

# THE ICL PUBLIC INQUIRY

Inquiry Chairman: The Right Honourable Lord Gill

## **Inquiry Protocol: Legal Representation at Public Expense**

*In order to operate most effectively and most efficiently, an Inquiry such as this needs to operate flexibly. Procedures may need to be adopted, or may need to be adapted, to enable this. The procedure outlined is not intended to cover every eventuality or every procedural issue that will arise. When procedural decisions need to be taken, they will be taken by the Inquiry Chairman with the assistance of the Inquiry legal team and of representations or submissions from others, if the Chairman considers that would be appropriate and desirable.*

These procedures are subject to, and should be read having particular regard to S17 and S40 the Inquiries Act 2005, the Notice of Determination by Ministers under S40(4) dated 21 February 2008 (annexed), and Rules 17 to 28 of The Inquiries (Scotland) Rules 2007 (SSI2007/560) and the Terms of Reference for the Inquiry.

### **1. This Protocol relates to:**

- (a) applications by a Core Participant or an individual witness (“applicant”) for an award to be made under section 40(1)(b) of the Inquiries Act 2005 (“the Act”) in respect of expenses to be properly incurred, in attending or otherwise in relation to the Inquiry, in respect of legal representation (“legal expenses”); and
- (b) following a decision to make an award, the assessment of legal expenses which become payable under it.

### **2. A person is eligible to be considered for an award only if**

- (a) he or she is a person attending the Inquiry to give evidence or to produce any document or other thing, or
- (b) a person who, in the opinion of the Inquiry Chairman, has such a particular interest in the outcome of the Inquiry as to justify such an award.

### **3. In exercising his power to make an award in respect of legal representation the Chairman must:**

- (a) act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or to others) (S17)
- (b) ensure he complies with the qualifications and conditions placed on him by Ministers under S40(4) (as set out in the Notice of Determination dated 21 February 2008)
- (c) “Qualifications and conditions

1. Awards in respect of legal representation may only be made in circumstances in which the Chairman

*considers it necessary, fair, reasonable and proportionate for such an award to be made.*

- 2. Any award must be subject to the condition that payment will only be made for work that is evidenced and can be identified as having been done in an effective and efficient manner, avoiding unnecessary duplication and making best use of public funds.*
- 3. Awards may only be made in respect of legal representation provided by one or more named legal representatives whose involvement has been approved in advance by the Chairman. The Chairman must approve the size and composition of any legal team to be engaged, including the seniority and number of counsel where that is agreed to be necessary. Expenses associated with work carried out by legal representatives who are not approved in advance of the work being carried out shall not be met from public funds.*
- 4. Any award must specify the nature and scope of the work that is to be publicly funded. Legal representatives must not be publicly funded for work that does not fall within the agreed scope. An Inquiry under the 2005 Act is inquisitorial in nature and legal representatives will not be paid for investigative work or for work in relation to obtaining expert reports unless the Chairman gives express permission in advance for this work to be carried out.*
- 5. The legal representatives will agree in advance, with the Solicitor to the Inquiry, hourly rates for Counsel and solicitors, subject to the following maximum hourly rates:*  
  
*Senior Counsel £200*  
*Junior Counsel £100*  
*((N.B to the extent that the employment of any such Counsel may be approved by the Chairman))*  
*Solicitors £150*  
*((N.B. to the extent that the employment of a solicitor or solicitors may be approved by the Chairman))*
- 6. The maximum number of hours that can be charged by a legal representative in receipt of an award made by the Chairman shall be 40 hours per week save that exceptionally the Solicitor to the Inquiry may authorise an increase in the weekly cap up to 60 hours for Counsel or a solicitor during the oral hearings and for up to a two month period before they commence where she is satisfied that such action is justified in all the circumstances, for example, when the work involved in any week clearly needs to exceed 40 hours.*

7. *In respect of paragraph 6 of this notice:*
8. *no unused hours in any week may be set off against any other week;*
9. *a week shall be taken as commencing on Sunday and ending on Saturday;*
10. *Expenditure incurred before notification of the chairman's award of funding or expenditure in excess of the terms upon which approval is granted will not be recoverable".*

- (d) have regard to the financial resources of the applicant (rule 18) and
- (e) the public interest so far as relating to the making of an award (rule 18)

