Advising for the purposes of public funding in civil cases

22.1 Introduction

In civil cases, public funding (or legal aid as it used to be known) is only available for the most needy people in society, which means that the types of cases covered is restricted, and entitlement is controlled both in terms of financial eligibility and on the merits.

There are a number of excluded categories of cases. Generally, no public funding is available in the following cases:

- allegations of negligently caused injury (‘personal injury’ claims), death or damage to property, apart from clinical negligence;
- defamation and malicious falsehood;
- company or partnership disputes or other matters arising out of the carrying on of a business;
- trust cases (other than those involving joint ownership or occupation of domestic property, although the Commission can fund cases concerning implied, resulting, or constructive trusts, trusts arising when a person dies intestate, or where trust law arises under s 14 Trusts for Land and Appointment of Trustees Act 1996);
- the making of wills, generally;
- conveyancing, unless necessary to previous funded proceedings or to give effect to an agreement in a family case reached under public funding;
- boundary disputes;
- attending an interview conducted on behalf of the Secretary of State with a view to reaching a decision on an asylum claim.

There are exceptional circumstances where the Legal Services Commission has authority to grant public funding in excluded cases. The types of cases above will be funded by other means such as private means, conditional fee agreements, and insurance contracts. Please note, public funding does not cover representation in every type of court; for example the Employment Tribunal and small claims track of the County Court are both excluded from public funding for representation.

The cases which may now obtain public funding can be any matter of law in England and Wales not within the restricted categories above. However, the cases generally covered by public funding do tend to be family cases and social welfare law cases (housing, social security, immigration, education, public law, etc.). Public funding operates so that the work authorised is closely controlled. There are limits as to the amount of work done both in terms of cost and scope. As a result, you may be frequently...
Advising for the purposes of public funding in civil cases

instructed to advise as to whether public funding should be extended or allowed to continue in a certain case.

Public Funding is granted to clients under Legal Services Certificates. These certificates invariably contain restrictions. These are restrictions on the scope (the nature of the work that can be done under them) and the amount of costs which may be incurred before a further extension—the financial limit. You should always check the Legal Services Certificate (or Certificate for Full Representation) before you advise the client. You should state in your opinion the level of service under which the opinion you are writing is being given, and which of the Legal Services Commission’s case categories the matter falls under. You need this information so that you can ensure that the work you are asked to do is within the scope and the financial limitations, and in addition, so you can ensure you are paid. Instructing Solicitors are required to keep up-to-date totals as to the amount of money spent per file, so they should be able to inform you where the file stands in relation to the costs limit.

Please note that if any work is done beyond the limits of the Legal Services Certificate neither counsel nor Instructing Solicitors will be paid for the work concerned. The effect on the client is that the client will have no costs protection in respect of the unauthorised work.

It is important to remember that public funding, if granted, can be withdrawn or revoked. Funding can be withdrawn due to ‘unreasonableness’, because funding is not in the interests of the Community Legal Service fund, change in eligibility financially and on the merits, and for any failure by the client to provide documents, information, or payment of contributions.

22.1.1 Professional conduct and public funding

All of the normal principles of professional conduct relating to opinion writing apply to publicly funded work. However, there are additional considerations of which you will need to be aware. Paragraphs 303 and 304 of the Code of Conduct of the Bar of England and Wales impose a duty on barristers to comply with the obligations set out in the Access to Justice Act 1999 and any regulations or codes in effect under the Act. Further, Annex E of the Code of Conduct, Guidelines on Opinions Under the Funding Code also apply.

All barristers and solicitors conducting publicly funded work have an overriding duty to the Legal Services Commission. The duty is such that you are obliged to inform the Legal Services Commission of circumstances which should or may affect the continuation of a public funding certificate even where these circumstances are adverse to your client. This includes (but is not limited to) advising the Legal Services Commission of any offer made by the other side to settle the claim, and any circumstances which adversely affect your client’s prospects of success. However, if an offer of settlement is made which is below your estimation of the likely quantum, you are entitled to say so, and indicate your estimated level of damages.

