Housing Law Practitioners' Association

Minutes of the Meeting held on 15 January 2014
University of Westminster

Defending Possession Proceedings: One Year On

Speakers: **James Harrison, Edwards Duthie Solicitors**
Derek McConnell, South West Law

Chair: **Dominic Preston, Doughty Street Chambers**

Chair: Good evening everybody, my name is Dominic Preston and I will be chairing the meeting this evening which deals with the topic of Defending Possession Proceedings: One Year On. Firstly, does anyone have any corrections to the Minutes of the last meeting? If not, I will introduce our speakers. James Harrison from Edwards Duthie Solicitors will deal with the first section on possession, then Derek McConnell from South West Law will be dealing with mortgage cases. Just to tell you how good they are, I know that Derek has been speaking on this subject for a long time. You all know him from his publications but I think he and Nic Madge were the first speakers that I ever saw at a HLPA meeting something like 17 years ago so it is a pleasure to see him again.

James Harrison: On the slide in front of you is just a brief overview of my talk this evening. I am going to take us fairly quickly through LASPO and the Regulations. Secondly, in a bit more detail, I will go through the availability of Legal Aid in Rent Possession Cases. Thirdly, I will talk about how we might go about securing Inter-Partes Costs Orders which is, of course, the other side of the coin of Legal Aid practice. Fourthly, an area dear to my heart which is dealing with the LAA and, fifthly, other points to note which information that I didn't feel that I could not mention during a talk on possession.

Just to mention the title briefly, Defending Possession Proceedings Under Legal Aid: One Year On; one year on, of course, refers to one year or thereabouts since the changes in the scope to Legal Aid.

So, LASPO and the Regulations; this is all pretty familiar 9/10 months in, I hope, but the legal services that remain in scope are, of course, set out in Schedule 1 Part 1 and then you turn to Parts 2 and 3 of Schedule 1, which set out the exclusions. The Funding Code, our old friend, goes to be replaced by the Legal Aid (Merits and Criteria) Regulations 2012. That, I have to say, I think is welcome change because being a lawyer I find it much easier to find my way around Regulations which are conveniently in parts rather than the less clear Funding Code. The Legal Aid (Procedure) Regulations 2012 replace the old Funding Code Procedures and in practice set out how applications should be made and how cases should be conducted. Then the old Funding Code Decision-Making Guidance goes to be replaced by the Lord Chancellor's Guidance. Also worth bearing in mind the FAQs published by the Legal Aid Agency, they are on the Legal Aid reform section of their website. That is handy because it just gives some practical guidance of cases and it helps you to interpret the Regulations; not uncontentious but it is a useful starting point and one thing I do want to flag up as well is the Legal Aid Handbook website. I am not on commission but it is quite excellent as somewhere to find everything linked together; you can just go to that page, save it as your favourites and find all the Regulations, the FAQs, everything you need to find your way around the Legal Aid world.

So Legal Aid in Rent Possession Cases. So here we are in Part 1 of Schedule 1. You find your way down to paragraph 33 which deals with possession cases and it confirms that 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. Obviously, therefore, that includes possession proceedings, the possession hearings themselves and, in terms of eviction, warrant applications; they both remain in scope. An obvious point but it is the client's home that has to be at risk. Sometimes when you are doing duty advice you will come across a landlord, effectively, who has got an investment property, he is not living in the property; that is not within the scope of Legal Aid; it is not their home and, of course, it is a matter arising from a business so that is out of scope. Rent cases fall under the housing category and we are probably all familiar with the change

that mortgage cases now, effectively, fall under the debt category or at least what remains of the debt category because, let's face it, there is not much else. And as Dominic mentioned, Derek is going to take us through mortgage cases. So that is paragraph 33.

We also need to turn to Regulation 61 of the Legal Aid (Criteria & Merits) Regulations. That is in your handout that you will see in front of you which refers to Legal Aid for cases involving the individual's home. You will see at (a) it confirms that Regulation 39 applies. I notice in Derek's notes he has helpfully set out Regulation 39. I did not do that but these are all things that you will be familiar with when you fill out your APP1, so no other sources of potential funding other than CFA. Secondly is the case unsuitable for a CFA and I might mention there, I have been tripped up a couple of times by what I think has been a change on the APP1. I think they used to say is it suitable for a CFA and you tick no and force of habit makes you tick no again and, of course, they have turned the question around, is it unsuitable for a CFA and you say no so they reject your application or, hopefully, send you an email and get you to sort it out. Worth, of course, having a little data bank that you keep for answering that question so you can explain that it is not a damages claim and there are difficulties in getting after event insurance. I find that usually manages to negotiate the CFA issue. Thirdly, dealing with Regulation 39, no person other than the individual who might benefit can reasonably be expected to bring proceedings. Fourthly, they must have exhausted other remedies including the Ombudsman and ADR. Fifthly, need for representation in all the circumstances including the nature and complexity of issues, existence of other proceedings and the interests of other parties. And, sixth, of course, not a small claim.

So if you navigate Regulation 39 (b) tells you that 41 to 44 do not apply; those are the cost benefit, prospect of success, reasonable private paying client questions. (c) tells you, helpfully, that paragraph 2 applies so if you turn to sub-paragraph 2, an individual has a defence to the claim and the prospects for success are to be very good, good, moderate or borderline. I pause there to say that, of course, the proposals to reform Legal Aid for borderline cases will effectively mean that even in possession cases where we have been used to running some quite bold arguments which are borderline at best, we now have to have moderate prospects, 50% plus, a very unwelcome development. Thirdly, proportionality test is met. The proportionality test we find in Regulation 8 and that is the Director is satisfied that the likely benefits of the proceedings to give individual and others justify the likely costs having regard to the prospects of success and all the other circumstances of the case. Now I think probably in the vast majority of possession cases, because the likely benefit is preserving the client's home and preventing them becoming homeless, you probably meet the proportionality test but nonetheless it is worth just remembering that is one of the criteria. So that gets us through the Regulations.

We know there needs to be an immediate threat of possession and certainly before LASPO was implemented there was some discussion as to whether you would have to wait for proceedings to be issued before it would be within the scope of Legal Aid. Of course, you would have to have proceedings to grant Legal Aid but the question is whether you could advise under Legal Help before you actually have proceedings issued. I mentioned the FAQs at the start of this talk. FAQ 98 is relevant here because it says that there is no need for possession proceedings to have been issued as long as the client has received formal notification that proceedings will be issued (such as a Section 8 or 21 notice) unless there is some intervention. So as long as it seems pretty certain that there will be proceedings issued it is within the scope of Legal Aid and you can advise under Legal Help. I mention in passing that, of course, I think the vast majority of organisations have seen their matter starts cut significantly, probably all with 101 matter starts or so in each procurement area so you might want to think whether you want to advise under Legal Help and there will be cases where perhaps you can wait for proceedings to be issued. Plainly, on the other hand, there will be cases where acting in the best interests of the client means that you need to get on with it and write to the other side and act under Legal Help, but do think about preserving a matter start by dealing with it once the proceedings are issued. Succession cases are interesting because advising on succession itself, it seems to me, does not fall within the scope of Legal Aid so if your client, quite sensibly comes to get advice about their right to succeed to their late parents, tenancy or something and they want advice under Legal Help, you cannot provide it. It will be in scope, though, once proceedings have been issued. That, I think, in practical terms, is unfortunate because quite often you could gather together evidence they had been living there and resolve it under Legal Help before proceedings were ever issued, but that is the way we have to play it and FAQ 100 confirms that. Demotion of tenancy cases are out of scope and FAQ 106 is your reference point.

Now we all know, with sinking hearts, that benefits cases are out of scope of Legal Aid, so if you have possession proceedings and, not uncommonly, there is a housing benefit issue which is at the heart of

the rent arrears obviously you cannot use Legal Aid to assist in resolving those housing benefit issues. If that was not clear enough, FAQ 107 makes that plain and I have quoted that in my notes. It makes it very clear towards the end of that section that Legal Aid will not be available to resolve the housing benefit issue itself and then adds, "if providers carry out work in relation to housing benefit alongside a possession matter it will be their responsibility to apportion the work and ensure that no Legal Aid claim is made for the out of scope work." Just on that, if you do do some work on housing benefit it is strongly advisable to write your attendance note in such a way that you are clearly apportioning the work to units dealing with housing benefit issues, because otherwise I suspect on assessment the LAA will decide what apportionment to make.

So what are the options for dealing with housing benefit issues if they are not funded under Legal Aid? Well, firstly, I have suggested that you might want to do it out of the goodness of your heart, acting pro-bono but probably not realistically an option given the level of Legal Aid rates. There will be some cases where it is so basic that a quick email to the housing benefit department will resolve it and that is one letter that we can probably all manage. But if you have significant issues you are not going to be able to pursue them pro-bono in all likelihood. Secondly, obviously, there is nothing to stop you advising your client or a relative or a friend how to pursue it. Often it is tenacity rather than blinding knowledge of the housing benefit regulations that gets you through on those. Thirdly, perhaps more usefully, invite or as necessary press the local authority or other social landlord to pursue the issue and, of course, relying on the Rent Arrears Pre-Action Protocol which, just to remind ourselves, paragraph 6 says that "The landlord should offer to assist the tenant in any claim the tenant may have for housing benefit." So they have to offer to help your client with a claim. Paragraph 7 says: "The landlord should make every effort to establish effective ongoing liaison with housing benefit departments and make direct contact with the relevant housing benefit department before taking enforcement action. The landlord and tenant should work together to resolve any housing benefit problems." I have certainly heard it argued in court by duty advisors that, given the lack of availability of Legal Aid, that duty on the landlord is ever stronger. Your stick, really, appears at paragraph 14 which is, of course, "If the landlord unreasonably fails to comply with the terms of the protocol" the court can make an order for costs or in cases that are not on mandatory grounds, "adjourn, strike out or dismiss claims." So it seems to me that you have got scope there to be pretty bolshy and to press the opponent to pick up the housing benefit issues and pursue them. In reality, of course, they have an interest in that because they will be wanting to reduce the arrears.