#### **4. The scope for legal representation in the Inquiry at public expense**

##### **(a) For Witnesses**

- i. The question of funding of representation of witnesses arises only in respect of those who may face potential criticism from the Inquiry and in limited other special circumstances.
- ii. The Chairman will normally award funding only if such a witness is not part of a substantial body,
- iii. is at risk of criticism or is likely to be prejudiced if they were not represented, and
- iv. they have no other means of paying for representation and
- v. the Chairman considers it necessary.
- vi. An award will normally be limited to a recognised legal representative for a witness having a role in relation to some, or all, of only the following matters:
  - vii. consideration of initial instructions
  - viii. advising the client in relation to the making of a witness statement, and/or providing evidence to the Inquiry
  - ix. consideration of any material disclosed to an individual witness by the Inquiry only in so far as is necessary to properly to represent their client's interests
  - x. representing the client during their oral evidence (and the evidence of others, should that be necessary)

**(b) For Core Participants**

- i. The Chairman will normally award funding only if a Core Participant is not part of a substantial body, and
- ii. has no other means of paying for representation, and
- iii. the Chairman considers it to be necessary and
- iv. an award will normally be limited to a recognised legal representative for a Core Participant having a role in relation to some, or all, of only the following matters:
  - v. making an opening statement, where permitted
  - vi. consideration of the written evidence relevant to the Terms of Reference and documentation used by the Inquiry and contained in the Inquiry Bundle(s), in so far as is necessary to properly to represent their client's/clients' interests
  - vii. attending during such oral evidence as may be relevant to the interest of the Core Participant(s)
  - viii. representing their client's(s') witnesses (if any) during their evidence
  - ix. making an application to be permitted to examine any witness giving oral evidence (such application must relate to the Core Participant's(s') interest in the Inquiry and the topics/issues in respect of which they are permitted to participate)
  - x. making final submissions, where permitted.

**(c)** When considering the scope of any award he may make in respect of an application by a Core Participant, the Chairman will bear in mind the information contained in the applications for the status of Core Participant and the Statement of Case in which a Core Participant is required to set out in brief terms:

- 1. what issues they would wish the Inquiry to address;*
- 2. what circumstances leading to the explosion they would wish the Inquiry to explore;*
- 3. the topics in respect of which they would wish to participate and*
- 4. what they would wish to seek to establish in respect of each of those topics and*
- 5. how each topic would assist the Chairman in fulfilling his terms of reference.*

**(d) General**

- i. All work falling outside the Terms of Reference and the interest of the Core Participant(s) concerned will be disallowed. Those Terms are:-
- To inquire into the circumstances leading up to the incident on 11 May 2004 at the premises occupied by the ICL Group of companies, Grovepark Mills, Maryhill, Glasgow;
  - To consider the safety and related issues arising from such an inquiry, including the regulation of the activities at Grovepark Mills;
  - To make recommendations in the light of the lessons identified from the causation and circumstances leading up to the incident;
  - To report as soon as practicable.

**5. Applications for awards under s40(1) and the criteria for agreeing the level of funding**

- (a) An applicant who wishes to apply for an award relating to legal expenses to be incurred may submit an application to the Chairman in writing specifying the following
- (b) the reason(s) why legal representation is considered necessary and
- (c) confirmation that there are no other means by which such representation can be funded. Rule 18 states the Chairman must take into account the financial resources of the applicant; and the public interest so far as relating to the making of an award.

The Inquiry is urgently seeking to establish what the appropriate test as to financial resources might be and will notify through the website shortly.

As previously indicated by the Chairman any person wishing to make any representation to the Inquiry in respect of any aspect may do so. Any such communication should preferably be by letter or email.

- (d) the nature of the public interest being served by an award from public funds being made available (Rule 18 (2) (b))
- (e) the nature and function of the legal representation for which the award is sought
- (f) the level of seniority of the qualified lawyer appointed as the recognised legal representative and their proposed charging rate, subject to the maximum hourly rate as stipulated in the Notice of Determination under S40(4).
- (g) where a core participant(s) decide(s) to appoint other qualified lawyers to assist their recognised legal representative in the

discharge of their function, the size and composition by name, including seniority, of the team to be engaged.

