



The Law Society

Un-recouped payments on account

Law reform and legal policy

10 August 2006

Introduction

The Law Society continues to receive complaints from solicitors with regard to the Legal Services Commission's current recoupment exercise. There is widespread concern that the LSC is claiming recoupment in cases where it is not due in very old cases where solicitors no longer have case records, and therefore cannot provide the LSC with documentary proof and in cases where the LSC cannot provide sufficient information for the solicitors to identify their client and therefore locate their file.

The Law Society is aware that similar problems have arisen in earlier recoupment exercises, and we have suggested to the LSC that it would be prudent for them and practitioners to consider procedural changes to avoid such problems in future.

Summary of Law Society concerns

The LSC is now claiming recoupment in cases which are very old; many of which ceased to be active in the 1990's and some which ceased to be active in the 1980's. We believe the LSC has delayed unacceptably in making these claims.

The LSC's delay in dealing with recoupment is unfortunate because it is at the point of case closure that both the solicitor and the LSC is in the best position to make an accurate assessment of costs and any recoupment which may be due, because all the records are to hand and queries can be checked with the relevant fee earner.

Recoupment requests by the LSC in respect of matters that are over six years' old results in the following problems for solicitors:

- Computer records of cases may have been deleted or damaged.
- Older cases may pre-date computerisation in some firms.
- Computer hardware and software has been updated, and details of non-active cases have not been transferred on to the new programme.
- Paper files have been destroyed, sometimes by accident (e.g. fire or flood) or in accordance with an approved destruction policy, normally 6 years (it is prohibitively expensive to store files and legal aid practitioners operating on tight margins cannot afford to retain bulky case files beyond a reasonable time).
- Paper files have been sent to archive, but cannot be traced because the archive references no longer match solicitor's updated computer software and/or the references provided by the LSC do not match the archive case references.
- The fee-earner for the particular case has left the firm, or no longer has any independent recollection of the case details.

We also think that the problem of reliability in LSC records is more acute in older cases:

- We assume that, in common with solicitors, the LSC also destroys paper records after a certain time, and therefore completed forms and correspondence from solicitors on old cases are not held by the LSC , preventing cross-checking for errors in data entry on the computerised system.
- The LSC has also presumably updated its computer software and hardware over the years, resulting in the risk of file corruption or inaccurate transfer of details from old to new systems.

Preliminary Law Society proposals to the LSC

The Law Society has made some preliminary proposals to the LSC to form the basis of discussions with them.

Amnesty for cases older than six years

We think it would be helpful for the LSC to acknowledge the potential unfairness of making recoupment claims in respect of very old cases, where the delay in doing so is likely to be a result of the LSC's own maladministration, and the basis for recoupment cannot be verified by reference to either LSC or solicitor paper files. In our view, the LSC should not pursue its claims in such cases, on the understanding that more effective procedures will in future be introduced by both the LSC and practitioners. This would apply to cases that are more than six years old.

The LSC and the Law Society should examine reasons for delay in recoupment, and consider how these can be minimised in future by improved procedures, both within the LSC and within solicitors' firms.

Quarterly reports

Firms would be assisted if the LSC provided quarterly reports on all cases to them as a matter of general practice. The firms would have the opportunity to detect and correct inaccuracies and omissions sooner. As a minimum, these reports should contain a list of all live cases held by that firm together with:

- Full identification of the case. This would include not only the legal aid reference number, but also the solicitor's reference, the name of the fee-earner dealing with the case and the date of issue of the certificate. All of these are supplied by the firm, but are not currently being provided to them by the LSC, causing real difficulty in identifying matters, particularly where they are old.
- All payments made on account of profit costs, disbursements and counsels' fees showing VAT.

Such a system of reporting would enable both solicitors and the LSC to keep tabs on recoupments and to ensure that these problems do not arise again in the future.

Flexible methods of payment to LSC

A further suggestion would be for the LSC to make it easier for solicitors to deal with recoupments at the time when it is best for them to do so, i.e. closure of the case. The current system of recoupments through BACS actually prevents solicitors from paying back monies owed to the LSC and is possibly at the root of the problem. Practitioners have suggested to us that they would prefer to send the LSC a cheque for all monies owed to the LSC, at the time that they report, rather than wait several months for the LSC to recoup it from them. If the LSC could offer this as a more flexible service to practitioners, then it might find that the need for recoupment exercises on a large scale in the future would be greatly reduced and perhaps not be necessary at all.

Law Society guidance to the profession

We think it may be helpful for the Law Society to revisit its guidance to practitioners on retention of records, in respect of legal aid cases. The cost of retaining full case papers is prohibitive, particularly for legal aid firms on tight margins. The Law Society has suggested that practitioners in legal aid cases might be advised to retain only the file relating to costs and legal aid for a longer period than the usual 6 years and we are keen to explore whether this would in practice provide sufficient information to enable them to deal with late claims. This is likely to impose a considerable burden upon solicitors in terms of archiving costs and we will explore whether alternatives are possible.

Initial payments on account where the case does not proceed

Initial payments on account, (£250 plus VAT), in matters where the case does not proceed represent a particular problem for solicitors. This is because of the disproportionate size and complexity of the form Claim 1 in such cases. We propose that this longstanding problem be addressed constructively by providing a simplified claims and notification procedure for such cases, i.e. a shorter and simplified Claim 1 to be used only for such matters where the lengthy report is not required and is disproportionate in terms of information to be supplied.

Merger/dissolution of firms

This is a major cause for concern among solicitors. It is essential that clear guidelines are established, perhaps jointly between the Law Society and the LSC, to assist solicitors in drafting contractual arrangements with the incoming or outgoing firm to ensure that liabilities in respect of recoupment obligations are appropriately allocated, at the time of transfer.