

# Contribution towards Costs of Legal Aid Case and Director of Legal Aid's First Charge

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Important Information for Aided Person

For information relating to financial eligibility limits for legal aid, scale of contribution and the Director of Legal Aid's first charge, readers can refer to the "Financial Information Sheet" for the latest figures.

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# I Introduction

There is a generally held but mistaken belief that legal aid is free. In fact, an aided person who litigates at public expense is required to contribute towards the costs and expenses incurred by the Legal Aid Department (the Department) including pre-certificate expenses such as fees for bank search or counsel advice obtained by the Director when conducting means test or investigating the legal merits of the case. The only exception is:

- where the financial resources of the aided person as assessed under the Legal Aid (Assessment of Resources and Contributions) Regulations do not exceed a certain amount; and
- where no property is recovered or preserved for him or her in the proceedings

in which case no contribution is payable.

2.

The aim of this booklet is to illustrate, using examples, how and under what circumstances an aided person's own financial resources or the fruits of the litigation, i.e. property recovered or preserved or both will be used to pay for the costs and expenses incurred by the Department in connection with the legally aided proceedings.

## Liability to contribute out of aided person's own financial resources upon acceptance of legal aid

An aided person is required to pay a contribution out of his or her financial resources upon acceptance of the offer of legal aid. The amount of the contribution varies depending on the aided person's financial resources. Applicants who are Comprehensive Social Security Assistance recipients are generally deemed financially eligible unless there are reasonable grounds to suspect that their financial resources might render them financially ineligible or liable to pay a contribution.

### 2.

At the close of the case, if the contribution paid and the costs (if any) recovered from the opponent are less than the costs and expenses incurred by the Department including pre-certificate expenses, for example, fees for bank search and counsel advice as well as mediation expenses (actual costs), the aided person will be asked to pay the balance, if any, up to the full amount of the contribution. If, however, the contribution paid exceeds the actual costs, the balance will be refunded to the aided person. In other words, the costs to be borne by an aided person will not exceed the contribution payable even though the actual costs are higher, unless the Director of Legal Aid's (the Director) first charge otherwise applies.

### 3.

The following are some examples of how the contribution paid will be applied:

Assuming: Legal aid is granted to "A" to take proceedings against "X"  
Contribution payable: \$36,000  
Contribution paid: \$20,000

### Example 1

"A" won the case. The court orders "X" to pay "A"'s costs which, as taxed by the Master, come to \$10,000. Assuming the actual costs of the case incurred amounts to \$15,000 including the costs of the assigned lawyer paid by the Director on "A"'s behalf and "X" has paid the taxed costs of \$10,000, "A" has to pay \$5,000 to the Department out of his contribution. Since "A" has paid a contribution of \$20,000, a balance of \$15,000 will be refunded to "A":

$$\begin{aligned} & \$20,000 \text{ (contribution paid)} - \$5,000 \text{ (costs payable by "A" )} \\ & = \underline{\underline{\$ 15,000}} \end{aligned}$$

### Example 2

Same as Example 1 except that "X" fails to pay "A"'s costs as ordered by the court. A balance of \$5,000 will be refunded to "A":

$$\begin{aligned} & \$20,000 \text{ (contribution paid)} - \$15,000 \text{ (actual costs)} \\ & = \underline{\underline{\$ 5,000}} \end{aligned}$$

### Example 3

Same as Example 1 except that actual costs come to \$35,000 including pre-certificate expenses. Since "A" has paid a contribution of \$20,000, "A" will have to pay a further \$5,000 to the Director to cover the balance of the actual costs expended.

$$\begin{aligned} & \$35,000 \text{ (actual costs)} - \$20,000 \text{ (contribution paid)} - \$10,000 \text{ (costs} \\ & \text{paid by "X" )} \\ & = \underline{\underline{\$ 5,000}} \end{aligned}$$

#### Example 4

At the close of “A”’s case, the court orders “A” and “X” each to be responsible for their own costs.