Fourthly, the old chestnut of a Witness Summons on the Director of the Housing Benefit Department; it seems to me that if there are significant housing benefit issues there is absolutely nothing to stop you wanting the Director of the Benefits Service to come along to court and give evidence about the problems and, it seems to me, that would be in the scope of Legal Aid because that is a witness in the possession proceedings. I have done it a couple of times; you get as far as the summons, the tricky bit is working out what the conduct money is, and sure enough, it resolves it before you get anywhere near the hearing. Fifthly, if you have got a real dog's breakfast of a housing benefit claim where it seems that the actions of the local authority are unlawful there is nothing to stop a judicial review application; that is still in scope so you could apply in appropriate cases for Legal Aid to pursue judicial review. Obviously, you could try and get your possession proceedings stayed in the meantime. Sixthly, there is nothing to stop you applying for exceptional funding and have put there a link to the Guidance from the Lord Chancellor on the Exceptional funding. It is worth flagging up as well that there are some excellent articles from LAG towards the end of last year and, I think, a series of articles about applying for exceptional funding. I guess it is something that once you have got the first one under your belt you are on the road with those so well worth thinking about that.

Counterclaims is, of course, an interesting point because, effectively, Paragraph 33.6 will re-include some of those services which are out of scope so the excluded services will be, effectively, re-included; they are back in scope and that allows you to pursue your damages claim for disrepair which, of course, ordinarily is a free-standing claim and would not be available any longer under Legal Aid. Also counterclaims for trespass to goods because, of course, that constitutes a defence to the possession proceedings by way of equitable set-off. I have made reference there to the FAQ 83.

So Inter-Partes Costs Orders, now we have probably all heard some horror stories about the April amendments to the Overriding Objective and to CPR3.9 and the tough stance that judges have been asked to take on non-compliance with Orders and Directions. I have set out in my notes the amended form of the Overriding Objective and of CPR3.9. The name of the game is proportionality and compliance and at the end the definition of Overriding Objective flags up enforcing compliance with rules, practice directions and orders. CPR3.9; gone is the long check list as it was known to be replaced by a much shorter version which talks about conducting litigation efficiently and at

proportionate case, enforcing compliance with rules, practice directions and orders. Panic not; it is your friend and not your foe if you are organised and on top of your directions because if you comply there is nothing to worry about. There is, though, a great opportunity because when your opponent, your stretched local authority or RSL or whoever it is does not comply, that is your opportunity to apply for an unless order or, even worse, strike them out there and then for non-compliance. Judges, in my experience, are making those orders and if you have secured at an interlocutory stage an inter-partes costs order you will set up very nicely. So it is a great opportunity. I have to say that I have found that the attitude of judges is a bit variable; some are really very tough and some are less tough and perhaps more generous to your opponents that you would have hoped when you sent off your application for an unless order with enthusiasm but nonetheless there is nothing to lose and everything to gain by making these applications. Of course, an old chestnut but worth flagging up, early Part 36 offers really assist you in securing advantageous costs orders. It allows you to get good settlements for your clients not only in the obvious cases like disrepair claims but anti-social behaviour possession cases. If you have instructions from your client there is nothing to stop you offering a suspended possession order at an early stage and if it resolves in that way you could have the rather unusual but satisfying reward of a costs order in an anti-social behaviour case.

So this is now the real high point of my talk, dealing with the Legal Aid Agency. Now, I do not want to be demotivating but more of a challenge than ever is my experience, I am afraid. It is, I think, proving very difficult in certain circumstances to get any decision out of the Legal Aid Agency within a reasonable time. Some of the turnarounds in applications are still enormously long; the quality of the correspondence is questionable and, as I will mention in a moment, serious, serious difficulty over means assessment. So what I would urge you to do, certainly I have been doing it rather a lot, is making use of the Complaints Procedure which is on the Ministry of Justice website. That though, I am afraid, is also a very mixed bag; I have made complaints and had things resolved very quickly, I have also ended up complaining about the Complaints Procedure about the Complaints Procedure as I wait 4 months for a response so I have found it to be very, very variable indeed. I think it depends on who is dealing with it. Of course a third stage requires you to get an MP involved to go to the Parliamentary and Health Service Ombudsman which is also a bit cumbersome but, certainly, I think we have all got to make these complaints in order to get it on someone's radar to resolve it. Incidentally, right at the end of the case, once you have managed to get Legal Aid for your client and you have brought the case and you are submitting your bill, if your bill is wrongly rejected make sure you use the "Civil Claim Fix" email address if it has been wrongly rejected because only then will they amend your reject rates. That is a key performance indicator so you need to make sure that if they were wrong that the records are amended.

I mentioned means enquiries a moment ago and I am sure we have all got experience of this where you produce your client's three months bank statements, you send them in with your Means 1 which you have completed as diligently as you can and in as much detail as you can and a few weeks later there is a letter with about 10 queries about individual transactions, £5 here, £10 there. That should not be happening. LAPG raised that issue, amongst others, with the LAA; they spoke about retraining of staff, this was a number of months ago in August and September but as recently as last week I received a similar letter so I have added to the end of my paper both LAPG's letter together with the LAA response. It makes slightly depressing reading but as you go through it at least you will not feel alone because everyone is out grappling with these issues. What I have started to do is refer to those in my letters and in my complaints and if you want to do that by email and send the electronic version you will find that on the LAPG website.

So on to the final section of my paper, I mentioned at the start that I did not think I could give a talk on possession without mentioning a few of the points that follow so indulge me if you will. *Spencer v Taylor* in the Court of Appeal on 20 November, this is what makes law interesting because you think that you know one thing and it has been like that for a long time then all of a sudden everything changes. Some of you may be familiar with this case I am sure but the background briefly is that on 6 February 2006 Mr Spencer granted an assured shorthold tenancy to Ms Taylor, a property in Chesterfield. It was a six month fixed term commencing on 6 February which, to save you all working it out, that happened to be a Monday and the rent was payable weekly so, of course, the rent period ran from a Monday to a Sunday. On 18 October 2011 Mr Spencer served a section 21 Notice. It said that possession was required on 1 January 2012 and there was a saving clause in the form that we are all used to seeing. 1 January, you will be interested to know, was a Saturday so it was not the end of the period of the tenancy and, of course, predictably enough the question was whether the Notice was valid. We are all familiar with section 21; I have set it out in my notes just in case you want to look back at it and I take you through these next points. The case arrives in the Court of Appeal, Mr Justice Lewison looks at section 21(1) and notes that the assured shorthold tenancy has come to an

end, there is no new assured shorthold tenancy other than a periodic tenancy and 2 months notice in writing is being given and because, of course, it is section 21(1) there is no need for that to expire on the last day of a period of the tenancy. Not surprisingly Counsel for Ms Taylor advanced the argument that we are all familiar with about section 21(4)(a) requiring the notice to expire on the last day of the period of the tenancy but Lord Justice Lewison rejected that. He looked at section 21(1)(2), noted that it says "may", it does not use the words "may only" and said that if you interpreted it as "may only" that would, in his words, "turn the permissive language on its head." So we thought we were all familiar with the relationship between section 21(1) and 21(4)(a); the Court of Appeal now thinks differently and if you look at the judgement you will see Lord Justice Lewison referring to *Fernandez v McDonald* and dismissing the arguments in that. There are some curiosities here; he did not look at all through the history of section 21, as you would expect, and references to notices to quit; he skipped all of that. The other curiosity is that because of the savings clause he later on decides that it is okay to have 2 dates for possession, the date in the notice and on the savings clause, the 21(4)(a) Notice would have been valid anyway. So where that leaves us on the face of it is that 21(4)(a) will apply to a tenancy that has been periodic from the outset, i.e. obviously without a fixed term and an interesting debate as to the relationship between *Fernandez v McDonald* and *Spencer v Taylor*. I look forward to knocking that around the district judges and I am sure members of the audience here will have views on that.

Prevention of Social Housing Fraud Act 2013, just to flag that up really, I am not going to take you through it because it was something that was touched on in the November Housing Law Update. You will probably have seen that the DWP has issued an urgent bulletin highlighting that applicants who have been continuously entitled to housing benefit since 1996 should not be affected by the Bedroom Tax. We will wait to see how quickly that gets tidied up but for the moment that is something to watch for.

Finally, I just wanted to touch on Public Law cases, only briefly because that it is a topic in itself. But to mention *Leicester City Council v Shearer*, I have set out the facts in my paper here, it is a rather sad case where the defendant marries Mr Shearer and she and her young daughter go to live with him at his mother's home in Leicester, 35 Martival was the address. When Mr Shearer's mother died he succeeded to the tenancy and the defendant and Mr Shearer later had a child together. In January 2010 the defendant left due to Mr Shearer's violence and went to live elsewhere with the children, although she and the children continued to spend time at 35 Martival. Rather sadly, one night when she is staying there, she wakes in the morning to find that Mr Shearer had hung himself. After his death she and the children returned to 35 Martival and she, predictably enough, asked the Claimant Local Authority whether she could become the tenant. She was told that it would not be possible and she should make an application to the council for accommodation. Later there was some debate within the council as to how best to handle the case and eventually the decision was taken to follow what was termed "due process"; they served a notice to quit on the Public Trustee and commenced possession proceedings. The council was worried that a precedent would be set if they were to grant a tenancy to an estranged spouse with no right to succeed.

Now Leicester's Allocations Policy contained a provision for a direct let of accommodation in exceptional circumstances including violence, decants, witness protection and, in the words of the policy, "exceptional circumstances that merit priority rehousing associated in managing risks, emergencies and making best use of management stock." Predictably enough, the problem arose that it was said on behalf of the defendant that the claimants had not given any consideration to that really quite broad discretion that they had under their Allocations Policy so in the County Court the Recorder who heard the case dismissed the claim for possession. The Court of Appeal, on appeal, obviously, by the claimants, upheld that decision and said that in commencing possession proceedings against the defendant without giving any or any proper consideration to the option of making a direct let under paragraph 5.6 of the Allocations Policy the council had acted unlawfully. Now I mention that because it seems to me that it is relevant to some bedroom tax cases that we are dealing with. If you have got a client who is facing rent arrears due to the bedroom tax it is well worth having a look in the council's Allocations Policy because quite often there will be provision for a high priority transfer if someone is under-occupying because it makes sense for the local authority to move that tenant on to liberate a much needed family size property. There is also, sometimes, provision for compensation that is payable upon downsizing and if you can get your client transferred and persuade them to set off any compensation against the arrears you have got a really very good result for your client. What is more, it seems to me that if they do not think about that when they commence possession proceedings or as they are going along, that will certainly constitute a defence in your possession proceedings. Also, it occurs to me it is quite interesting about where your reasonableness defence will end and where the public law angle will take over because, of course, usually with secure

tenancies we do not really delve into public law issues particularly; we do not need to because of the ambit of the reasonableness defence. So I just thought that was worth mentioning.

