



# Civil legal assistance - mortgage rights and repossessions

Issued to all registered firms of civil legal aid solicitors

Jan 2010

## Civil legal assistance in mortgage rights cases

This mailshot contains important information about advice and assistance and civil legal aid for clients who may face repossession because of mortgage arrears. During the current economic downturn there has been significant publicity about lenders repossessing properties and about homeowners who are having difficulties in making mortgage payments. Some publicity has suggested that legal aid is not available, particularly when court proceedings are involved. That is incorrect.

### Availability of civil legal assistance in arrears and repossession cases

The eligibility criteria for these cases are the same as for other categories of work.

#### *Advice and assistance*

In advice and assistance, the solicitor decides if an applicant meets the eligibility tests: the matter must relate to Scots law and the applicant must satisfy the financial eligibility criteria.

#### *Civil legal aid*

Applications for civil legal aid for proceedings raised under the Mortgage Rights (Scotland) Act 2001 may be made to lodge a minute in the proceedings or to defend the substantive issues raised in the action. To meet the tests of probable cause and reasonableness you need to send us information to show that there is a potential defence to an action or that there is a basis for seeking to suspend the creditor's rights.

This may include

- a challenge to the amount of alleged arrears
- a claim that arrears have been paid
- seeking time to sell a property, and
- seeking additional time to pay any arrears.

The majority of civil legal aid applications for Mortgage Rights (Scotland) Act cases relate to minutes in terms of section 2 of the 2001 Act. In the application, you should address

- whether immediate repossession would be unreasonable and
- why the court should suspend the creditor's rights.

The grant rate in relation to the legal merits of these cases is over 80%.

We do not need third-party statements to support an application for civil legal aid in this type of case. We accept that individuals are unlikely to discuss details of their financial position outwith a very close circle. If we think that information given by an applicant should be supported, we will continue the application and ask you to provide this.

The applicant must also meet the financial eligibility criteria for civil legal aid. Recent changes to eligibility for civil legal aid (see our web page on extended eligibility) mean that more people than ever before could qualify financially for civil legal aid.

## What your client may have to pay

---

Your client may have to pay a contribution, a payment under the clawback provisions, or expenses to their opponent.

### Contributions

---

Your client may have to pay a contribution from their disposable income or disposable capital.

In advice and assistance you are responsible for assessing and collecting any contribution. In civil legal aid we assess and collect the contribution. We will generally allow an assisted person to pay income-based contributions:

- up to £500 in 20 monthly instalments
- £501-£1,000 in 30 monthly instalments
- £1,001-£1,500 in 36 monthly instalments
- £1,501-£2,000 in 42 monthly instalments
- over £2,000 in 48 monthly instalments

#### *What can you do to help the applicant?*

We recognise that even with these extended timescales for payment some clients, particularly those with debt problems, may still struggle to pay. Please remember, therefore, that if you give us an estimate of the cost of the case that is lower than the assessed contribution we can reduce your client's instalments. For example, your client might have disposable income leading to an assessed contribution of £2,500 payable by 48 instalments of around £52. If you tell us the estimated cost of the case is, for example, around £400, we would reduce that to 20 instalments of £20.

## Clawback

---

### *Advice and assistance*

The assisted person's dwelling house is exempt from clawback under advice and assistance. If the matter can be resolved under advice and assistance before legal proceedings are raised, and the applicant succeeds only in staying in their home, they will not have to pay clawback. However, any other form of settlement under advice and assistance, such as an agreement to sell the house, may mean the applicant has to pay the cost of the legal advice from the proceeds unless they can show that to do so would cause them grave hardship or distress. (For more information on hardship applications see section 9 of the Civil Legal Assistance Handbook.)

### *Civil legal aid*

Under civil legal aid, the assisted person will have preserved property if they successfully oppose an action in which the lender has sought possession of the security subjects. (For more information on clawback in civil cases see section 18 of the Civil Legal Assistance Handbook.) However, preserving property does not automatically mean the assisted person has to make a payment under the clawback provisions. In around half of the Mortgage Rights Act cases we have seen so far, clients have not had to make a payment under clawback.

For clawback to apply, the market value of the property must exceed the amount of the outstanding mortgage, including arrears and charges. If the assisted person does have a liability, the amount is limited to either the cost of the case or the excess of the value of the property over the outstanding mortgage, whichever is the lower. If you have paid a contribution from your disposable income or capital, the amount you will have to pay under clawback will be reduced accordingly.

If the assisted person does have to make a payment under clawback we do not demand immediate payment. Some media coverage has suggested that clients can owe thousands of pounds and have to sell their home to pay

what is owed to the Legal Aid Fund. In fact, the average amount payable under clawback in civil legal aid cases of this sort is around £400.

We will always discuss alternatives for payment with you and the assisted person. They can either pay by affordable monthly instalments or they can defer payment by granting a standard security in favour of the Board.

Our practice in such cases is always to reach agreement about how the sums owed can be paid. We only resort to legal action or enforcement proceedings when we are left with no other reasonable alternative.

*If you have any queries about the clawback implications of any proposed or potential settlement or disposal of a case, staff in our Treasury Department will be happy to discuss this with you at any point. Please contact us as early as possible.*

## Expenses

---

If the assisted person is found liable for the expenses of any part of the action for which they received legal aid, they are personally liable for that amount but they can apply to the court to have their liability "modified" under section 18 (2) of the Legal Aid (Scotland) Act 1986.

---

**For further information about any of the matters in this mailshot, please contact Joe Kelly on tel. 0131 226 7061.**