“A”’s own costs including pre-certificate expenses come to \$35,000, i.e. actual costs incurred by the Director on “A”’s behalf.

Since “A” has paid a contribution of \$20,000, a balance of \$15,000 will have to be paid by “A” to the Director.

$$\begin{aligned} & \$35,000 \text{ (actual costs)} - \$20,000 \text{ (contribution paid)} \\ & = \underline{\underline{\$ 15,000}} \end{aligned}$$

#### Example 5

At the close of “A”’s case, the court orders “A” to pay the legal costs of “X” and “A”’s own legal costs and they come to \$60,000 altogether.

Strictly speaking, since “A” only paid \$20,000 by way of contribution, there is a shortfall of \$40,000.

However, as “A”’s contribution has been assessed at \$36,000, “A” only has to pay the Director a further \$16,000 even though the shortfall is \$40,000.

$$\begin{aligned} & \$36,000 \text{ (contribution payable)} - \$20,000 \text{ (contribution paid)} \\ & = \underline{\underline{\$ 16,000}} \end{aligned}$$

## Liability to contribute out of the fruits of proceedings (Director's first charge) at the end of the proceedings

Whether an aided person is required to pay a contribution or not, if he is successful in recovering or preserving any money or property in the legally aided proceedings, he will be required to repay the Director the costs and expenses incurred by the Department including pre-certificate expenses, for example, fees for bank search and counsel advice as well as mediation expenses out of the money or property recovered or preserved. The sum required to be paid will be reduced by the contribution he has paid and any costs which may be recovered from the opposite party. The Director's right to recover the costs and expenses incurred or any shortfall from the property recovered or preserved is known as the Director's first charge.

### 2.

Property recovered or preserved in the proceedings includes:

- non-monetary capital (such as stocks and shares);
- article of value (such as jewelry, paintings and antique);
- land or interest in land such as the matrimonial home in a divorce case; and
- pecuniary awards such as:
  - a lump sum maintenance payment for a spouse or former spouse or for children;
  - monthly maintenance payment for a spouse or former spouse;
  - employees' compensation;
  - damages in personal injury cases;
  - wages arrears, severance payment, etc.

Monthly maintenance for the spouse or former spouse not exceeding a certain amount and monthly maintenance for children are exempted from the Director's first charge.



### 3.

If the property recovered or preserved is land or interest in land, the Director's first charge may be registered in the Land Registry without prior notice to the aided person, as security for payment of the charge. In cases where the property recovered or preserved is to be used as a home by the aided person or his/her dependants, the Director may defer enforcing the charge (i.e. delay selling the property to pay for the costs and expenses incurred by the Department) if he is satisfied that the property will provide adequate security for payment of the charge. If enforcement of the charge is deferred, the aided person is further liable to pay simple interest at a prescribed rate\* on the amount of the charge plus costs and disbursements incurred by the Director in connection with the registration of the charge in the Land Registry.

### 4.

The Director has the discretion to waive or reduce the interest if he considers that it would cause serious hardship to the aided person, or if he considers that it is just and equitable to do so. An aided person may apply in writing to the Director to have the interest waived or reduced at the time of satisfaction of the charge and should give reasons in support.

### 5.

Where no money or property is recovered or preserved, the aided person will not be required to repay the Director the costs and expenses incurred on his or her behalf (including pre-certificate expenses), but he or she will still be required to pay a further sum up to the full amount of the contribution payable. See Examples 3 & 5 in Section II above.

\* This rate will be adjusted annually on 1 June each year

6.

If an aided person recovers or preserves money or property after the Director has discharged/revoked the legal aid certificate, the aided person is required to pay the costs and expenses incurred by the Department including pre-certificate expenses prior to the discharge/revocation and not recovered from the opposite party out of the money or property recovered or preserved. (Please refer to example 8 on P.14)

7.

The following examples illustrate the application of the Director's first charge:

Example 1

Legal aid was granted to "A" to seek damages from "X" for injuries sustained in a traffic accident.