Finally, just to mention *R(JL) v Secretary of Sate for Defence* and the availability of Article 8 arguments at the enforcement stage in exceptional circumstances. Because of time I am not going to go through that in any great detail but I have set it out in my notes there.

Derek McConnell: When I was given the steer to deliver a presentation at this meeting, I was advised that this should be Public Funding, the title One Year On meaning one year on from when Armageddon happened when the scope changes came in and that was when it was implemented. So my contribution is going to be somewhat more focused in relation to mortgage repossession and public funding. I am pleased, in fact, that it did not go out as an advert because I am sure that half of you would not be here if you knew that the other half of the contribution to this meeting was going to be something quite so tedious as mortgage repossession which are, of themselves, very boring. But the funding of those is even more boring. I said to one of my colleagues at work that I was giving this presentation and I said, "What should I say about public funding and mortgages?" and she said, "What is there to say about public funding and mortgages?" Well, I hope I have got a few minutes to steer you towards some things. When I was looking to prepare the notes I went through the various regulations and I echo James' commendation of the Legal Aid Handbook link on the first page of his notes. When you are at work tomorrow, just tap that into your favourites so that you can actually call it up as a matter of speed. It is worth it; it is an excellent link.

So I will not go through the regulations line by line. I have put quite a lot of this information simply copied and pasted from that particular link so that they are there for you. One of the interesting points in the way that the policy has dictated in terms of where people get advice and help for mortgage possessions is that the people in this room are not the people who generally are now being funded to undertake any form of representation in relation to mortgage repossessions, other than those of us lucky enough to have a contract to do the housing possession duty rota. My firm enjoys the contract in Bristol county court and, frankly, we have never been busier. The focus, as we will discover, is the gateway. Now, what a lovely expression, the gateway; it conjures up some sort of Star Trek-esque facility to beam yourself into some position where you will get tiptop advice, representation down at the Weston Super Mare county court and everything will be lovely. Well that ain't what happening and I will dive into the details behind that as quickly as I can.

The issue really is what is covered within mortgage repossessions and who does it? Certainly my firm is not doing very much Legal Help work in mortgage repossessions, not because it is out of scope, in some ways it is in scope if you are careful about it, but the fact is that we have had, I think, it is four Legal Help case starts in debt in this particular year. So we save those four up and we debate who is going to be the lucky recipient of that particular Legal Help. But as I will come on to it, we are not all dead in the water; we can go straight on to funding certificates and that is the way that we need to address this particular problem.

Schedule 1 Part 1 sets out what is in scope for housing and it is not described as housing; it is called loss of home. So court orders for sale or possession of the individual's home. Home is defined as being the individual's only or main residence so there is some scope for arguing as to what is the individual's home. But also, and this is an interesting issue I think, Regulation 33(2) civil legal services provided to an individual in relation to a bankruptcy order where the individual's estate includes the individual's home and where the petition has not been presented by the individual themselves. Nowhere does it talk about possession claims; it talks about legal services in relation to somebody who is in that scope. Now there are a number of cases, a lot of cases involving bankrupts where possession proceedings are not immediately the presented problem. As I read it, that is something that you can actually deal with and that does not fall as a debt case within the gateway definition. So maybe we should all be turning ourselves into insolvency practitioners and making a ripe old living on what we can get out of Legal Help within that context.

We have the madness of exclusions and then re-inclusions and I have set those out the notes. Part 1 says what is in; Part 2 says what is not in. Then we have this rather strange paragraph 14 within Part 2 which is, as I read it, in scope and then we have civil legal proceedings relating to an individual in relation to matters arising out of or in connection with a proposal by that individual to establish a business. I mean what is this? I just do not understand. Perhaps somebody here can help me with this but it does seem to me that to be a steer towards legal services for people wanting to set up business which I had never thought as being what the LAA was here to pay for. Maybe better minds than mine can figure out what Regulation 14 is really intended to deal with.

Moving quickly on, the subordinate legislation, the (Procedure) Regulation sets out the Gateway concept and in our context we are talking about mortgage repossessions, mortgage repossessions are defined as a debt matter and an individual who has a debt matter is obliged to go to the Gateway. Those of us who are advising somebody who has a debt matter and mortgage repossession are obliged under our contract with the LAA to refer somebody to the Gateway so it is a contractual obligation for us to steer somebody towards the Gateway and there are suggestions of contract sanctions if we do not all do as we are meant to in terms of referring people to the Gateway. So the application to the Gateway can be done by phone, email, electronic format or by post. I define on the second page what Gateway work is and Gateway work includes discrimination, education etc but in our context we are talking about where somebody has a "debt matter" as cases involving court orders for the sale or orders for possession on account of mortgage default. So those are steered into the Gateway. If the Gateway feels that somebody needs face-to-face provision they will then signpost out or refer out and then that person will then be able to have a new matter start opened up by the face-to-face supplier. It is a new matter start so you are not taking over, as it were, a matter start opened up by the civil legal advice; you are starting up a new one and you are using one of your very precious Legal Help case starts.

You can go straight to using up your Legal Help case starts if you have an "exempted person" in front of you or perhaps not in front of you because the definition of "exempted person" in part is somebody who has been deprived of their liberty or a child. Now not many children that I know are actually able to contract with the Halifax plc to take out a mortgage but there we are. Or somebody who has previously within the last 12 months qualified for Gateway advice from a face-to-face supplier and has a linked problem which is a matter arising out of or related to the issue upon which the person had advice from the face-to-face supplier.

The Lord Chancellor's Guidance I have set 8.10 to 8.12 in the notes; I am not going to repeat those other than to point out that 8.12 Guidance clearly suggests that it is perfectly legitimate for one of us to go straight to legal representation and to issue a funding certificate without going through Legal Help if the merits of a case are appropriate. In other words, if you have a clear defence, it has to be done urgently and the other criteria that we have that James went through in Regulation 6(1) are complied with. So I think the way we are actually going to be able carry on doing this work is to scratch the Legal Help which is frankly not worth a great deal and go straight on to funding certificates, if you are in a position to do so.

At the top of the following page, Legal Aid Agency Policy Documents; I have printed out the Civil Legal Advice and the gateway: Guidance for Civil Contracted Providers. It is a ripping read, I commend it to you. I had occasion when I was preparing for this to actually phone up the Legal Aid Gateway and I spoke to a very nice woman who was very helpful in terms of taking my phone number and my postal address and how old I was and what my middle name was and a number of other issues which are important, statistically, I am sure. The deal is, you phone them up, they will then make an analysis as to whether or not your customer, your client, ex-client or would-be client is financially eligible and, if they are and they have got a case, they will then be referred to a specialist advisor who will then take the case on from there. If your person is not financially eligible or in an "exempt person" they will then be given the names of local suppliers in the postal area or closest to the postal area where your client lives. I asked them who I would get if I had actually asked for help and I was not financially eligible and I was given my firm's address which is nice and I was then given a firm in Bath which is about 12 miles away and then the next one was in Weston Super Mare which is about 18 miles away, so there is not a huge pool of suppliers out there so it is a matter of some concern that somebody may have to travel some distance in order to get face-to-face advice if they are in need of it. This document also goes through the obligation on the legal advice supplier, the Gateway supplier, to make an assessment as to whether or not somebody needs face-to-face advice. I note with interest there is a comment on one of the earlier pages that in family, housing and welfare benefits clients can always choose to be signposted or referred to a face-to-face advice service if they would prefer, so I do not know whether that is a steer that any individual who goes to Gateway and says I want my face-to-face supplier is entitled to have that. On face value that would be the case. Have a look at it; it does put some meat on the bones as to how the Gateway is meant to work so you are then in a position to know what the person you are referring to is likely to get.

In my notes I go through the grant of legal representation. James has very adequately dealt with that. I come to the Frequently Asked Questions section, I have just distilled the ones that are relevant to mortgage repossessions and these go from 87 onwards. They speak for themselves; there are a number that I find somewhat surprising. Question 92, if the possession proceedings result from a

Secured Loan on the property is this still in scope? Well, one would like to think that you would realise that a Secured Loan is a mortgage and therefore would be in scope, why would you need to ask the question? I was intrigued by the mind of the person who posed question 94, as a face-to-face debt provider could I sign up a child for Legal Help whose parents are subject to mortgage possession proceedings? Well, we all have to think outside the box and I think that is a commendable attempt to see whether we could take things further. Tragically, the answer comes back, no but I think that must be right.

Point 98, you do not need to wait for possession proceedings providing you get a threat of possession proceedings. My concern is the last sentence in that answer to 98. "An application for legal representation will not be granted before proceedings have been issued at court by the opponent." Now, it has always been my understanding that there are occasions where you might be asking for a funding certificate before the issue of proceedings, maybe it is hard to contemplate in the context of mortgage possession but you might want to get an analysis as to whether or not a particular document is validly signed; somebody disputing the signature on a second charge document, something like that. That might be something where you would like to get investigative help in order to assess the merits of a defence in that case. So I worry where the Frequently Asked Questions concept takes people because it is in danger of being looked at by lawyers, perhaps, as being interpreted like a statute and I do not think we should be looking for that. Question 102, can a provider attend the court hearing and claim under the Housing Possession Court Duty Scheme? Well, the answer is clear that if you are representing under that Scheme you claim under that Scheme. If you then take up the option of advising somebody under Legal Help then you cannot claim your £85 or whatever the pot fee is on the Duty Scheme.

