PUBLIC INQUIRIES SEMINAR

FUNDING & RECOVERY OF DOCUMENTATION

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1. FUNDING

The overall funding for a public inquiry comes from the Government, and unless it is a joint inquiry, such as the Stockline Inquiry, this means the Scottish Government.

That funding will obviously cover all aspects: premises, inquiry personnel, expenses etc. However, the issue of interest for today is what funding may be available for legal representation for those who become involved with inquiry proceedings – and generally this will be core participants or witnesses.

Where the entity involved in an inquiry is a large organisation such as a company or union the expectation is that they will be self-funding. That was the position before the Inquiries Act 2005, and remains the case. For individuals, Legal Aid is not available.

Funding can be obtained from an inquiry budget for core participants, and in some instances witnesses or a person required to produce documentation. The legislative provision allowing for funding is **s.40 of the Inquiries Act 2005**, and more detailed provision is given by **The Inquiries (Scotland) Rules 2007**.

An award of funding in terms of s.40 can cover two things:

a) compensation for loss of time
b) expenses properly incurred or to be incurred

in relation to the inquiry.

It is the second of these that is the most significant, and s.40 specifically includes an award in respect of legal representation. This often constitutes the most significant part of the total cost of an inquiry. As an illustration:

	LEGAL COST	TOTAL COST
Penrose Inquiry:	£5,15m	£12.1m

BWI:	£9.84m	£29.8m

The application for an award for funding is regulated by Rules 17 to 28 of the 2007 Rules, and there will also usually be a specific protocol produced by the Inquiry setting out their own approach and procedure. As an example, the Scottish Child Abuse Inquiry ("SCAI") has a 'Cost of Legal Representation' protocol, which is available on their website. This explains the process in simple language, and provides and application form.

There are a number of key points to note about applications for funding.

1. An application to the Chair can be made at any time (rule 17(1)), although generally the clear preference is that it is made before any costs are incurred (the SCAI protocol highlights this is "very important").

2. A full written application has to be made to the Chair, who will have discretion: there is no automatic entitlement to funding. In 2014 a House of Lords Select Committee considered whether there ought to be any change to this, and recommended it was right to keep this discretion. The decision of the Chair is final.

3. When determining an application, the Chair must take into account the following two criteria:

(a) the financial resources of the applicant; and
(b) the public interest so far as relating to the making of an award. (rule 18)

So, when considering the funding application the Chair may take into account whether an individual has other sources of help, such as a trade union or insurer (perhaps if the individual is a company director – as was the case Trams Inquiry). I understand in the Trams Inquiry the Chair applied essentially legal aid rules to the process.

4. An application for funding for legal representation must state–

(a) the nature and estimated duration of the legal representation for which the award is sought;
(b) the proposed hourly rates of any legal representative providing that representation; and
(c) any other expenses relating to legal representation.
(rule 19)

5. Where the Chair determines that an award should be made, various conditions will then be set. These include:
   a) nature and scope of work to be funded
   b) hourly rates
   c) limit on sum or hours to be paid
(rule 19)

It is easy to see how such advance prescription might cause problems during the ebb and flow of an Inquiry. I have heard of an example of a colleague representing a Core Participant in the Edinburgh Tram Inquiry who was provided with over 1 million documents only 2 weeks before the evidence was scheduled to commence and advised that they could only spend 40 hours a week reviewing it –25,000 documents an hour.

6. The actual amount that will be allowed following an award is a matter for the solicitor to the inquiry, not the Chair. (rule 21) In relation to legal expenses already incurred, the solicitor will consider whether they are proportionate and reasonable. (rule 22)

7. Unlike the Chair's initial decision whether to allow an award, the solicitor's assessment is subject to review (rule 23).
   - If the award is challenged, the solicitor must then re-assess the amount
   - if a dispute remains, the Chair will either direct the solicitor to issue a final award or refer the matter to the Auditor of the COS for review.

Although not a matter of funding, it is worth noting regulation 5 of the 2007 Regulations, which provides that the Chair may direct that two or more core participants who are separately legally represented to be represented by a single representative. This is where:

i) similar interests in the outcome

ii) reliance on similar facts

iii) fair and proper.

An issue that can arise in relation to funding is where a company or large organisation is involved with an inquiry, but individual employees may be required to give evidence, or may themselves face criticism. This presents an obvious conflict of interest, in a situation where the individual employee would be unlikely to be in a position where they could finance separate representation.

2. RECOVERY OF DOCUMENTATION

Initial requests for information can be made informally by an inquiry, however for a number of reasons this may not be fruitful, such as:

- unwillingness to comply
- being worried about consequences of disclosure
- may be statutory bar on disclosure

Section 21 of the 2005 Act gives an inquiry significant powers to compel disclosure of evidence. The Chair can issues notices requiring production of documents that relate to a matter in question at the inquiry in two ways.