Assuming:

• (i) Damages awarded	\$200,000
• (ii) Actual costs incurred	\$55,000
(a) Costs recoverable from "X" : \$50,000	
(b) Costs payable by "A" : \$5,000	
• (iii) Contribution	Nil

If "X" paid the costs in (ii)(a), the Director will first deduct the sum payable by "A" in (ii)(b) from the sum at (i) and then pay back to "A":

\$200,000 (damages) – \$5,000 (costs payable by "A")

= **\$ 195,000**

### Example 2

Legal aid was granted to "A" to sue "X" for compensation for breach of a sale and purchase agreement.

Assuming:

• (i) Compensation awarded	\$300,000
• (ii) Actual costs incurred	\$120,000
(a) Costs recoverable from "X" : \$100,000	
(b) Costs payable by "A" : \$20,000	
• (iii) Contribution	\$40,000

If "X" fails to pay the costs in (ii)(a), the Director will first deduct the costs incurred from the sums received at (i) and (iii) and then pay back to "A":

$$\begin{aligned} & \$300,000 \text{ (damages)} + \$40,000 \text{ (contribution)} - \$120,000 \text{ (actual costs)} \\ & = \underline{\underline{\$ 220,000}} \end{aligned}$$

### Example 3

Legal aid was granted to "A" to sue "X" for compensation for breach of a sale and purchase agreement.

Assuming:

• (i) Compensation awarded	\$300,000
• (ii) Actual costs incurred	\$120,000
(a) Costs recoverable from "X" : \$100,000	
(b) Costs payable by "A" : \$20,000	
• (iii) Contribution payable	\$42,425
• (iv) Contribution paid	\$20,000

If "X" fails to pay the costs in (ii)(a), the Director will first deduct the costs incurred from the sums received at (i) and (iv) and then pay back to "A":

$$\begin{aligned} & \$300,000 \text{ (damages)} + \$20,000 \text{ (contribution paid)} - \$120,000 \text{ (actual costs)} \\ & = \underline{\underline{\$ 200,000}} \end{aligned}$$

#### Example 4

Legal aid was granted to “A” to claim a share in a property jointly owned with “X” and despite an offer to settle the claim, “A” decided to take the case to court which ordered the property to be sold and awarded “A” a share of the proceeds.

Assuming:

• (i) Monies recovered i.e. “A”’s share of the proceeds	\$600,000
• (ii) Actual costs incurred N.B.: Assuming the court has ordered “A” and “X” each to bear his own costs	\$700,000
• (iii) Contribution payable	\$40,000
• (iv) Contribution paid	\$30,000

The whole amount of the monies recovered will be utilised to meet the actual costs incurred, leaving a deficiency of \$100,000.

As “A” is required to pay a contribution of \$40,000, but he has already paid \$30,000, he is still liable to pay a further sum of \$10,000 to the Director.

This example shows that it is important for an aided person to bear in mind the Director’s first charge and the costs of the proceedings throughout the course of the proceedings especially when considering an offer for settlement.

### Example 5

“A” has been granted legal aid to take divorce proceedings. The court orders “A”’s spouse to transfer his interests in their jointly owned property previously used as their matrimonial home (50% share) to “A” so she can fully own the property and use it as her residence.

Assuming:

• (i) Actual costs incurred	\$65,000
(a) Costs recoverable from the spouse : \$15,000	
(b) Costs payable by “A” : \$50,000	
• (ii) Contribution	\$6,000

Assuming the spouse has paid the legal costs in (i)(a) and “A” has paid the contribution at (ii). As the sums paid are insufficient to meet the actual costs of the case (i.e. \$65,000), “A” is still liable to make up the difference of \$44,000. The Director’s first charge is registered against the property to secure payment of the sum of \$44,000.

As the property is to be used as the residence for “A” and if the Director considers that the property provides adequate security for payment of the sum of \$44,000, the Director may, in his discretion, defer enforcing the charge, i.e. selling the property and allow payment of the sum at a later date.