Inevitably, when you are considering mortgage repossessions and public funding you always have to have in mind, and I know all of us do in those dark moments when you are staring across the desk at the client, the issue of the statutory charge. To be frank, I think I can only remember two or three cases where I have had a mortgage case involving public funding which has not turned somewhat sour, either very sour or just a little bit off. The person concerned; "you didn't tell me about the statutory charge". Well, when you get to my age you know exactly what you need to say at the beginning on a case like that. Or, "you didn't tell me how much the fees were going to be and your fees are much more than I thought they were going to be." So you have to be very careful. Please do be careful and put it in writing; put it in your client care letter, go that extra mile because otherwise it is going to be a disaster at the other end. So Section 25 of LASPO sets out the statutory charge. The statutory charge applies to any property recovered or preserved in proceedings or in any compromise or settlement of a dispute. So the Legal Aid Agency's view is that virtually anything that results in a suspended possession order or anything above that will result in the application of the statutory charge. So be careful. If you end up with a very long adjournment, well I would have thought that may not be something where property has actually been preserved; be ready for the argument because they will have that with you.

The (Statutory Charge) Regulations are new under LASPO, the reference is set out at the top of the following page. Enforcement of the charge is discretionary. The Lord Chancellor has the discretion not to enforce so you have to work on the assumption that if the charge applies then your client may be at risk of the Legal Aid Agency taking steps to require a repayment of the charge. Under Regulation 22 the Lord Chancellor may postpone enforcement if the order or the agreement relates to property to be used as a home or relating to money which is to be used to buy a home. Secondly, in addition, the Lord Chancellor has to be satisfied that the property involved will provide adequate security for the statutory charge. If you have preserved a property in negative equity then you client is going to have some difficulty because that property will not be one that is going to provide adequate security for the Legal Aid Agency. Then, ultimately, that they have to be satisfied it would be unreasonable to repay the amount of the charge. Well, I think in this context it is going to be difficult to see many officers within the LAA taking a view that people should not be expected to repay property which is the subject of the charge. The LAA has the option of reviewing any decision to suspend or postpone enforcement of the statutory charge.

The final issue is interest, Regulation 25, interest shall accrue from the date when the charge is first registered and you are obliged to tell the LAA as soon as any agreement has been reached. Where the charge may arise you need to notify them otherwise you are going to have some difficulty if they lose out because of delay resulting in their charge being ineffective; your costs are going to be at risk. So it runs from when it is registered to when it is paid and it runs at 8%. Now the last time that I remember, I think the Bank of England base rate was 0.5% but I suppose this is associated with the judgment rate of 8%. That is quite a punitive rate, I think, but nevertheless that is what it is. You can

chip away, you can contribute payments towards reducing the statutory charge and that may be something that in appropriate cases you might need to advise your clients to contemplate.

I hope that it gives you some scope to see that there is some potential for Legal Aid practitioners to make some way of making a living out of this particular topic.

Chair: My thanks to Derek and James. Has anybody any questions or any contributions or perhaps even any indications as to what county court judges are doing with possession cases, the housing benefit one always intrigues me as to how they deal with that. Does anybody know whether the Section 21 case from the Court of Appeal is going any further? I was wondering if anybody had any information about that.

John Gallagher, Shelter: I spoke to the solicitors in Mansfield who are representing Mr Taylor; they are still waiting for the outcome of their application for Legal Aid to go to the Supreme Court. They have got an extension of their time for submitting; I do not know whether it is still a petition or what, to the Supreme Court to await the outcome of the Legal Aid Agency's deliberations so I am afraid we are stuck with the outcome of *Spencer v Taylor* for a while longer.

Chair: There are many appeals you have to go through with the Legal Aid Agency before you even get to your appeal at the Supreme Court. Any other indications at all as to what is happening on the ground, what district judges are doing for possession cases when there are these difficult housing benefit problems?

Mark Lahaise, Steel and Shamash Solicitors: Can we refer to the Legal Aid Agency letter to Carol Storer when dealing with the Legal Aid Agency?

James Harrison: I have certainly referred to it and I think it is useful to do so. It is on the LAPG website

Jan Luba QC, Garden Court Chambers: Just a couple of points to contribute on this. Firstly, that both the speakers reminded us that it is still possible to seek Legal Aid full representation in a borderline category case if it is possession proceedings and, as James' footnote on page 2 indicates, the Government proposes to abolish that category. The Statutory Instrument is before Parliament at the moment and if it is passed the commencement date for that provision is 27 January so we have about a fortnight left to make sure that any application for legal representation in a borderline case is made, unless of course the Regulations are defeated. Passing swiftly on, do remember that if you are making such an application the borderline test is defined in the Regulations. It does not mean that the case is 50/50, it means that the case is complex or raises a novel point and therefore you cannot know what the true prospects of success are and that does still cover a wide range of possession proceedings, not least proceedings about whether the Section 21 notice is valid, which is, of course, now a point on which it is impossible to advise securely, given the Court of Appeal has just overturned the understanding that everybody has had for the last 22 years. So borderline cases apply immediately and obviously that is a good context in which to echo the point that James made that if you are faced with a client who has got possession proceedings issued, you never waste time on a matter start; you go straight to a certificate of legal representation and get your application in.

The second point I wanted to contribute was at the end of James' paper on the helpful review of public law defences to possession proceedings. He reminded us of the *Shearer* decision which was dealt with in some detail also at the last meeting. The intriguing question about public law defences is what happens on the first hearing, the summary hearing in the 10 minutes list? If you have pleaded both a human rights Act defence and a public law defence we know that there is a pretty high threshold to be got over on the human rights aspect but what is the threshold for your public law aspect? In particular, what if you have pleaded that the public law deficiency is the public landlord's failure to comply with duties under the Equalities Act 2010? One circuit judge decided that the test is the same for both; that is there is a high threshold for both and the Court of Appeal has just given permission to appeal on that and that is a case called *Akerman* and that will be heard in the Court of Appeal later this year. For those of you with an interest in human rights, and I had to slip it in somewhere, you may like to know that the case of *Southend v Armour* is scheduled for hearing in the Court of Appeal on 3 or 4 March of this year.

Both speakers helpfully mentioned the Frequently Asked Questions dimension of the Legal Aid Agency website and the MoJ site and as Derek's paper indicates, the questions are as drawn at May 2013. I think it would be helpful if we could have some clarification that this is not a rolling

programme. Nobody can any longer ask questions; they have ended the process of Frequently Asked Questions because questions were being asked too frequently but perhaps you could just clarify that?

Chair: A question for James in relation to what he asked about CPR3.9 and the failure to comply with rules. My question is about tactics to some extent, very often, you will have direction in relation to witness statements and it will say "mutual exchange". Should you be mutually exchanging or should you, in fact, be putting your witness statements in, waiting for the other side to be late and then claiming that they have not got any evidence to put in front of the court? Following on from that, and it relates to whether you should make an application, as it were, for an unless order or whether you should just turn up at court and say, "You do not have any evidence to rely on." I have not really got to the bottom of it, some people in the audience may have an idea but that is my query as to what the tactics should be on witness statements.

James Harrison: I find this question "mutual exchange of statements" difficult in terms of compliance because if you are not careful you get dragged into the same bin of sin as your opponent even though you are ready. The approach I tend to adopt is that I make it very clear in correspondence that I am ready, my statements are done and if I do not pretty soon get an answer, certainly what I have done recently is I have filed my statements at the court with my application for an unless order because I have demonstrated that I have complied and I have explained that in my statement. I have not been able to find any authority for that approach in the CPR but it seems to me that it is just a practical way of dealing with it.

Chair: The second part was whether you should make an unless order application or whether you can wait until the last minute and, effectively, say well, you have not asked for relief?

James Harrison: I suspect, as with all questions of tactics, different people have different views for different reasons. For what it is worth, my view is I think you get in there straight away because if you have got that unless order you know you are going into trial and there is still a default so there has been a sanction. You are going into trial on a much stronger footing, it seems to me, so if it can be justified I think it is a pretty good £80 spent on the court fee.

Katie Brown, TV Edwards Solicitors: The Justice Select Committee has called for evidence on the impact of LASPO and they are asking for responses fropm practitioners by 30 April 2014, so it sounds to me like this would be a really good opportunity for housing advisors to gather evidence on, for instance, housing benefit and disrepair issues. I think HLPA are probably going to be asking for some information from the practitioners so I thought I would highlight that first of all.

Chair: Thank you very much. If there are any reports from the Executive or anything else that anybody wants to contribute beyond, as it were, the topics this evening?

Sara Stevens, Anthony Gold Solicitors and HLPA Executive: Firstly following on from what Katie said, the Junior HLPA Group has sent round an email to the junior loop. They would like to put in their own representations to the Justice Committee and I think that is great. So if anyone would like to contribute to that please correspond directly with the Junior Group. The HLPA Executive will be putting a draft up on the website hopefully well in advance for people to comment and add before we submit it. The other point is that people may have seen the announcement yesterday that CCMS, the online application is being postponed because the LAA has not ironed out all the bugs. People who were going to be within tranche 1, so that is firms A-F and counsel, there is not going to be a tranche 1, as I understand it; there will be a roll out of a smaller amount of firms at a time because they realised they could not cope with 600 new providers suddenly entering the system. We do not have dates for that; they will not give a time-frame yet. I will keep you posted if I get any more information.

Chair: Just before thanking the speakers and bringing the meeting to an end, can I just remind you again that January is the time for renewing membership? It saves us an enormous amount of administrative trouble if you can get your membership in and it gets you a discount. Finally, it just remains to thank both James and Derek for their enlightening talks.

HOUSING LAW PRACTITIONERS ASSOCIATION

Wednesday 15 January 2014

DEFENDING POSSESSION PROCEEDINGS UNDER LEGAL AID: ONE YEAR ON

James Harrison, Edwards Duthie Solicitors

OVERVIEW

1. **LASPO & REGULATIONS**
2. **LEGAL AID IN RENT POSSESSION CASES**
3. **INTER-PARTES COSTS ORDERS**
4. **DEALING WITH THE LAA**
5. **OTHER POINTS OF NOTE**

1. LASPO & REGULATIONS

- As we all know the legal services that remain in scope are set out in Schedule 1, Part 1 whilst Parts 2 and 3 of Schedule 1 set out the exclusions

- The Funding Code is replaced by the Legal Aid (Merits and Criteria) Regulations 2012

- The Legal Aid (Procedure) Regulations 2012 replace the old Funding Code Procedures and set out how applications should be made and how cases should be conducted

- Lord Chancellor's Guidance replaces the old Funding Code Decision-Making Guidance

- FAQs published by Legal Aid Agency are a useful reference point.