- Subsection 1 (b) provides that the Chair may issue a notice requiring a person to attend at a particular time and place to produce any documents in his custody or under his control.
- Subsection 2 (b) provides the Chair may issue a notice requiring a person, to provide any documents within such period as appears to the inquiry panel to be reasonable.

Effectively this is a power for an inquiry to issue a specification of documents, and a person or body faced with a s.21 notice must then respond.

There are two grounds for providing a negative response, set out in s.21 sub-section (4). A person may argue that either:
(a) he is unable to comply with a notice under this section, or
(b) it is not reasonable in all the circumstances to require him to comply with such a notice.

This response will then be determined by the Chair, who may revoke or vary the notice. It is important to remember the test to be applied by the Chair, which is set out in sub-section (5). The Chair must consider the public interest in the information in being obtained by the inquiry, having regard to the likely importance of the information.

The first ground for failing to respond, section (4)(a), covers the situation where the information simply cannot be found – however, a person will have to be able to explain clearly and robustly why that is not the case. And re-assure the Inquiry that appropriate efforts have been made.

The second ground is a bit more nebulous, that is not 'reasonable' to comply. The Chair will then have to balance the reasonableness of the request against the public interest and importance of that information. This will require consideration of the cost, logistics and time-constraints of providing the documents.

Accordingly, if a client receives a s.21 notice, they will have to be in a position to provide a full report to the inquiry explaining their position. That report should be detailed, and include:

- what they have done to find the information
- where they have looked
- what hurdles the will face in trying to locate it (logistical or expense wise)
- a clear explanation of why it is not reasonable to provide the documentation, in terms of the notice

I understand that applications to vary s.21 notices are frequent in the SCAI, in particular to seek a change to the timescale.

Confidentiality, s.19

Turning to issues of confidentiality, as with a specification, if documentation has to be produced in response to a notice, it should be handed over without redaction. If there is concern regarding confidentiality, an application can be made for the Inquiry to make a restriction notice in terms of s.19 of the 2005 Act. This allows for restrictions to be imposed on attendance at the inquiry or disclosure or publication of evidence or documents.

Section 19 provides that a restriction order made by the Chair shall specify such restrictions as are necessary in the public interest, having regard to inhibition of allaying of public concern, and can make the order subject to confidentiality conditions.

In some cases, it can happen that Inquiries make general restriction orders - such as in the SCAI. The latest was made in June 2020, and provides:

- The identity of anyone claiming to have been abused is protected
- As is anyone alleged to have been an abuser
- Any child in care

I would refer you to the recent case of:

Bilfinger Construction UK Ltd v Edinburgh Tram Inquiry [2018] CSIH 48

Bilfinger had produced to the inquiry monthly financial reports made to its parent company. It sought redaction of information said to be commercially sensitive, on the basis that disclosure would weaken its commercial advantage, in terms of s.19. The Inquiry refused the restriction order, and so Bilfinger sought interim suspension of the inquiry chairman's decision to refuse its application for a restriction order under the Inquiries Act 2005 s.19, and interim interdict from publishing allegedly confidential information. The respondent cross-appealed against the Lord Ordinary's conclusion that, if the reclaimer had demonstrated a prima facie case, then the balance of convenience would have favoured the grant of the interim orders sought.

Ld Tyre held that Bilfinger had failed to demonstrate a prima facie case; in particular, it had failed to show that the reports contained information which, if revealed to the public, would cause it loss and damage. Bilfinger reclaimed, and was unsuccessful.

s.22 public interest immunity

In relation to public interest immunity, section 22 of the 2005 Act gives witnesses the same privileges in relation to request for information that they have in civil actions - in particular if there is a clam for legal professional privilege they can refuse to provide evidence.

Failure to comply

s.35: it is a criminal offence to fail, without reasonable excuse, to comply with a requirement under s.21, and this carries a maximum sentence of imprisonment of 6 months. However, as an alternative, s.36(2) of the 2005 Act provides that where a person fails to comply with, or acts in breach of, notice under s.19 or 21 or threatens to do so the Chair may certify the matter to the Court of Session. The Court of Session may then hear evidence or representation, and may make:

> "*such order by way of enforcement or otherwise as it could make if the matter had arisen in proceedings before the Court*".

Accordingly, if it appears that there will be a failure to respond to a s.21 notice, which is not to be varied or revoked, then an approach can be made to the inquiry team and the Chair can be asked to make an application to the Court of Session for a determination.