If “A” repays the sum secured by the property at a later date, the amount to be paid to redeem the charge will be:

- (i) \$44,000 being the legal costs due and owed by “A”;
- (ii) the Department’s costs of registering the charge;
- (iii) the amount chargeable by the Land Registry at the time of registration of the first charge and land searches fees; and
- (iv) simple interest on the sum at (i) from the date of registration of the charge.

### Example 6

“A” has been granted legal aid to take divorce proceedings.

Assuming:

• (i) “A”’s spouse is ordered to pay maintenance:	
(a) to “A”	\$12,000 per month
(b) to the child	\$5,000 per month
• (ii) Actual costs incurred	\$30,000
(a) Costs recoverable from “A”’s spouse : \$10,000	
(b) Costs payable by “A” : \$20,000	
• (iii) Contribution	Nil

Assuming the first \$8,850 out of monthly maintenance payable to “A” is exempted from the Director’s first charge and since the monthly maintenance awarded to “A” exceeds \$8,850, the excess will be regarded as money obtained by “A” in the proceedings and is therefore subject to the Director’s first charge which will first be used to repay the actual legal costs incurred. No deduction will be made from the maintenance for the child because it is exempted from the Director’s first charge.

In this example, the Department will deduct \$3,150 per month from “A”’s monthly maintenance, i.e. \$12,000 (monthly maintenance) – \$8,850 (amount of exemption\*) until the amount of actual costs or the sum due and payable by “A” is repaid, i.e. either \$20,000 or \$30,000 depending on whether the spouse pays his share of the legal costs.

\* The amount of exemption will be adjusted regularly. For latest information on the amount exempted from the Director of Legal Aid’s First Charge, please refer to the “Financial Information Sheet”.



QR code for “Financial Information Sheet”

### Example 7

“A” has been granted legal aid to defend a claim by “X” for recovery of stocks valued at \$500,000 which “X” claims “A” is holding on trust for him. The court dismisses “X”’s claim and further orders “X” to pay “A” costs.

• (i) Actual costs incurred	\$300,000
(a) Costs recoverable from “X” including pre-certificate fees for counsel advice : \$250,000	
(b) Costs payable by “A” including pre-certificate expenses for bank search : \$50,000	
• (ii) Contribution paid	\$30,000

As “A” has successfully preserved the stocks, the stocks will be subject to the Director’s first charge to meet the costs incurred.

Assuming “X” fails to pay the costs in (i)(a). Since the contribution paid is insufficient to meet the actual costs, “A” is liable to pay the difference of \$270,000 from the preserved stocks.

Therefore, the Director may enforce the charge, i.e. sell the stocks for payment of the \$270,000 costs.

### Example 8

"A" has been granted legal aid to sue "X" for injuries sustained in an accident at work. "X" made a sanctioned payment into Court of \$180,000 which amount his lawyer considers reasonable but "A" refuses to accept.

The legal aid certificate for "A" is discharged.

"A" continues the claim against "X" but eventually settled the claim at \$180,000 with "X" paying the costs of "A" incurred prior to the latest date on which "A" could have accepted the sanctioned payment without the leave of the court. "A" will bear the costs incurred thereafter.

Assuming:

• (i) Costs of "A" incurred up to the latest date on which "A" could have accepted the sanctioned payment into Court	\$80,000
• (ii) Costs of "A" incurred thereafter <b><i>but before the discharge of legal aid</i></b>	\$7,000
• (iii) Costs payable by "A" in any event (Common Fund Costs)	\$5,000

The Director is liable to pay the costs at (i), (ii) and (iii) totaling \$92,000.

Assuming "X" has paid the costs at (i), "A" is required to pay to the Director \$12,000 (i.e. \$7,000 + \$5,000) out of the settlement sum of \$180,000. The net amount "A" gets is therefore \$168,000. "A" is of course personally liable to pay the costs incurred by "X" after the date on which "A" could have accepted the sanctioned payment.