- The Legal Aid Handbook website contains everything in one handy location

  http://legalaidhandbook.com/laspo-resources/

2. LEGAL AID IN RENT POSSESSION CASES

- Para 33 of Part 1, Schedule 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

- Rent cases fall under the housing category whilst mortgage cases fall under the Debt category

- See also Regulation 61 of the Legal Aid (Criteria & Merits) Regulations:

  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[1]; and
  (c) the proportionality test is met.

- There needs to be an immediate threat of possession but that does not require proceedings to have been issued. See LAA FAQ 98 which says that there is no need for possession proceedings to have been issued as long as the client has received formal notification that proceedings will be issued (such as a notice under section 21 or section 8) unless there is some intervention.

  Plainly there are cases where it will be in the best interests of the client to act quickly under Legal Help but where that is not the case consider waiting for proceedings to be issued in order to avoid using a legal help matter start (a relevant consideration given the modest allocation to most suppliers).

- There will be some cases where we have to wait for proceedings to be issued for the case to be in scope, for example succession cases. See LAA FAQ 100.

- Demotion of tenancy cases are out of scope. See LAA FAQ 106

- As we all know welfare benefits cases are out of scope. This means that even if there is a legal aid certificate in place in respect of possession proceedings we cannot assist the client in resolving any outstanding housing benefit issues. See FAQ 107:

[1] The Government proposes to abolish Civil Legal Aid for borderline cases. See Transforming Legal Aid: Next Steps. Paragraph 2.21

Is all work relating to Housing Benefit out of scope even where it is used as a defence to possession proceedings?

Work to obtain or re-instate Housing Benefit is out of scope, see paragraph 15 of Part 2, Schedule 1 of LASPO. If issues regarding Housing Benefit have led to possession proceedings then legal aid will be available to advise the client on their possession matter. This could include obtaining witness statements in support of a client's defence to a possession case. It could also include seeking an adjournment of possession proceedings to enable the client to resolve their Housing Benefit issues. However, as stated, legal aid will not be available to resolve the Housing Benefit issue itself. If providers carry out work in relation to Housing Benefit alongside a possession matter it will be their responsibility to apportion the work and ensure that no legal aid claim is made for the out of scope work.

So what are the options?

1. Assist with the HB issue pro-bono (hardly an option with legal aid rates as they are but feasible in some cases particularly as many HB department will correspond by e-mail)

2. Advise client or relative/friend how to pursue the matter

3. Invite, or as necessary press, the Local Authority or other social landlord to pursue the issue, relying on paragraphs 6, 7 and 14 of the Rent Arrears Pre-Action Protocol::

   (6) The landlord should offer to assist the tenant in any claim the tenant may have for housing benefit

   (7) ….The landlord should make every effort to establish effective ongoing liaison with housing benefit departments and, with the tenant's consent, make direct contact with the relevant housing benefit department before taking enforcement action. The landlord and tenant should work together to resolve any housing benefit problems.

   (14) If the landlord unreasonably fails to comply with the terms of the protocol, the court may impose one or more of the following sanctions –

   (a) an order for costs;

   (b) in cases other than those brought solely on mandatory grounds, adjourn, strike out or dismiss claims.

4. Consider serving a Witness Summons on the Director of the HB Department where the HB issues are of sufficient gravity to justify it.

5. Where appropriate and where alternative remedies have been pursued apply for Legal Aid to make an application for Judicial Review

6. In appropriate cases apply for exceptional funding. See Lord Chancellor's Guidance on Exceptional Funding (non-inquests) and Regulation 67 of the Procedure Regulations which prescribes the form of the application

   http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf

- As we all know damages claims for housing disrepair are now out of scope. Legal Aid only extends to the removal or reduction of the risk of serious harm [LASPO Sch 1. Part 1, Reg 35]. However legal aid will extend to a claim for damages where it will provide a defence to possession proceedings i.e by way of equitable set-off against arrears of rent. See FAQ 83:

  Can a counterclaim for damages be in scope in respect of any other issue than serious disrepair?
  Any counterclaim that is properly pleaded as a defence to possession proceedings is in scope, subject to the Part 2 exclusions set out in paragraph 33 of Part 1, Schedule 1.

3. INTER-PARTES COSTS ORDERS

- We have all probably heard horror stories about the April 2013 amendments both to the Overriding Objective and to CPR3.9 and the tough stance that Judges have been asked to take on non-compliance with Orders and Directions.

Overriding objective

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

CPR3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

However so long as we comply with Orders these amendments present an opportunity to make applications in respect of the other party's non-compliance and to obtain valuable interlocutory inter-partes costs orders.

- There are similar opportunities with early Part 36 offers not only in disrepair cases but in possession proceedings, for example offering a suspended possession order at an early stage in an anti-social behaviour case

4. DEALING WITH THE LEGAL AID AGENCY

- More than ever a challenge (or is it just me?!)
- Where appropriate make use of the Complaints Procedure which is available at:

  www.justice.gov.uk/complaints/laa

- Incidentally also be sure to use the "Civil Claim Fix" email address for wrongly rejected bills otherwise your bill reject rates will be wrongly recorded:

  laacivilclaimfix@legalaid.gsi.gov.uk

- Where appropriate take issue with inappropriate and unnecessary means enquiries, such as explaining individual transactions on bank statements.

  LAPG has raised this issue with the LAA and it may be useful in individual cases to LAPG's letter and to the LAA's response (see attached).

5. OTHER POINTS OF NOTE

Spencer v Taylor [2013] EWCA Civ 1600. Court of Appeal, 20 November

On 6 February 2006 Mr Spencer granted Ms Spencer an Assured Shorthold Tenancy of a property in Chesterfield. The tenancy was granted for a fixed term of 6 months, commencing on 6 February which happened to be a Monday. The rent was payable weekly. At the end of the fixed term a weekly periodic tenancy arose and of course the rent period therefore ran from the Monday to the Sunday.

On 18 October 2011 Mr Spencer served a section 21 Notice. The Notice said that possession was required on 1 January 2012 and there also followed a savings clause. As 1 January 2012 was a Saturday it was not the end of a period of a tenancy. The question then was whether the notice was valid.

As we all know section 21 reads:

> (1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling house let on the tenancy in accordance with chapter one above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy a court shall make an order for the possession of the dwelling house if it is satisfied -
>
> (a) that the assured shorthold tenancy has come to an end and no further assured tenancy, whether shorthold or not, is for the time being in existence other than an assured shorthold periodic tenancy, whether statutory or not and -
>
> (b) the landlord, or in the case of joint landlords at least one of them, has given to the tenant not less than two months notice in writing stating that he requires possession of the dwelling house.
>
> (2) A notice under paragraph (b) of sub-section (1) above may be given before or on the day on which the tenancy comes to an end and that sub-section shall have effect notwithstanding that on the coming to an end of the fixed term tenancy a statutory periodic tenancy arises.
>
> (3) Where a court makes an order for possession of a dwelling house by virtue of sub-section 1 above, any statutory periodic tenancy which has arisen on the coming

to an end of the assured shorthold tenancy shall end without further notice and regardless of the period in accordance with section 5(1A).

(4) Without prejudice to any such right as is referred to in sub-section 1 above, a court shall make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied -

(a) that the landlord, or in the case of joint landlords at least one of them, has given to the tenant a notice in writing stating that after a date specified in the notice being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling house is required by virtue of this section, and -

(b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above.

4A. Where a court makes an order for possession of a dwelling house by virtue of sub-section 4 above, the assured shorthold tenancy shall end in accordance with section 5(1A)."

Lewison LJ highlighted the 3 conditions under section 21(1):

- AST has come to and end;
- No new AST, other than a periodic tenancy; and
- 2 months notice in writing (need not expire on the last day of a period of the tenancy)

Counsel for Ms Taylor advanced an argument that we are all familiar with which is that as the fixed term had come to an end the landlord could only rely on s21(4)(a) which requires the notice period to expire on the last day of the period of the tenancy.

Lewison LJ rejected this on the basis that s21(1)(2) says “may” not “may *only*” and that the latter interpretation would “turn the permissive language on its head”

Commenting on the Judgement of Hale LJ in *Fernandez v McDonald* [2003] EWCA Civ 1219, which was consistent with a prohibitive reading of s21(1), Lewison LJ said:

First, section 21(1) also encompasses cases in which a fixed term assured tenancy is followed by a periodic tenancy. That is because it says it does. Second, that periodic tenancy may or may not be a statutory periodic tenancy. It does not matter, because section 21(1) says that it does not. Thus, third it is a mistake to see section 21(4) and section 21(1) as in some way mutually exclusive. Fourth, section 21(4) is expressly stated to be without prejudice to any such right as is referred to in sub-section (1). So if there is any conflict between the two sub-sections, section 21(1) prevails.

The actual decision in the case was that the notice under section did not comply with section 21(4) so in my judgment what the court said, or rather did not say, about the

applicability of section 21(1) is not part of the ratio decidendi of the case. If, therefore, as I think, section 21(1) rather than section 21(4) governs this case, then all of the arguments about whether the notice in the present case did or did not comply with section 21(4) are irrelevant.

Lewison LJ then went on to consider whether the Notice was valid given the two alternative dates for possession, i.e. 1 January 2012 and the date determined by the savings clause. His conclusion was that this did not affect the validity of the notice and it follows that the notice would have complied with the requirements of s21(4)(a). It is perhaps surprising therefore that Lewison LJ did not simply find the notice to be valid on that basis.

Where does this leave us? Where a tenancy has been a periodic tenancy from the outset the landlord must comply with the requirements of s21(4)(a). However where a periodic tenancy was once a fixed term tenancy the landlord can rely on s21(1)(b) and avoid the pitfalls that flow from s21(4)(a).