If you believe a case has no prospect of success following the discovery of new facts (for example after a conference with the client), you are bound by your duty to the Legal Services Commission. In practice, you would initially inform your instructing solicitors that they ought to apply to the Commission for termination or discharge of the public funding certificate due to the adverse circumstances, and only if they refuse to do so should you inform the Legal Services Commission yourself. The Commission can take a few weeks to terminate or discharge the certificate. Please note that the Commission must be informed well in advance if there are any future hearings in the case!
If you consider that your client has obtained public funding improperly, you have a clear obligation under the Code of Conduct. Initially you should try to ensure that the issue is discussed with your lay client and/or professional client (your instructing solicitors). It may well be that they agree to inform the Legal Services Commission of the difficulty. If the lay client does not agree to correct the information given to the Commission, you should cease to act. However, whatever the position of your lay client or instructing solicitors, you are required under Rule C44 of the Funding Code Procedures to inform the Director of the Commission if it appears that the lay client has required the case to be conducted unreasonably, may have given defective information, where it is no longer possible to act for the client, or new circumstances which affect the terms or continuation of the Certificate come to light. You should ensure you are familiar with rule C43 ‘Duties of the Solicitor’ and C44 ‘Duties of Legal Representatives’ before advising in any case. Barristers are required to comply with rule C43. It is correct that you are entitled (under paragraph 22 of Annex E Guidelines on Opinions Under the Funding Code) to inform your instructing solicitors of any difficulty and request that they pass on the information to the Commission. However, if you consider that this may not happen, you should inform the Commission directly. If you have a suspicion but fail to report it to the Commission, you may have to explain your reasons why later.

22.1.2 The Funding Code and eligibility for public funding

The special requirements of advising a publicly funded client involve the consideration of the Funding Code, which establishes the criteria for the granting of public funding. It can be found in the Legal Services Commission Manual. You may also need to refer to the LSC’s magazine Focus for up-to-date guidance. The Funding Code is the central source of information for the guidelines for when public funding will be granted. It covers the two aspects necessary for the grant of public funding: first, financial eligibility and secondly, sufficient merit to the case.

There are strict limits on financial eligibility. The Legal Services Commission requires applicants to disclose their means for assessment, upon which eligibility is assessed. It is very important that all barristers conducting public funding work are aware of the eligibility limits and method of calculation. The means test involves both income and capital. If the client’s means change, then any change should be immediately reported to the Legal Services Commission. Those who receive Income Support or Income-based Jobseekers Allowance qualify for funding automatically. Those who receive other benefits or are employed have their means assessed and if their income or capital is above a certain threshold, may be required to pay a contribution to their public funding. A contribution is a sum of money paid monthly by the client to the Legal Services Commission directly, and is calculated on a ‘sliding scale’. Failure to pay results in the withdrawal of public funding. The amount of any contribution can be very relevant to barristers advising a publicly funded client as it can have an impact on whether the client should accept offers of settlement. The financial eligibility rates change from time to time (often annually) so it is vital to ensure you are dealing with the right rates. It is important to note that, even if a client is financially eligible, if alternative sources of funding litigation are available (either through insurance or other means), public funding is unlikely to be available. Please note that there is no means test for obtaining legal representation in cases before the Mental Health Review Tribunal. In addition, the financial eligibility limits are lower for legal representation before the Immigration Adjudicator or Immigration Appeal Tribunal.
22.1.3 Eligibility on the merits under the Funding Code

Please note that the part of the Funding Code dealing with the merits of a case is split into sections. One part of it is the General Funding Code applicable to the majority of cases; however, there are specialist sections. The Standard Criteria (Section 4 of the Funding Code) applies to all cases, general and specialist. The specialist sections have different requirements to be met for the granting of public funding. The categories of cases which have these special requirements are:

- very expensive cases (referred to the Special Cases Unit of the Legal Services Commission);
- judicial review matters;
- claims against public authorities;
- clinical negligence cases;
- housing cases;
- family cases;
- mental health matters;
- immigration cases;
- quasi-criminal proceedings.

These specialist cases will not be dealt with further in this chapter. If you need to find out more about these types of case, you should consult the Funding Code for more details.

At the time of writing the most current Funding Code on the criteria for grant of public funding was the July 2007 version (as updated in August 2008). The manual and/or LSC website should be consulted for further details. Section 5 is the General Funding Code, which states that where alternative funding (but not a conditional fee agreement) is available, or there are complaint systems, ombudsman schemes or alternative dispute resolution or another of the levels of public funding would be more appropriate, public funding may be refused. The small claims track is specifically excluded. If none of these issues apply, then the grant of public funds will depend on the prospects of success and the cost/benefit ratio.

For publicly funded cases, the prospects of achieving a successful outcome should be estimated in percentage terms. Giving an indication of ‘very strong prospects of success’ is not enough. The Legal Services Commission gives categories for the prospects of success and your advice should indicate into which category a particular case falls:

- Very good (80% or more).
- Good (60–80%).
- Moderate (50–60%).
- Borderline (not poor, but because of difficult disputes of fact, law, or expert evidence, it is not possible to say that the prospects of success are better than 50%).
- Poor (clearly less than 50% so that the claim is likely to fail).
- Unclear (the case cannot be put into any of the above categories because further investigation is needed).

