

Cause for complaint

Andrew Hogan on the Legal Ombudsman's powers to deal with fee disputes

When a client receives a bill for a solicitor's work, it may provoke a gamut of emotions from gratitude to anger. Anger normally arises from a belief that the client has been overcharged, or is being asked to pay for work of poor quality – or work that has been undertaken negligently, in turn causing the client to suffer further financial loss.

In such circumstances, a client's options should they wish to take matters further are threefold. The first can be an action for damages for professional negligence, the second can be an application for a solicitor-client detailed assessment in the Senior Courts Costs Office or a District Registry, and the third can be a complaint, initially to the solicitor, but then almost inexorably to the Legal Ombudsman.

The question of which of these routes is to be pursued will normally follow from correctly identifying what the subject matter of the complaint is, and what remedy will be sought. But in a post-LASPO world, where success fees are irrecoverable, as is the cost of after-the-event insurance (if it can be obtained at all), the ability of a client to fund further legal proceedings against his former advisers is likely to be severely curtailed, possibly rendering professional negligence proceedings or a solicitor-client detailed assessment unviable.

The Legal Ombudsman route becomes of necessity, a client's only real chance of redress; because in making a complaint to the ombudsman, a client does not expose themselves to the prospect of an adverse costs order – noting that particularly in the context of a solicitor-client detailed assessment, the 20% rule loads the dice against a client recovering the costs of those proceedings. In addition, because the process is inquisitorial, much of the 'heavy lifting' in terms of determining the complaint will be undertaken by the ombudsman, giving an unrepresented individual a greater prospect of success.

EXPANDED ROLE

The Legal Ombudsman's role has been expanded in recent years, to include complaints about claims management companies as well as solicitors and other lawyers. A significant proportion of complaints against solicitors are complaints about fees, and in 2014 the Legal Ombudsman published a report *Complaints in Focus: No win, no fee agreements*, which identified an increasing concern with conditional fee agreements, including particular problems with the transfer of risk of unrecovered costs, lack of clarity in terms and conditions, a lack of explanation of complex terms and conditions, aggressive marketing and a lack of robust vetting.

In respect of claims management companies, the report *Complaints in focus: Claims management companies* identified that 40% of complaints against CMCs are about fees, including unjustified fees, the failure to refund upfront fees and contractual disputes about fees.

DEALING WITH FEE DISPUTES

It follows that when a dispute about fees arises and a complaint is made, a solicitor will need to know with clarity the basis upon which the Legal Ombudsman will reach a decision, and assuming the worst, how that decision might be capable of challenge.

The Legal Ombudsman is the ombudsman scheme established by the Office for Legal Complaints under the auspices of the Legal

Services Act 2007. The details of the scheme are contained within the scheme rules, the latest version of which is January 2015. The scheme closely parallels that which applies to financial services, albeit that the source of its jurisdiction and its context is distinct. It is open principally to consumers of legal services who are individuals, or small businesses at micro-enterprise level, or charities or clubs with an income of less than £1m per annum, who have a right of complaint.

The Legal Ombudsman will usually require that a complaint is made first to the solicitor's firm for redress under their internal complaints procedure, but if that is not addressed within eight weeks or in-house resolution is not possible, or there are other exceptional reasons, a complainant can ask the ombudsman to deal with the complaint directly.

There is a limitation period of six years from the date of the act or omission, with provision for a later period of three years from the date of knowledge of the act or omission, and the ombudsman retains a discretion to extend time. Detailed rules of procedure establish an inquisitorial system for the garnishing of evidence, the receipt of

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representations, the grounds on which a complaint may be dismissed or discontinued, and the possibility of an oral hearing, though most complaints will be resolved 'on the papers'. The criteria by which a complaint will be determined are set out in rules 5.36 and 5.37:

5.36 An ombudsman will determine a complaint by reference to what is, in his/her opinion, fair and reasonable in all the circumstances of the case.

5.37 In determining what is fair and reasonable, the ombudsman will take into account (but is not bound by):

- (a) what decision a court might make;
- (b) the relevant approved regulator's rules of conduct at the time of the act/omission; and
- (c) what the ombudsman considers to have been good practice at the time of the act/omission.

It is these rules that have led to the fearsome and often misunderstood proposition that the ombudsman is not bound to apply the law. What it means is best addressed by example. For instance, when looking at a solicitor's conduct, in a case where there has been negligent advice, but that advice has not resulted in any financial loss to the client, a court trying a professional negligence action would be bound to dismiss the case on the grounds of lack of causation of loss. The ombudsman is not bound to apply the law of causation and reach the same conclusion, and can simply give a remedy for poor service.

The ombudsman himself is a creature of public law, his actions are amenable to judicial review, and he is accordingly bound by well-established principles of public law to reach a decision which is legal, according to his powers.



Thus in this sense, the ombudsman is very much subject to law, and a solicitor aggrieved by a ombudsman's decision is entitled to challenge the decision in the High Court. In the context of a dispute about fees, given that the ombudsman has the power to award compensation of up to £50,000 or an unlimited ability to reduce fees, it can be seen that in a real sense the remedies available under the scheme exceed those which would be available to a costs judge on a detailed assessment.

JUDICIAL REVIEW

In general, it can be observed that judicial reviews are hard to run successfully. In procedural terms, any claimant faces a number of hurdles, from the tight time limit that proceedings should be brought as soon as possible, to the requirement to grant permission. In substantive terms, the High Court is usually prepared to afford a public law decision taker, acting in their particular area of expertise, a degree of deference. But judicial reviews can be brought and won against the Legal Ombudsman.

The grounds upon which a decision of the ombudsman can be impugned are the full array of grounds which can be deployed in public law challenges in any context. These include *ultra vires*, jurisdictional error, error of law, error of fact, fettering a discretion, insufficient inquiries, bad faith or improper motive, unfairness, inconsistency, irrelevancy, Wednesbury unreasonableness, procedural unfairness, proportionality and also human rights, such as A1P1, where money is involved. Perhaps the most fruitful area for challenge lies in the field of natural justice, including the obligation by the Legal Ombudsman to give a lawyer a chance to make representations and to give reasons for his decision.

Two relatively recent decisions of the High Court illustrate some

of the issues that arise in fee disputes. The case of *Stenhouse v Legal Ombudsman & Pasture* [2016] EWHC 612 (Admin) concerned a dispute over a barrister's fees, incurred on a direct access basis. A jurisdictional challenge to the Legal Ombudsman's decision failed, but a challenge on the grounds of natural justice succeeded. The barrister's conduct had been unfairly traduced in the decision, because the first he had known of the allegation was when he read about it in the decision.

Conversely, in *Mitchell and Co v Legal Ombudsman and Patel* [2016] EWHC 1933 (Admin), a solicitor's challenge to a decision that he repay his client £34,000 in fees incurred under a contingency arrangement, on the basis (1) that the ombudsman lacked jurisdiction to direct the repayment; (2) alternatively, that the ombudsman's decision was not founded on the quality of the advice provided to the client, as he claimed, but rather on the fairness of the contingency fee agreement; and (3) the decision to direct repayment was irrational or unreasonable, failed on all grounds.

CONCLUSION

Overall, then, the conclusion I draw is that when a client disputes a solicitor's fees, the cumbersome and expensive procedure of a solicitor own client assessment may prove less advantageous than a complaint to the Legal Ombudsman, for the reasons outlined above.

But the popularity of this approach will hinge on whether the quality of the ombudsman's decision-making is perceived to be comparable to a rigorous approach by a judge, and whether in the years to come the current impasse in obtaining adverse costs protection can be overcome.

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