Prevention of Social Housing Fraud Act 2013

- Criminal offence for a secure tenant to sub-let the whole or part of the property without the landlord's consent if the tenant knows it is a breach of an express or implied term of the tenancy and has ceased to occupy the property as his/her only or principal home [section 1(1)]

- Same offence for an assured tenant [under section 2(1)]

- Offence not committed if the tenant sub-lets because of violence to him/her or family [sections 1(3) and 2(3)]

- In civil proceedings the landlord can apply for an "unlawful profit order" [section 5]

- Section 6 amends the Housing Act 1988 as follows:

  15A Loss of assured tenancy status
  (1) Subsection (2) applies if, in breach of an express or implied term of the tenancy, a tenant of a dwelling-house let under an assured tenancy to which this section applies—
  (a) parts with possession of the dwelling-house, or
  (b) sub-lets the whole of the dwelling-house (or sub-lets first part of it and then the remainder).
  (2) The tenancy ceases to be an assured tenancy and cannot subsequently become an assured tenancy.

Bedroom Tax

- The DWP has issued an urgent bulletin highlighting that applicants who have been continuously entitled to HB since 1996 should not be affected by the bedroom tax [2]

Public Law cases

- Possession Proceedings and Allocations Policies. Is there a public law defence if the Local Authority landlord has pressed ahead with a claim for possession without considering relevant provisions of its allocations policy?

  Leicester City Council v Shearer [2013] EWCA Civ 1467

  The Defendant married Mr Shearer and she and her young daughter went to live with him and his mother at a house in Leicester, 35 Martival. When his mother died Mr Shearer succeeded to the tenancy. The Defendant and Mr Shearer later had a child together.

  In January 2010 the Defendant left due to Mr Shearer's violence and went to live elsewhere with the children. However both she and the children continued to spend time at 35 Martival. One night she was staying there and woke in the morning to find that Mr Shearer had hanged himself. She and the children then returned to live at 35 Martival and asked the Claimant Local Authority whether she could become the tenant. She was told that would not be possible and she was advised to make an application to the Council for accommodation.

  There was later some debate within the Council as to how best to handle the case. Eventually the decision was taken to "follow due process" and serve a NTQ on the Public Trustee and commence possession proceedings as the Council was worried that a precedent would be set if it were to grant a tenancy to an estranged spouse with no right to succeed.

  The Council's Allocations Policy contained a provision for a direct let of accommodation in exceptional circumstances including violence, decants, witness protection and *"exceptional circumstances that merit priority rehousing associated in managing risks, emergencies and making best use of management stock"*

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270200/hb-bulletin-u1-2014.pdf

Eventually the matter came to trial and in the County Court the Recorder dismissed the claim for possession and reached the following conclusion:

So in the light of all those circumstances, in my judgment it cannot seriously be argued that a reasonable Authority would without more on the facts known have refused or omitted to exercise its discretion to grant a Direct Let. I regard that refusal or failure to consider the possibility of a Direct Let had an impact on the decision to seek possession and that failure has had an improper fettering of the discretion. It is a lack of exercising the discretion. It is a removal from the discretion to be exercised of an investigation of the matters which were appropriate to be looked at. That vitiates and compromises their decision to seek possession

The Court of Appeal upheld the decision of the County Court and concluded that In commencing possession proceedings against the defendant without giving any or any proper consideration to the option of making a direct let under paragraph 5.6 of the Allocations Policy the Council acted unlawfully.

- In bedroom taxes there may be a public law defence if the Local Authority landlord has not had proper regard to relevant provisions of its allocations policy, for example high priority under-occupation transfers and compensation payments for downsizing?

- Public Law arguments at enforcement stage. R(JL) V Secretary of State for Defence [2013] EWCA Civ 449

..[T]here will be exceptional cases, and the present is a very unusual but powerful example, where the raising of Article 8 rights at the enforcement stage will not be an abuse. The obvious example is where there is a fundamental change in the occupant's personal circumstances after the making of the possession order but before its enforcement. The example canvassed during the hearing of this appeal was that of the diagnosis of an incurable illness for the first time after the making of the possession order, making it disproportionate for the public authority to evict the occupant before he or she could be allowed to die peacefully at home.

The present case is a (probably unique) example where it would not be an abuse of process to pray in aid Article 8 rights at the enforcement stage. The appellant vigorously pursued her Article 8 rights during the possession proceedings but, as the law then stood, and Collins J was bound to conclude, they afforded her no defence. Yet it is now recognised, before the end of the process designed to lead to her eviction, that the appellant has a right to a proportionality review of the enforced loss of her home on the application of the respondent public authority. There is, quite simply, no occasion other than the present proceedings, in which that review can be conducted in that case.

I am not deterred from that analysis by Mr Hooper's submissions about the risks of cost, delay, uncertainty and a resort by public authorities to swift and rigid enforcement of possession orders. The courts are familiar with last minute

attempts of occupants of residential properties to stay the enforcement of possession orders. County court judges will be well able to discern, on a summary basis, whether some substantial change of circumstances gives rise for the first time to an Article 8 issue which neither was, nor could have been pursued prior to the making of the possession order. Abusive attempts to re-litigate, or litigate Article 8 issues which could and should have been raised during the possession proceedings can be met with the usual sanctions imposed for abuse of process including, where necessary, the making of Civil Restraint Orders.

Mr S McNally
Legal Aid Agency
102 Petty France
SW1H 9AJ

30 August 2013

Cc Mr O Mapley

Dear Shaun,

Concern about LAA Means Assessments

There has been considerable discussion for some time at the Civil CCG meetings and at a recent meeting between the LAA and practitioners (the Access To Justice Committee Problem Solving Group) about the problems faced by clients and practitioners re means assessment. We know that you put considerable resources into that meeting and it was extremely helpful to have a meeting with so many of the relevant senior staff there.

Further to that meeting our co-chair contacted the LAA to ask if there was an IT solution to gather more examples from practitioners in order to find solutions. How examples can be collated and dealt with is important. We confirm our willingness to continue to engage on this.

A number of examples about means assessments were given to you at the meeting. We have been sent a lot of examples in recent months. In view of the concern expressed by our members, we were on the verge of seeking Counsel's opinion about means assessments but have been told that the LAA has identified that some of the issues are due to incorrect training of staff. We are therefore writing to seek clarity about what the LAA asserts is correct procedure as opposed to means enquiries which are incorrectly requested.

The appendix to this letter sets out various examples which have been sent to us over the past few months. You and your colleagues may well have been sent them by others. However at this stage we would ask you to identify if you think the LAA is correct in taking the steps it has in each example and if so please could you identify

- your authority for doing this
- if this is a new procedure, when was it introduced?
- can you disclose the guidance that is being applied by means assessors and their training materials?

We have identified a number of themes and grouped the examples together. We can summarise these further and would identify these as the main themes:-

- Means testing others in the household
- Wanting detailed evidence on potential other sources of income
- Wanting detailed evidence on who is providing contribution in kind such as food, heat and light
- Wanting detailed evidence on spend.
  (And in some cases the request for information does not seem relevant because information on those transactions would not take the person outside the eligibility limits.)

Why is this so important?

There are many clients and those who are - sometimes in the loosest sense of the words - giving them support are greatly distressed and this may deter the client from proceeding with their case.

The early stages of a solicitor/client relationship are very important and if the client sees only hurdle after hurdle in obtaining advice or representation, they will become even more despondent and possibly not proceed.

Delays mean clients may be unable to obtain important protection or remedies that they would have obtained had legal aid been granted promptly.

We are informed that means issues are leading to requests for adjournments in court cases.

Emergency certificates may have to be extended while means issues are resolved.

One practitioner states that the outcome is simple: 'We are finding the LAA are being extremely picky about any means case (which is basically every one now capital is included) and I am very reluctant to allow my staff to delegate legal aid even when there is an urgent need as it takes so long for the substantive certificate to be granted and we end up doing even more work for no money.'

The level of risk has increased for practitioners.

There is more administration involved for practitioners and the LAA.

We want to identify what the LAA asserts is correct and what is not and we wish to provide urgent guidance to our members. We look forward to hearing from you in the next 14 days.

Yours sincerely

Carol Storer

Director, LAPG

Appendix

Example 1: evidence sought of financial position of former partner

A single man living alone with mental health and substance abuse issues in his 30s on a passporting benefit asked whether he is in still in a relationship with a former partner with whom he had children and if so to provide copies of her bank statements. He is an assured shorthold tenant granted an Emergency Certificate to be represented at a short notice hearing following accelerated possession proceedings and the court is satisfied he has an arguable Defence. The relationship ended many years ago. The client risks revocation of the Emergency Certificate if the queries are not answered.

Example 2: refusal to rectify mistake (seeking details from DWP)

A Council tenant living with her disabled partner who receives a passporting benefit faced with an imminent possession hearing for rent arrears and with a substantial counterclaim for disrepair. By mistake LAA phone the DWP and check her rather than her partner and then refuse to rectify over phone but insist that the practitioner obtain a letter from the DWP confirming the current award to her partner. At the same time they write with numerous questions on the bank statements provided in relation to income and expenditure – much of these relate to DLA income and disability connected expenditure. The client is severely distressed. The client risks revocation of the Emergency Certificate if the queries are not answered.

Example 3: level of detail requested – Bank Statements

3a Clients on passporting JSA are being asked to explain every entry on their bank statements over 3 months.

3b A member has heard anecdotally of demands for evidence such as recent bank statements from street homeless people etc.

3c The LAA are also asking more and more questions about what clients are *spending* their money on - eg there are questions asked about why £250 was withdrawn from an account 2 months previously - this is even where the client is on passporting benefits for income purposes. The LAA are also asking questions about income and outgoings beyond the 3 month bank statement period (eg if the bank statements go further back than 3 months and they've been included because they are on the same statement page).
The queries are taking up a lot of time both for the fee-earner and the LAA. They are also causing issues for court proceedings with hearings having to be adjourned where the means assessment is outstanding and the emergency certificate has expired.

3d. A report back from a practitioner: 'We still do not legal aid for a client for whom we delegated functions in a Children Act matter in the last week of March (substantive application sent mid March) because the LAA is querying 2 payments of £30 and £20 out of her bank account. We have now provided evidence from the friend to whom she was making those payments. He has MS and cannot get out of the house. She borrowed £30 from a friend. It is now July and we cannot represent this client on a fact finding because of these queries.
In the same letter our client who is on a previously passporting benefit is being asked to provide further bank statements (in the context of capital means testing) which she had not received by the initial deadline for submission of the App 1 and Means 2. Our client speaks no English.'