This example shows that despite the discharge of the legal aid certificate, an aided person remains liable for any costs incurred but not recovered from the opposite party during the time he was legally aided.



### Example 9

“A” applies for legal aid to sue “X” for injuries sustained in a traffic accident shortly before the time for filing a claim expires. The Director instructs a Counsel to prepare an advice on the legal merits of the claim. Counsel advises that “A” does not have a meritorious claim against “X”. However, as the time for filing a claim will soon expire and to preserve “A”’s right to claim against “X”, “A” is granted a limited legal aid certificate to take out a generally endorsed Writ.

The legal aid certificate for “A” is discharged once the writ is issued.

Assuming “A” engages solicitor in private practice to continue the claim against “X” and eventually settled the claim at \$180,000 with “X” paying the costs of “A” except the fee for the unfavourable counsel advice at \$25,000.

As “A” has successfully recovered damages following the discharge of legal aid, the damages will still be subject to the Director’s first charge to meet the pre-certificate fee for counsel advice at \$25,000.

This example shows that despite the discharge of the legal aid certificate, an aided person remains liable for pre-certificate expenses not recoverable from the opposite party including fees for unfavourable Counsel or expert advice because of the Director’s first charge.

### 8.

Upon conclusion of a case, the Director will ascertain whether and if so how much an aided person has to contribute towards the costs and expenses incurred by the Department out of the money or property successfully recovered or preserved on his behalf. If the relevant claim is a money claim, before the exact amount are ascertained, interim payments may be made to the aided person. The following example illustrates the steps involved in finalising the account of the case:

- Step 1 · The court orders an opponent to pay an aided person \$1 million as damages for the injuries he received in a traffic accident.
- Step 2 · The damages are paid and passed over to the Director.
- Step 3 · The lawyer informs the Director that the estimated total legal costs including the expenses of the case come to \$300,000.

**Note:** At this stage, the Director may release a sum of \$700,000, i.e. \$1 million (damages recovered) - \$300,000 (estimated costs) to the aided person by way of interim payment.

- Step 4 · The lawyer works out his exact costs at \$250,000. But the opponent does not agree with the amount billed, and request the Master to tax the costs, i.e. to determine the amount of the costs payable by the opponent.

**Note:** The Director may further release \$50,000 to the aided person.

- Step 5 · The Master determines the amount of legal costs payable at the taxation hearing as follows: \$200,000 (party and party costs, i.e. costs payable by the opponent) and \$10,000 (common fund costs, i.e. costs payable by the aided person).

- Step 6 · The lawyer obtains from court the Certificate stating the amount of costs allowed by the court and writes to the opponent or his solicitor demanding payment.

- Note:**
- (1) If the opponent pays the taxed costs, the Director, upon finalisation of his account, will release \$240,000 to the aided person, i.e. \$1 million (damages) - [\$700,000 + \$50,000 (interim payment)] - \$10,000 (actual legal costs).
  - (2) If the opponent fails to pay the taxed costs, the Director, upon finalisation of his account, will only pay him \$40,000, i.e. \$1 million (damages) - \$750,000 (interim payment) - [\$200,000 (costs which the opponent fails to pay) + \$10,000 (the aided person's share of the legal costs)].
  - (3) The length of time taken for an aided person to receive interim or final payment of damages varies from case to case. It depends very much on how soon the costs of the proceedings can be agreed or determined by the court and paid by the opponent.

This booklet is published for general information only and is not intended to be an authoritative statement of law. In case of any discrepancy, Legal Aid Ordinance and its subsidiary legislation shall prevail. Further, this booklet does not attempt to deal with all circumstances involving payment of contribution and the Director's first charge.

## 2.

If you have any doubt or queries concerning the contents of this booklet or the amount of costs and expenses incurred by the Director before or after the grant of legal aid, you should seek clarification from staff of the Department or the lawyers having conduct of your case before accepting the offer of legal aid or a settlement of your claim.



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