- (h) the proposed hourly charging rate for all qualified lawyers subject to the maximum hourly rates as stipulated in the Notice of Determination under section 40(4).
- (i) Where it is thought necessary to instruct Counsel, the reasons for doing so, the date of call, and that Counsel's proposed hourly rate, subject to the maximum hourly rates as stipulated in the Notice of Determination under section 40(4).
- (j) The estimated duration for the recognised legal representation, for example, the requirement for recognised legal representation at stage one and stage two of the Inquiry.
- (k) The numbers of hours each week for which it is anticipated that the recognised legal representative's team will be engaged on Inquiry work and in respect of what, having regard to the interest of the Core Participant(s), and the topics in respect of which they wish to participate
- (l) The number of hours each week for which it is anticipated that counsel (if permitted at public expense) will be engaged on Inquiry work.
- (m) The amount of time anticipate to be spent in conference at the end of each day of oral hearings
- (n) Particulars of any other expenses relating to legal representation

#### **6. Agreement as to the hourly rates for qualified lawyers**

- (a) Subject to the cap on rates as provided in the Determination by Ministers, the Recognised Legal Representative will agree with the Solicitor to the Inquiry in advance of an award being made, the hourly rates to be applicable to the Recognised Legal Representative and those other qualified lawyers appointed by the Core Participant(s) to assist their Recognised Legal Representative in the discharge of their function, should in the event the Chairman approve their involvement.
- (b) In the event of no agreement as to hourly rates the Chairman will determine such rates as he considers appropriate upon receipt of representations from the Applicant.

#### **7. Determination of applications by the Inquiry Chairman**

- (a) Having regard to the provisions of the Inquiries Act 2005, the qualifications and conditions to his power to make an award as set out in the Determination under S40 by Ministers dated 21 February 2008 and the Rules and as referred to above, the Chairman will determine an application for an award within a reasonable time.
- (b) The Chairman will notify in writing, the applicant (and where the applicant has a recognised legal representative, the recognised legal

representative) his determination and where an award is made, set out the terms of any such award, taking into account the matters that must be addressed as specified by the Determination under S40 dated 21 February 2008, the Rules and as otherwise indicated in this protocol. This will include a requirement that the applicant provide evidence that the expenditure has been properly incurred.

- (c) Expenditure incurred before the making of an award will not be recoverable. The operation of Rules 21 et seq have been excluded by the Determination under S40 by Ministers dated 21 February 2008.
- (d) Notwithstanding the caps imposed by Ministers on funding for legal representation the Chairman, either initially or at any time after making an award, may impose further conditions on the award. In particular, he may determine that a lower cap should be imposed in relation to legal expenses that may be incurred at public expense. This may amount to an overall financial limit and/or a limit on the number of hours to be spent on Inquiry business.

#### **8. Disbursements by Recognised Legal Representatives**

- (a) Disbursements in excess of £100 will not be paid unless authorised in advance by the Solicitor to the Inquiry. Disbursements under £100 will only be paid where the expenditure was reasonable and necessary and where they are supported by evidence of payment.

#### **9. Billing procedures**

- (a) An applicant who has been granted an award of legal expenses in relation to whom the Chairman has decided that an award should be made in accordance with Section 2 of this Protocol, should submit Bills of Expenses at monthly intervals to the Chairman at the address stated below. Such accounts are to be received no later than 7 days immediately following the end of the month to which they relate, with a final account to be submitted no later than one month after final submissions are made, and should contain the following information:
- (b) A breakdown of the number of hours worked by each person on each day specifying, in each case, details of the work undertaken and the time spent on it.
- (c) The hourly rates charged for each person. These will be those specified by the Chairman in his original determination of the application for expenses to be incurred in relation to legal representation.
- (d) A list of all disbursements claimed (please note 8) a) above)..
- (e) Where work has been undertaken by Counsel, details of Counsel's fees (supported by notes which must specify precisely what work was done and how much time was spent on it. Descriptions such as "preparation" will not be sufficient).

#### **10. Procedure for the assessment of amounts payable under an award**

- (a) The relevant part of the United Kingdom for the purposes of the assessment of an award shall be Scotland.
- (b) A Bill of Expenses submitted by an Applicant for payment will be referred by the Chairman to the Solicitor as soon as reasonably practicable for an assessment of the amount to be awarded having regard to the terms of the award made.
- (c) Any work undertaken by an applicant's recognised legal representative which relates to matters outside the Inquiry's terms of reference or otherwise outside the terms of the award made, will be disallowed.
- (d) Save in exceptional circumstances, legal expenses will be assessed in accordance with the judicial party-party rate having regard to whether those expenses were proportionate to the matter in issue, were reasonably incurred and are proportionate and reasonable in amount.
- (e) The Solicitor will, within 21 days of a referral,
  - i. make an initial assessment of the amount to be awarded and
  - ii. notify the applicant of that assessment in writing
  - iii. identifying each item to which the Solicitor objects;
  - iv. stating the nature of the objection for each item; and
  - v. proposing an amount to be allowed for each item in respect of which a reduction is sought.
- (f) The applicant must provide the Solicitor to the Inquiry with a written response to the points of dispute within 21 days of their having been sent to the applicant.
- (g) The Solicitor to the Inquiry and the Applicant may agree in writing to extend the deadlines in paragraphs 11 e) and f).
- (h) Where the applicant has not responded to the points of dispute within 21 days of the date when the initial assessment of the Bill of Expenses was sent and there has been no agreement in writing to extend the deadlines as referred to in 11 g) above the Solicitor will issue a final assessment.
- (i) Where the Solicitor determines that the full amount of an applicant's Bill of Expenses should be paid, that assessment is also the final assessment.