3e Another member writes: 'We have concerns as the LAA is now also asking for information on relatively small amounts of money going in and out of a client's bank account. So even where the client is passported for income purposes (e.g. on income support) the LAA still requires their bank statements as proof of their capital. This has then led LAA assessors to come back to clients to ask for an explanation of all transactions (it seems) over around £200 and sometimes going back 2-3 (or more) months.
This is causing many many delays as clients find it difficult to remember what each and every cash withdrawal was used for and any small amount of income is from. Sometimes it has led to hearings having to be adjourned as emergency certificates have expired – causing further costs for the courts system (and sometimes the local authority opponent) and concern and worry for the client.'

3f In addition, many benefit claimants do not have bank accounts, but have only post office accounts. The PO accounts do not have regular paper statements. Instead they are sent out only every 3 months. Clients have found it very difficult to obtain copy statements from the PO to send to the LAA as proof of their capital.

Example 4: checking means of all members of a family in premises where there are possession proceedings

4a 'When defending possession proceedings, the LAA is requiring every person resident in the property, even if not named on the tenancy or party to the proceedings (e.g. client's adult children), to complete a MEANS1 with full proof, on the basis that they might benefit from the proceedings and potentially should contribute.'

4b 'We represent a client under an Emergency Certificate and now substantive PFC a housing association tenant in possession proceedings for rent arrears. She has one disabled child and 2 adult children for whom disputed Housing Benefit adult non-dependant deductions are being applied causing the rent arrears. We are being asked to provide Means 1 or Means 2 for both adult children within 14 days relying on Reg 44(6) and on the basis they have an interest in defending the proceedings.
We have never been so asked before and would not means test the adult children in such circumstances. Further there can often be a conflict of interest between the parent and adult child in a situation where a deduction is correct but the adult child is refusing to pay the parent his or her contribution to rent.'

4c 'I had a client on passported benefits but her adult daughter (who is in work) also lived with her. The Legal Aid Agency insisted on her daughter also filling in a Means1 and supplying 3 months bank statements and wage slips. This was not pleasant as this entailed the mother having to disclose to her daughter that she had a gambling problem and that had rent arrears and was facing possession proceedings. We finally got the substantive certificate through. She has been assessed as requiring a nil contribution.'

Example 5: destitute clients – benefactors

5a Benefactors who are helping to support destitute clients are being required to complete full means assessments. Should they be?

5b 'I have three clients who are receiving nominal amounts of money from friends/relatives in circumstances where they themselves are unable to claim benefits. The friends have been assessed

as over the legal aid limit. As such the clients' certificate has been cancelled. In the third case the client has to pay an upfront contribution of £3000 because her brother is over the limit.'

Example 6: evidence from others

6a. Lodgers' landlords. Example from family lawyer: 'The LAA have assessed other family members in most of my cases. The recent one has been where my client is a paying lodger at a couple's house. They asked the landlords to disclose evidence of how and where they spent the £350 a month they took from my client in rent and board for living in their home in London. They refused as they said they have no relation with the client as she is merely a paying lodger in their home.'

6b. Client's cousin (family case) 'We have recently had a rejection for legal aid because the LAA decided they wanted a full means assessment from the client's cousin with whom he was staying and who was giving him £10 per week to live on.'

6c. Client's brother 'I recently had a case where the client was being supported financially by her brother in the amount of £60 per week but she was in her own property. The LSC (as was) insisted on the brother completing MEANS1 and they assessed her out of scope because of his capital. It was an emergency certificate and was revoked as a result.

I appealed this on the basis that while the rules do permit assessment of a third party where they place their resources at the disposal of the client, in my case, the brother was only assisting her by way of income and the two properties he owned (which took him/her out of scope) were not made available to the client in any way – the LSC accepted this and reinstated her certificate.'

Example 7: definition of disposable income

From last year: 'Client is on contribution based JSA - £71 per week. With him lives his 19 year old daughter who is on income based JSA. LSC ask during the means assessment - what does your daughter contribute to household expenses? We say - £10 per week for gas and electricity but buys her own food and clothes (as you can imagine, she never actually gives him the £10 even though they've agreed that).

LSC then add £10 per week to his disposable income which makes him liable for a contribution. We argue that the £10 per week is not paid to him to increase his disposable income but is paid for her share of gas and electric which he pays.'

Example 8: student nurse

'We have a client who applied for legal aid under the old regime – ie. prior to 1.4.13. She is a student nurse – so she receives a bursary – she works in a hospital and also has blocks of study.

We have been going back and forwards with LAA over financial documents – previously the LAA said that client had not provided sufficient evidence of child care costs – so she provided additional evidence – now they are saying that because she receives a bursary only (rather than wages) she is classed as a student by HMRC rather than an employee of NHS/Health service – therefore she is not in remunerative work therefore childcare costs cannot be taken into account – does anyone know what the answer is? It is somewhat irritating if they are correct as she was initially asked for additional documents to show costs of child care.'

Example 9: detailed immigration case

'I wonder whether you have any additional guidance about the 2013 Regulations and in which circumstances certain provisions relating to assessing eligibility for legal aid will be applied? Under The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, specifically regulation 16(5), pasted below, where a person is applying for legal aid, LAA will now take into account the resources of any person contributing substantially to their maintenance.

Many of our immigration clients applying for public funding to pursue judicial review against the Home Office are not allowed to work and not eligible for NASS support, they live with friends, extended family and on the charity of others, who provide them with pocket money and food, and often let them lodge free of charge in their homes, sometimes for years, which often leads to quite a strained relationship! Some lodge with a rota of friends, who take it in turns to support them. Some rely on a combination of support from all sorts of different people. Sometimes family from abroad send money by transfer or from places like Afghanistan and Iran, in non-official channels, for them to live on. We have always provided confirmation and evidence (where possible) of the amount of support these clients get from these friends, relatives or churches and charities' destitution funds. However, now it seems we additionally need to provide information about those individuals or organisations own resources. It's the first time I have seen this, so wondered if there is some guidance I have not yet seen about how this is to be applied and in what circumstances it is not reasonable to provide this information.

We have today had an application batted back to us so that we can provide full information about our client's cousin's resources, who lets our client live in his family home but provides him with no other money, including, it seems, children's bank accounts, along with information about overseas relatives means. This will likely take months and in some cases will be impossible, particularly where clients are in Iran and subject to UN sanctions! It may also mean we are well outside the JR deadline, in an emergency this could mean we cannot get legal aid in time.

Regulations:

Resources to be treated as the individual's resources
This section has no associated Explanatory Memorandum
16.-(1) Subject to paragraph (2), in calculating the disposable income and disposable capital of the individual, the resources of the individual's partner must be treated as the individual's resources.

(2) The resources of the individual's partner must not be treated as the individual's resources if the individual has a contrary interest in the dispute in respect of which the application is made.

(3) Paragraph (4) applies where an application is made for any form of civil legal services except legal representation (other than legal representation in family proceedings).

(4) Where the individual is a child, the resources of a parent, guardian or any other person who is responsible for maintaining the child, or who usually contributes substantially to the child's maintenance, must be treated as the child's resources, unless, having regard to all the circumstances, including the age and resources of the child and any conflict of interest, it appears inequitable to do so.

(5) Where it appears to the Director that-

(a)another person is, has been or is likely to be substantially maintaining the individual or any person whose resources are to be treated as the individual's resources under this regulation; or .

(b)any of the resources of another person have been or are likely to be made available to the individual or any person whose resources are to be treated as the individual's resources under this regulation, .
the Director may treat all or any part of the resources of that other person as the resources of the individual, and may assess or estimate the value of those resources as well as the Director is able.

(6) A reference to "individual" in regulations 21 to 36 and 40 to 43 is a reference to-

(a)the individual in respect of whom the determination about financial resources is being made; and .
(b)any person whose resources are to be treated as the individual's resources under this regulation. .
(7) In this regulation-

"family enactment" has the same meaning as in paragraph 12(9) of Part 1 of Schedule 1 to the Act;
"family relationship" and "matter arising out of a family relationship" have the same meaning as in paragraphs 12(7) and (8) of Part 1 of Schedule 1 to the Act(1); and
"family proceedings" means-
(a)any matter which is described in any of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)-
(i)paragraph 1 (care, supervision and protection of children);
(ii)paragraph 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults), to the extent that the matter relates to-
(aa)a child; or
(bb)a vulnerable adult but only to the extent that it is a matter arising out of a family relationship;
(iii)paragraph 10 (unlawful removal of children);
(iv)paragraph 11 (family homes and domestic violence);
(v)paragraph 12 (victims of domestic violence and family matters);
(vi)paragraph 13 (protection of children and family matters);
(vii)paragraph 14 (mediation in family disputes);
(viii)paragraph 15 (children who are parties to family proceedings);
(ix)paragraph 16 (forced marriage);
(x)paragraph 17 (EU and international agreements concerning children);
(xi)paragraph 18 (EU and international agreements concerning maintenance); or
(b)a matter arising out of a family relationship in respect of which the Director has made an exceptional case determination under section 10 of the Act and which is under-
(i)a family enactment; or
(ii)the Trusts of Land and Appointment of Trustees Act 1996(2).'

Legal Aid Agency

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New Hall Place
Liverpool, L3 9AF

Carol Storer, Director

Legal Aid Practitioners Group (LAPG)

3rd Floor

Universal House

By email only

Dear Carol,

Thank you for your letter dated 30th August 2013. I read the content with some concern and am sorry that you've had to take the time to contact me in this regard.

As you will be aware the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced a means test for previously passported clients. As well as training and recruiting staff to manage this process we have continued to strengthen the means assessment process in the last 12 months to ensure only those eligible receive funding.

It's re-assuring to hear that you found the inaugural meeting of the Access to Justice Committee Problem Solving Group to be a productive exercise. Jim Peake who is the Agency's Lead Means Assessor was present at that meeting and he is responsible for training new means assessment recruits to ensure consistency in our practices. In any process involving human intervention there can inevitably be an element of inconsistency and we work hard through both quality control and training to ensure we process means assessments as consistently as possible.

We look to identify inconsistency and tackle it as quickly as possible but it is clear from your letter that we have more work to do in this area. Joanne Bainbridge (Head of Operations, Civil Case Management) who is responsible for the means assessment process will take forward with Jim Peake a programme of further training and consistency checks to address the potential inconsistencies raised in your letter.

