

**Bills Committee on
Legal Aid (Amendment) Bill 1999**

**Internal Guidelines on the Waiving of Interest
On DLA's First Charge**

The Issue

This paper outlines the framework of the internal guidelines to be adopted by Legal Aid Department ("LAD") in exercising the discretion, under the proposed section 18A(3B)(c)(i) to waive or reduce any interest payable arising from deferring enforcement of any charge against the property of an aided person recovered or preserved by the LAD on his behalf.

Background

2. At the meeting of Bills Committee on the Legal Aid (Amendment) Bill 1999 on 28 January 2000, Members sought information on the guidelines to be adopted upon enactment of the Bill. Members also requested relevant information about the United Kingdom's practice.

Provisions in the Legal Aid Handbook of United Kingdom

3. Pursuant to Members' suggestion, we had another closer study of the Legal Aid Handbook 1998/99 issued by the Legal Aid Board of the United Kingdom. We understand from the Notes for Guidance of the Handbook, which are expected to be followed by legal practitioners who handle UK legal aid work, that the Legal Aid Board has no power to waive the statutory legal aid charge under the UK Standard Legal Aid Scheme. However, the area office of the Legal Aid Board has the power to authorise a solicitor not to enforce his or her green form charge (i.e. the charge on money or property recovered or preserved for the setting off against any deficiency he is claiming out of the legal aid fund for the provision of legal advice under the Green Form Scheme) on grounds of "grave hardship", distress to the client or unreasonable difficulty in enforcement because of the nature of the property. The relevant provisions in the UK Legal Aid Handbook is extracted at Annex A.

The Framework

4. LAD will draw up detailed internal guidelines for the exercise of discretion under the proposed 18A(3B)(c)(i) when the Legal Aid (Amendment) Bill 1999 is enacted. It envisages that such guidelines would cover, inter alia, the following aspects:

A. Procedural Issues

(i) initiation of action to waive or reduce interest

Generally speaking, a legally aided person would be expected to apply for a waiver, or reduction, of interest on the first charge and explain what serious hardship would be caused to him or why it is not just and equitable if he were required to pay all or part of the interest accrued.

Nevertheless, there may be cases where LAD considers that it is in all circumstances just and equitable to do so, in which event, LAD may on its own initiative waive or reduce interest on the first charge;

(ii) timing of the decision to exercise discretion

a decision on whether to waive or reduce interest would normally be made when such payment is required. This is because existing section 18A(3B)(c) (i.e. the new Section 18A(3B)(c)(ii)) provides that Director of Legal Aid (“DLA”) shall not seek to recover interest until payment of the sum secured by the first charge is made. This notwithstanding the LAD may consider waiving or reducing interest at any time after registration of the first charge ;

(iii) authority to exercise the discretion

the subject professional officer who handles the case in question would, upon receipt of all the supporting facts and arguments, make a recommendation to an officer at the directorate rank (D2 or above) for a decision to be taken under the proposed section 18A(3B)(c)(i);

(iv) appeal mechanism

section 26(1) of the Legal Aid Ordinance provides that “an applicant for legal aid or an aided person who is aggrieved by any order or decision of the Director made under any provision of this Ordinance may appeal therefrom to the Registrar of the High Court in chambers”. A decision by DLA made under the proposed section 18A(3B)(c)(i) would be appealable under this section.

B. Assessment Criteria

(i) consideration of “serious hardship”

in considering whether the charging of interest would cause serious hardship on the part of the aided person, LAD would take into account all relevant factors, including the following:

- personal circumstances of the aided person
- financial circumstances of the aided person
- the value of the property recovered/preserved by LAD on behalf of the aided person, both at the time when the property was recovered/preserved and at the time when the outstanding payment is made by the aided person;

(ii) consideration of “just and equitable”

in considering whether it would be just and equitable to exercise the discretion to waive or reduce interest, LAD would take into account the specific circumstances of individual cases, in particular unforeseen circumstances which might affect the financial or other position of the aided person. For example, if upon realization of the property, it comes to light that the remaining balance of sales proceeds less the liability of the aided person is so small or such that the charging of interest, or part thereof, would have the effect of depriving the aided person of any benefit at all out of the property recovered or preserved, LAD may consider exercising the discretion to waive or reduce the interest.