**11. Provision for review of an assessment of an amount payable under an award**

- (a) Where an applicant has provided a response under paragraph 10 f) and there remains a disagreement, the Chairman may either:

- i. refer the assessment to the Auditor of the Court of Session together with all relevant evidence and documentation, including the application and any correspondence between the solicitor and the applicant; or
  - ii. require the Solicitor to the Inquiry to issue a final assessment of the amount of the award.
- (b)** Where the assessment of the amount is referred to the Auditor of the Court of Session, the Auditor of the Court of Session must hold a review hearing within a reasonable time.
- (c)** The Auditor of the Court of Session must notify the Solicitor to the Inquiry and the applicant of the date and location of the review hearing, in writing, as soon as practicable, and in any event not later than 14 days before the date of the hearing.
- (d)** A person other than the applicant, the Solicitor to the Inquiry and the applicant's qualified lawyers may be heard at the review hearing only if the Auditor of the Court of Session gives permission for that person to be heard.
- (e)** The Auditor of the Court of Session must send to the applicant and the Chairman his or her assessment of the amount of the award as soon as reasonably practicable following the review hearing.
- (f)** The Auditor of the Court of Session's assessment under rule 26(1) of the Inquiries (Scotland) Rules 2007 is the final assessment of the amount of the award.
- (g)** Where the Solicitor and the applicant reach an agreement on the assessment of the amount to be awarded at any time after the Chairman has referred the application to the Auditor of the Court of Session and before the date of the review hearing, the Chairman will withdraw the referral. The agreed amount is the final assessment of the amount of the final award.
- (h)** The Solicitor will issue a final assessment of the amount to be awarded as soon as practicable following an agreement being reached.

## **12. Applications, Notifications and Claims etc.**

- (a)** Any requirement under this protocol that a document is given or sent to the Inquiry is satisfied by that document being:
  - i. sent to the Inquiry's designated postal address by first class post;
  - ii. faxed from the sender's designated fax number to the Inquiry's designated fax number or
  - iii. sent by email in Word format to the Inquiry's designated email address.

- (b) The Inquiry's contact details for each of the above methods of communication are set out below.
- (c) Any requirement under this Section that a document is given or sent to the applicant is satisfied by that document being:
  - i. sent to the applicant's designated postal address by first class post;
  - ii. faxed to the applicant's designated fax number; or
  - iii. sent by email to the applicant's designated email address, provided the applicant has notified the Solicitor in writing that documents sent by email will be accepted.

**13. Payment of an award**

- (a) Where the amount of an award is not to be reviewed by the Auditor of the Court of Session, the Chairman will arrange for payment in the amount of the final assessment to be made within 28 days of that assessment being sent to the applicant.
- (b) Where the amount of an award has been reviewed by the Auditor of the Court of Session, the Chairman will arrange for payment of the amount assessed by the Auditor of the Court of Session within 28 days of the assessment being sent.
- (c) All payments will be made by a Bankers' Automated Clearing System (BACS) transfer. To enable payment to be made, an applicant will be required to complete the appropriate documentation which will be provided by the Inquiry. When completed and signed, the documentation should be returned to the Inquiry Secretary to whom any queries relating to the processing of payments should also be directed.

**14. The Inquiry's contact details are as follows:**

The Inquiry Secretary  
Inquiry Secretariat  
The ICL Inquiry  
3rd Floor,  
Lothian Chambers,  
59-63 George IV Bridge,  
Edinburgh,  
EH1 1RN.

Email: [info@theICLinquiry.org](mailto:info@theICLinquiry.org)  
Telephone: 0131 240 6863  
Fax: 0131 240 6811

**Issued under the authority of the Chairman on 2 May 2008**

**Failure to adhere to, and comply with, any of the matters or procedures set out in this Protocol could result in payment being delayed or refused.**