I have looked to address each of your examples below. It should be pointed out that without the file reference numbers and the ability to review the entire case and information we were provided, it is difficult to comment definitively on the examples provided.

Example 1 – Evidence sought of financial position

On the face of the description you've offered this is a caseworker error. The Agency should not be looking to assess the financial means of a former partner. I do wonder though, looking at this example, whether there was a trigger contained within the papers which led the caseworker to question whether the client was still in a relationship with his former partner.

Example 2 – Refusal to rectify mistake (seeking details from DWP)

To accurately identify what has happened in this case we would need to see the case reference for this matter so it can be investigated further. Caseworkers don't usually communicate with the DWP on the telephone and the lists that are sent to the DWP central records each day are sent via secure e-mail. We've recently set up a link with a contact at the DWP which enables Jim Peake to speak and/or e-mail them directly in cases where there is a contradiction between the evidence produced from a client showing them to be in receipt of a passported benefit and a check with the DWP central records which has suggested that they are not. I'm led to believe that this arrangement is working well.

Where the applicant is in receipt of a passporting benefit there will be no need to carry out an assessment of income; and for non-passported clients DLA income is wholly disregarded. Caseworkers may however ask questions in order to determine **whether** a payment is DLA or an extra-cost disability benefit in order to avoid erroneously including that income within the assessment.

Example 3 – Level of detail requested – Bank statements

3a – Clients on passporting i.e. income-based JSA should not be asked to explain every entry on their bank statements – this was picked up through quality control and addressed so this should no longer be happening.

3b – The Agency's starting point with bank statements is that all adult clients are asked to provide three months' worth for each account they hold in their sole name or hold jointly with other parties. Clients have been asked to provide statements since November 2010. Documentation is collected to provide assurance that clients are accurately declaring their financial position on applying for funding. This is only a starting point however and the Agency will always be prepared to listen to a supplier's representations as to why it would be inappropriate in a specific case to collect statements. We recognise that clients who are street homeless and/or have mental health difficulties may have particular difficulties in providing statements but will continue to look at each case on an individual basis. The Agency will look to compromise where appropriate and I've been told that, as an example, in a recent case where the client was street homeless a sheet of paper from his bank which simply confirmed the balance of the account was accepted as an alternative to the usual bank statements.

3c – We have identified previous issues where inexperienced staff have asked unnecessary questions about cash withdrawals and engaged in-depth enquiries for lower-risk cases. We have now sought to address this issue and suppliers should now be starting to see an improvement in this area.

3d – In order to comment accurately on this I'd need the case reference number. The delays encountered by the supplier in this case do not appear justified unless those withdrawals are transfers to other bank accounts for which the Agency hasn't had the statements as yet. If you could provide the reference for this case Jim Peake will look at the case and conclude any outstanding assessment.

3e – This is a similar point to that raised under '3c' above. I refer to my comments above.

3f – Guidance has recently been issued to staff in relation to Post Office statements after an issue was identified as part of quality control. Means assessors are now aware that post office statements are only issued at three-month intervals.

Example 4 – Checking means of all members of a family in premises where there are possession proceedings

4a - The Regulation being relied upon here is Regulation 44(6) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 which outlines that it will be appropriate to assess the financial means of third parties where it is considered that 'there are other persons or bodies, including those who have the same or a similar interest to the individual or who might benefit from any proceedings, who can reasonably be expected to contribute to the cost of the civil legal services, or (ii) some other source of funding exists which could be used to contribute to that cost.' This power may therefore apply in possession proceedings to others living in the applicant's home. Prior to April 2013, this power was set out in the Funding Code (Procedural Rule C18 and Regulation 38(5) of the Community Legal Service (Financial) Regulations 2000. Clearly where there are other adults within the property who will benefit from the proceedings it is right that we consider their ability to contribute to the costs of the funding of the legal case. Further guidance has been issued to caseworkers so that enquiries will be better targeted at those who are more likely to be required to contribute (e.g. adult child/relative in full-time employment as opposed to adult child/relative who is a full-time student or receiving income-related benefit; also caseworkers have now been asked to telephone clients in the first instance to obtain some provisional information about a third party's financial means to avoid unnecessary delays. In terms of advice for your fellow practitioners they should be aware that questions as to whether someone else should be making a contribution towards legal costs will arise where there are other adults living in the property in possession cases. For clients on income-passporting benefits, information as to who these adults are (e.g. full-time student, unemployed, in work) can be declared on the 'extra information' sections of the CIV Means2 form.

4b – It would be helpful to have the case reference number to allow a full review of this case. The housing benefit 'non-dependant deduction' amount is calculated based on the gross income of the non-dependant i.e. there are set amounts that are deductable from the housing benefit award depending on the level of gross income; the smallest deduction will be applied for an adult who is in low paid work or receiving income-related benefits. Therefore whether it is appropriate to ask for a contribution towards the costs of the case in accordance with Regulation 44(6) will depend on the particular circumstances.

In relation to the potential conflict of interest where rent arrears have accrued owing to the adult's refusal to meet their obligations towards the rent despite staying in the property, the circumstances should be fully explained when the application is made.

4c – From the information you've provided in this case that the daughter was in work, it would appear that the Agency has taken appropriate steps here to establish the financial circumstances in the first instance although it was subsequently determined that she should not be required to pay a contribution.

Example 5 – Destitute clients – benefactors

5a – When a client has no income of their own Regulation 16(5) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 like its predecessor Regulation 11(4) in CLS (Financial) Regulations 2000 provides the basis for the inclusion of resources belonging to a third party in the circumstances described in the regulations. Guidance is set out in the Lord Chancellor's Guide to determining certificated work at section 3.2 which confirms that the Director has the power to treat all or part of the resources of the other person concerned as belonging to the individual.

Generally, where an individual is receiving a fixed amount of monetary support from a third party, the determination will include the financial support received alongside the individual's main source of income. For cases where a person appears to be wholly financially supported by a third party, it is our practice to send out the CIV Means1 to obtain full information about the third party's resources i.e. pursuant to including all of the resources of the third party who is in effect substantially maintaining that individual in accordance with Regulation 16(5).

5b – Again it's difficult to speak about specific cases in the absence of case reference numbers but generally the Legal Aid Agency will consider the overall circumstances of a case and decisions will be influenced by all relevant factors such as whether the client has made or intends to make an application for state benefits and the reason for not doing so previously where such funds are potentially available; or whether it is a scenario where a person has no recourse to public funds e.g. a failed asylum seeker; the degree of affiliation with the third party providing support e.g. a distinction may be drawn between say a registered charity providing support and close family members who the client is living with and fully supported by; along with some consideration of the level of financial support provided.

Example 6 – Evidence from others

6a – Lodgers' landlords – The main issue that arises in informal lodging arrangements, which often involve close relatives, is that it is sometimes unclear what the money paid by the legal aid applicant is for i.e. accommodation only, or to pay for utilities, food or other incidentals, or all of the above. This may necessitate further enquiries to establish the amount deductable for the cost of accommodation, as opposed to amounts going towards expenditure such as food and utilities that is in-built into the financial limits and therefore should not attract a further allowance.

6b – Client's cousin – See the examples under 5 above. From the information provided it was reasonable for the Agency to make enquiries in this case.

6c – Client's brother – Again I would refer you to my response under 5 above.

It appears from what you've said that the client was in her own property (not living with her brother or residing in one of the brother's houses) presumably with her own financial resources in addition to the allowance of £60 per week. The conclusion that one could draw here is that an inexperienced caseworker may have sent out the CIV Means1 to the brother but when the review came through an experienced caseworker realised that the assessment should have just included the £60 per week.

Example 7 – Definition of disposable income

Money received from lodgers or adult children living in the family home is counted as income – this will include money given to the client or paid directly to the utility company to cover the client's household bills i.e. payment in kind. The salient point in this example is whether the money was in fact being paid. (Regulation 21 and 16(5) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 refer).

Example 8 – Student nurse

It appears form the detail given that our handling of this case could have been improved however the decision reached by the Agency was correct i.e. childcare costs cannot be allowed for student nurses who receive bursaries. I accept that it would be frustrating for the client and the supplier to be asked for documentary evidence of childcare only to then be told that no allowance could be made in the assessment process for it. No allowance can be made in the assessment process for childcare for the reasons you state, namely that HMRC class student nurses as being students rather than employees - see Regulation 27 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 for more information or its equivalent under the CLS (Financial) Regulations 2000 as amended which was Regulation 23.

Example 9 – Detailed immigration case

Please see my response under Example 5. As stated regulation 16(5) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 provides that the Director may include all or part of the resources belonging to a third party within the financial determination in the circumstances described in the regulations. We have previously identified that there may be particular concerns about how Regulation 16(5) is applied to failed asylum cases where a person is not entitled to NASS support or other state benefits and may be receiving small amounts of assistance from a charity or similar, and will re-issue our internal advice to caseworkers that although evidence of the type and amount (as relates to money or vouchers) of support provided should be obtained e.g. letter from the charity concerned, we will not be looking to include the charity's resources and a CIV Means1 should not be sent. Similarly, as relates to individuals providing support in these circumstances depending on the degree of affiliation between the client and the third party (e.g. whether they are closely related will be relevant), the amounts of support and the length of arrangement it may not always be necessary to issue a CIV Means1 – but it will be appropriate in some circumstances. Where there are

circumstances as described involving UN Sanctions, foreign exchange rules, person's in warzones etc it would be useful if an explanation can be provided as to the exact nature of the support and why it would induce a lengthy delay or prove impossible to provide evidence (e.g. because the person is based in Afghanistan etc) so that the caseworker concerned can consult a senior caseworker or the Means Policy Co-ordinator in head office.

As specific case reference numbers were not provided we have not been able to investigate the specifics of each case referred to. If these details are available we would welcome you sharing them with us so we can share learning points with our caseworkers and ensure any further training required for individuals takes place.

Joanne Bainbridge and Jim Peake would be happy to discuss in person the issues you've raised if you feel this would be beneficial. We are currently working on guidance materials for Solicitors in relation to means assessment and would welcome your input at the draft stage.

Yours sincerely

S G McNally CBE

Director, Case Management

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

....

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.

....

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.

...

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