Should a case in your opinion fall into the categories of borderline or poor, you will need to set out full reasons for the continuation of public funding if you believe such funding should continue. Your reasons and explanation will have to be set out
very persuasively to ensure further public funding is granted. You will need to make out a case for exceptional circumstances to obtain any public funding. Under the Funding Code, significant wider public interest or ‘overwhelming importance to the client’ may be exceptional circumstances justifying public funding. The definition of overwhelming importance under the Funding Code is that the case has ‘exceptional importance to the client’ which is ‘beyond the monetary value’ because the case ‘concerns the life, liberty or physical safety of the client or his/her family or a roof over their heads’.

If the client is able to fund the litigation by an alternative method to public funding, then public funding will be refused. Therefore if funding is possible under a conditional fee agreement, public funding will be refused.

Here are some useful extracts from the General Funding Code to show how the cost/benefit ratio can decide whether your client will obtain public funding:

5.7.3 Cost Benefit—Quantifiable Claims
If the claim is primarily a claim for damages by the client and does not have a significant wider public interest, Full Representation will be refused unless the following cost benefit criteria are satisfied:

(i) If prospects of success are very good (80% or more), likely damages must exceed likely costs;
(ii) If prospects of success are good (60%–80%), likely damages must exceed likely costs by a ratio of 2:1;
(iii) If prospects of success are moderate (50%–60%), likely damages must exceed likely costs by a ratio of 4:1.

5.7.4 Cost Benefit—Unquantifiable Claims
If the claim is not primarily a claim for damages (including any application by a defendant or a case which has overwhelming importance to the client), but does not have a significant wider public interest, Full Representation will be refused unless the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to litigate, having regard to the prospects of success and all other circumstances.

Please note that some of the ‘Specialist Areas’ have their own definitions of acceptable cost/benefit ratios.

(See 22.1.5 for commentary.)

22.1.4 Contents of a barrister’s opinion on the merits


Your written opinion on the merits should:

(a) State the level of service under which your opinion is given and which case category the matter falls under.
(b) State your decision as to whether a conference with the client is necessary to assess either his/her reliability or credibility.
(c) Show that the legal merits tests are met, referring specifically to the relevant parts of the Funding Code. Apply the Funding Code directly to the case.
(d) Set out any conflict as to facts concisely to enable the Legal Services Commission to assess the relative strengths of rival factual versions.
(e) Express a clear opinion as to whether the applicant’s version is likely to be accepted by the court and why.

(f) Summarise any issues of law sufficiently to enable the Legal Services Commission to come to a view about them without going outside the opinion. Remember to use plain English for clarity.

(g) Express a clear view as to whether the legal case has a reasonable prospect of being accepted by the court and why.

(h) Draw attention to any lack of material or other matters which could now or in the future materially affect your assessment of the outcome of the case and consider the need for a conference.

(i) Quantify at least the bracket within which damages are likely to be awarded (where damages are claimed). You should take into account any contributory negligence and whether the opponent may be unable to pay.

(j) Confirm that you are of the view that the proceedings are cost effective—i.e. that the costs are likely to be justified by the potential benefit to the applicant (bearing in mind the statutory charge). The opinion must address whether the specific cost/benefit ratio for the type of case has been satisfied.

(k) If the case concerns a benefit to the client other than damages (for example the client is seeking to uphold rights or defending possession proceedings), that benefit must be made clear. The benefit will need to be justified given the expense to the public purse.

(l) Suggest any limitation or condition that should be placed on the certificate (subject to any further advice), in order to either obtain an extension of score or protect the interests of the Legal Services Commission, depending on the circumstances.

(m) If there is a wider public interest, identify such interest by person, group of people (giving numbers), legal issue, and type of benefit.

22.1.5 Unquantifiable claims and the ‘privately paying client’ test

As stated above, where the claim is unquantifiable (it concerns a right or non-monetary benefit) no public funding will be granted ‘unless the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to litigate’. The question which must be asked here is: assuming that the client had the means to pay the likely costs, would he or she be advised to take or defend the proceedings at their own expense?

You should assume that the client would have moderate but not excessive means. Such a client should therefore be taken as being able to meet the likely costs in a privately paid action, albeit with some difficulty, or as something of a sacrifice.

22.1.6 The statutory charge

The statutory charge is such that public funding is provided as a ‘loan’ rather than a ‘grant’. It is a charge over ‘any money or property recovered or preserved as a result of the proceedings’. Therefore, if a recipient of public funding obtains damages (either from the court or by means of a settlement), the Legal Services Commission are entitled to recoup their money from those damages. The statutory charge applies, regardless of the client’s
means. The charge can also be attached as a charge to registered land. Solicitors who do publicly funded work are obliged to advise their clients of the effect of the charge.

