



Legal Ombudsman Update

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One of the most contentious issues in the Scheme Rules under which the Legal Ombudsman (“LeO”) operates is the scope of the Scheme and quite what “*poor service*” might embrace.

One issue that received a good deal of attention when the new arrangements took effect was the potential for the LeO to make an award for negligent advice. The FAQs for lawyers section of the LeO website state: ‘*Clearly, if something a lawyer has done (or not done) looks like negligence, it is also likely to be poor service.*’

With lay clients finding it difficult to differentiate between negligence and poor service and with the LeO’s compensatory jurisdiction at £50,000 since February 2013, it is not surprising that the LeO adopts a broad brush approach where possible.

The other such issue has been the potential for the LeO to interfere in matters of contract as to the fees agreed between the solicitor and his client. Section 5.38 of the Scheme Rules (established in accordance with Part 6 of the Legal Services Act 2007) provides that the LeO has the power to “*limit fees to a specified amount*” and, in relation to fees already paid, to order that “*all or part of the fees are remitted*” (5.40).

The main issue in *Layard Horsfall Ltd v Legal Ombudsman [2013] EWHC 4137 (QBD)* was whether Section 5.38 entitled the LeO to override a contractual agreement as to fees between the solicitor and his client. The firm had acted for a client in a building dispute pursuant to a CFA and agreed success fees and a cap on base costs of £5000 plus VAT. The builder was declared bankrupt before the issue came to trial. The client rejected the suggestion of obtaining judgment to trigger the success fee and instead opted to discontinue proceedings. The client did agree verbally, however, to pay the £5,000 base costs. Subsequently, the solicitor involved was convicted for fraud and the firm was intervened in by the SRA, but the firm did eventually invoice the client for the £5,000 base costs some 14 months after the claim was discontinued. The client duly complained to the LeO in relation to the fact that she had been billed at all and also the delay in so doing. The LeO reduced the fees to £1,500 plus VAT in pursuance of the powers set out above.

It was held that since the LeO’s jurisdiction over complaints was stated to “*relate to*” the services, his powers were sufficiently wide to vary sums that

might be contractually due. Furthermore, there was no irrationality in the award made, as also claimed, since the LeO has a wide discretion as to what is “*fair and reasonable in all the circumstances*” as per 5.36 of the Scheme Rules. A claim that the appeal was out of time was also rejected.

This decision has confirmed what most have suspected, that the prospects of an appeal against a finding by the LeO by way of judicial review is unlikely to succeed. This has led some commentators to suggest that the Scheme might be open to challenge under the European Convention on Human Rights, but such a claim seems unlikely for the time being unless it were supported by a professional body such as the Law Society. This case, therefore, serves as a reminder that the Ombudsman does have power to order payments of up to £50,000 by way of compensation, and may, in addition, also reduce fees “*all or in part*”.

The key concern here is that the LeO’s powers to reduce fees are not limited in amount in the Scheme rules unlike its compensatory powers. In the Layard case the issue of whether the LeO’s reduction of the fees from £1500 to £5000 was irrational or arbitrary was not addressed before the court. This argument may be one for the future where larger sums are at stake.

The Legal Ombudsman has also been in the news of late for revealing that almost £1m was awarded to clients in the year to the end of November 2013 where, despite the “*no win, no fee*” publicity, the client was asked to pay some level of fees or costs. The full report on the Ombudsman’s website provides several case studies, including a client billed nearly £15,000 for the costs of the other side where the claim was unsuccessful.

In the press release the Ombudsman questions whether the term “*no win, no fee*” should now be used at all - at the very least the retainer letter and any agreement must be specific on the circumstances when a payment will or may arise. With funding agreements and costs now so complex, it is even more essential to spell out clearly the clients’ financial responsibilities both at the outset and as the case progresses – a very time consuming exercise but worthwhile in the long run. ■

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