

(d) the capital on which it is calculated shall be the lesser of—

(i) the amount of the statutory charge outstanding from time to time, less any interest accrued under regulation 22(5)(a); and

(ii) the value of the property recovered at the time of such recovery.

(2) The legally aided party may make interim payments of either capital or interest, or both, in respect of the outstanding amount of the statutory charge, but no interim payment may be used to reduce the capital outstanding while any interest remains outstanding.

Derek McConnell

January 2014