However, the statutory charge can be satisfied in full if the whole of the costs of a case are recouped from the opponent and the solicitor decides to forgo any additional publicly funded costs. In practice, this usually only happens where the costs are agreed by both sides. If the costs are assessed, there is usually a shortfall between the costs paid by the opponent and the total costs (which would then be subject to the statutory charge).

When considering the settlement of a case, you should check whether costs are included in the proposed settlement and if not, the effect upon the client. A barrister must be able to advise the client on the true implications of a settlement: how much will the client get after the statutory charge has been paid?

22.2 Sample opinion—advice for the purpose of public funding

RE: GERALD GALTIERI

OPINION ON THE EXTENSION OF PUBLIC FUNDING

Introduction and Summary of Advice

1 I am asked to advise Mr Galtieri on a proposed claim for damages for professional negligence against his former solicitors, Grant and Runciman. My instructing solicitors have obtained Public Funding under Level 4 ‘Legal Representation’ which is limited to Solicitor’s investigations and Counsel’s opinion on the prospects of success. Those instructing me have obtained a copy of Grant and Runciman’s client file on Mr Galtieri’s case. They have also taken a statement from the Estate Agent involved. I also have a statement from Mr Galtieri and an expert report from a structural surveyor. This advice is sought to specifically address whether Public Funding should be extended to Full Representation. I advise that it should and that an appropriate scope limitation at this time would be to include issue and service and all steps up to disclosure. We will then know whether negligence is admitted and be better able to estimate the costs of a trial on quantum only. At this stage I do not consider a conference with the client to be necessary, given the clear merit apparent in Mr Galtieri’s claim as stated below.

The facts of the case

2 The background facts are that in 2002 Mr Galtieri became interested in buying a 3 bedroomed house at 8, Belmont Hill, Lewisham. He wanted to add the property to his small accommodation portfolio which he then let out and which formed his main source of income. Sadly, for reasons unconnected with this case, he no longer owns any property other than his own modest home, and is unemployed. I am instructed that Mr Galtieri is currently in financial difficulties, owing multiple debts under a number of credit cards, and that he is in mortgage arrears. In addition he is currently paying off some of his debts following creditors obtaining County Court Judgments against Mr Galtieri. He is therefore financially eligible for Public Funding.

3 Mr Galtieri made an offer of £250,000, against an asking price of £280,000, which offer was accepted, per the Estate Agent’s statement, which I have had the benefit of
reading, because the vendors wanted a quick sale. Mr Galtieri then contracted with Greenboyce and Co, a firm of chartered surveyors, for a survey of the property. Mr Galtieri says that he met with Sidney Boyce, a partner in the firm of surveyors in June 2001 and that he specifically explained that he intended to let out the property for profit and that he wanted the survey done as soon as possible so that the deal could be completed and tenants installed at the earliest opportunity. Since the property has a basement kitchen, and Mr Galtieri has some experience of such buildings, he says he wanted particular attention paid to the question of whether the basement benefited from an adequate damp proof course and was damp free.

4 I have seen the survey, which gives the property effectively a clean bill of health. It addresses the decorative condition of the kitchen but makes no comment specifically on the question of damp/damp proof course. Mr Galtieri, in reliance on the survey, purchased the property and installed tenants at a rent of £800 per calendar month in August 2002.

5 In October 2002, Mr Galtieri says that a fitted wardrobe fell off the wall in an upstairs bedroom, revealing a 2 and a half to 3 inch crack to the exterior wall. Further inspection revealed that the property was extensively affected by subsidence. The tenants moved out in December 2002, after the Council’s Environmental Health Officer served notice on Mr Galtieri to remedy the defects but not before dampness in the kitchen had risen to about 2 feet from the floor and caused losses to the tenants that they alleged to amount to £2,000. The Environmental Health Officer threatened to serve a closing order to prevent the property being re-let without repair. Unfortunately Mr Galtieri had not purchased buildings insurance, there being no compulsion on him to do so because he did not need a mortgage to buy the property.

6 Mr Galtieri could not afford to repair the property and in January 2003 was forced to sell the property to a developer for £180,000, a loss of some £70,000 on the purchase price.

7 In February 2003, Mr Galtieri consulted Grant and Runciman who advised him to institute proceedings against Greenboyce and Co for negligent valuation. For reasons that are not entirely obvious, Grant and Runciman failed to issue proceedings before August 2008. By then the action was statute barred. Greenboyce succeeded in their pleaded limitation defence and in October 2008, Mr Galtieri’s case was struck out. In September 2009, Mr Galtieri was advised by a friend that he might have a case to sue Grant and Runciman for negligence. At that time he visited those now instructing me and they have spent 6 months investigating the case and complying with the pre-action protocol.