Regard will be had to cases involving similar circumstances where interest was waived or reduced to ensure consistency of approach.

5. Members are invited to note the general framework set out above.

Administration Wing
Chief Secretary for Administration's Office
April 2000

2-34 Is it reasonable to grant a solicitor authority not to enforce the solicitor's charge?**(Legal Advice and Assistance Regulations 1989, reg. 33)**

The rule is that in paying for advice and assistance the legal aid fund is only responsible for the deficiency after taking into account the client's contribution (ABWOR only), costs paid by the other side and the solicitor's charge on property recovered or preserved for the legally assisted person in connection with that matter (Legal Aid Act 1988, s.11, p. 286). It may be necessary to look at the solicitor's file to decide whether the charge applies in any particular case.

Paragraph (i) of Schedule 4 to the Legal Advice and Assistance Regulations 1989 creates an exception from the solicitor's charge in respect of any sum, payment or benefit which by virtue of any provision of or made under an Act of Parliament, cannot be assigned or charged. The trigger to bring the exception into play is that the provision of or made under an Act of Parliament must prevent the monies in question from being assigned or charged. The most common category of cases to which the exception applies is state benefits, whether contributory, non-contributory or income related but awards by the Criminal Injuries Compensation Authority are also excepted.

NOTE: *The green form solicitor's charge is different from the legal aid statutory charge because:*

1. *There are different exemptions (see Legal Advice and Assistance Regulations 1989, Sched. 4, p. 358, compared to the Civil Legal Aid (General) Regulations, reg. 94, p. 407).*
2. *The green form charge is wholly handled by the solicitor who must take reasonable steps to protect his or her charge to ensure he or she receives money or property recovered or preserved and sets it off against any deficiency he/she is claiming out of the legal aid fund. This contrasts with the legal aid charge which involves payments in and out of the legal aid fund. The solicitor must take reasonable steps to protect his/her charge because where there is a recovery or preservation there will be no or a reduced, deficiency for payment out of the legal aid fund. This means that where the charge is lost the solicitor will bear that loss.*
3. *The area office has power to authorise the solicitor not to enforce his or her charge (whereas there is no power to waive the legal aid charge). The grounds are grave hardship or distress to the client or unreasonable difficulty in enforcement because of the nature of the property. See Legal Advice and Assistance Regulations 1989, reg. 33 and below.*

Grave hardship**2-35**

(a) What are the personal or financial circumstances of the client compared with the value of the money or property recovered or preserved? Since the hardship must be grave, the lower the value of the money or property recovered or preserved the less chance there is of grave hardship being suffered.

(b) What are the personal or financial circumstances of the client? If the client is on a low income, or income support/income based Jobseeker's Allowance, authority will usually be given where the client has suffered a financial loss and the compensation is to remedy that loss, but not where the compensation has an element of profit.

If the client is on a higher income any hardship may not be so grave as to justify authority.

(c) *What is the value of the money or property recovered or preserved? If it is so low that enforcement would substantially diminish or wholly extinguish the benefit to the client, authority might be justified. In such circumstances, however, the area office might consider whether to disallow the solicitor's costs on the grounds that he should have advised the client from the outset that the work would not be cost effective.*

(d) *What is the nature of any property recovered or preserved? If the property is an essential item such as a cooker, refrigerator or furniture, authority will be granted. If the property is a luxury item such as jewellery, a video or television, authority will usually be refused.*

Grave distress

2-36

Does the property itself have any special meaning for the client? If the item is of genuine sentimental value, for example, a wedding ring, authority may be granted.

Difficulty in enforcement due to nature of property

2-37

What are the problems in enforcement? Authority will be given only where there is real difficulty as opposed to inconvenience or delay, for example

where the property is outside the jurisdiction (but query should the advice and assistance have been given in the first place if difficulty in enforcement could be foreseen?).

Payment to a client by mistake and the difficulty of recovering the money are not matters for authority under regulation 33. They are matters for the area office to consider when assessing the solicitor's costs.