8 I have no hesitation in recommending that Public Funding be extended to issue and service of proceedings. Grant and Runciman were clearly negligent in failing to issue within the limitation period. We do not know what they may attempt to say in their defence but it is a failing that cannot be excused. The only circumstances I can think of where a Solicitor would be entitled not to issue would be where there were insufficient funds from the client, and even then the client would have to be clearly warned of the consequences. Mr Galtieri deals with this in paragraph 10 of his statement where he states that he responded promptly to all requests for funds and all correspondence from Grant and Runciman and far from failing to cooperate with his Solicitors, has evidence from his telephone bills of the time of at least 15 calls to Grant and Runciman in December 2007 and January 2008, all of which he says were not returned save a couple of calls from a secretary saying the person concerned was ill and away from the office and someone would get back to him.
9 There seems little doubt that Grant and Runciman’s failure to issue caused Mr Galtieri to lose the chance to recover damages from Greenboyce for negligent valuation. The question is what Mr Galtieri can now recover from them. In Solicitor’s negligence cases, damages are assessed by calculating the recoverable damages in the primary action (in this case Galtieri v Greenboyce) first. The trial judge will then make a finding of what the prospect of success would have been in Mr Galtieri succeeding in his case against Greenboyce. The recoverable damage figure is then multiplied by the percentage prospect of success to give the loss of chance damage figure recoverable against Grant and Runciman.

10 We have the benefit of an expert survey report stating that Greenboyce were in breach of their standard of care and negligent in that they:

(a) failed to undertake an adequate inspection to reveal faults (structural subsidence) that any reasonably competent surveyor would have made clear; and

(b) failed to respond to the specific instruction to check for damp proof course and dampness in the kitchen.

It is right that Grant and Runciman will be allowed their own expert evidence in the proceedings but on the evidence before me I advise that:

(i) Mr Galtieri has an excellent prospect of establishing liability against Grant and Runciman. I put this at 85–90%.

(ii) He has a good, though not excellent, prospect of establishing that he would have succeeded on liability against Greenboyce and Co. I would say 60–75%.

His measure of damage against Greenboyce would have been diminution in value (Watts v Morrow [1991] 1 WLR 1421). This equates to the price he paid less the true value of the house at the time of purchase, were the defects known. We will need expert valuation evidence on this point since, at present, we only know the difference between the price he paid and the price he sold for approximately six months later. This is £70,000 and I will take that figure for now as the closest we can estimate without a valuation report.

11 Added to this will be Mr Galtieri’s loss of income from the lack of tenants and he must give my Instructing Solicitors a breakdown of this and some supporting evidence. If he can prove payment of the £2,000 compensation to the tenants, he can also claim that together with any incidental costs such as advertising the vacancy or other business expenses which have not been offset against tax.

12 That gives damages of a minimum of £72,000. This multiplied by his minimum prospect of success against Greenboyce (60%) amounts to damages of £43,200. There is no apparent difficulty for Mr Galtieri to recover damages in full since Grant and Runciman should (as a firm of Solicitors regulated by the Law Society) be covered by professional indemnity insurance to the full value of Mr Galtieri’s property transaction at the very least. As a result, there is no need to discount Mr Galtieri’s damages any further.

13 My Instructing Solicitors tell me they estimate the costs of the case to be £12,500. This is a case with a good prospect of success. The Legal Services Commission requires damages in this category to exceed costs by a ratio of 2:1. This test is clearly satisfied.

14 I am aware that it is theoretically possible for Mr Galtieri’s case to be funded by means of a conditional fee agreement (CFA). However, it would be unjust and
impractical to expect Mr Galtieri to fund his case in such a way. The CFA would not cover my Instructing Solicitor’s disbursements in this matter, and given the need for expert evidence and insurance in case Mr Galtieri is unsuccessful, these are likely to be considerable. Mr Galtieri is, as I have indicated earlier in this opinion, in a poor financial position. He is unable to afford these disbursements to the extent that his lack of means would deny him a remedy to which he is entitled. This is therefore a case suitable for Public Funding.

15 I advise that Public Funding be extended to a Full Representation Public Funding Certificate to allow my Instructing Solicitors to obtain the valuation evidence I have advised and to cover the issue and service of proceedings and all steps up to exchange of evidence. I would then be pleased to advise further. My Instructing Solicitors are in a better position than I am to recommend appropriate costs limitation.

29th March 2010
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