LEGAL OMBUDSMAN

Guidance

Our approach to determining complaints

Legal Ombudsman January 2019

Summary

This guidance sets out the Legal Ombudsman's approach to determining complaints when deciding what is *"fair and reasonable in all the circumstances of the case"*. It explains why, when the test is based on the ombudsman's opinion and each complaint is decided on its specific circumstances, it is difficult to have a single definition. It also explores some of the common factors which may influence our decision on what is fair and reasonable, such as:

- **Characteristics of the customer** such as vulnerability and level of experience;
- **Expertise of the service provider/firm** and the standard of service we expect if a firm holds themselves out as experts;
- **Promises, assurances and service level agreements** and how circumstances might mean that a provider needs to go beyond their stated agreements; and
- **Reliance on the advice of others** and the expectation that service providers will use their own expertise to assess the work of others.

It may be helpful to read this guide alongside others we have published, including:

- **Our approach to putting things right;**
- **An ombudsman view of good costs service.**

We have also published a number of reports feeding back on certain areas of law such as wills and probate[1], conditional fee agreements[2] and conveyancing[3].

What is fair and reasonable in all the circumstances of the case?

Section 137(1) of the Legal Services Act 2007 ('the Act'), which is reiterated in Scheme Rule 5.36, states that a complaint is to be determined *"by reference to what is, in the opinion of the ombudsman making the determination, fair and reasonable in all the circumstances of the case*".

While this test seems to give the ombudsman a wide discretion, section 140(2) of the Act requires an ombudsman to give reasons for the determination. In reaching their determination, Scheme Rule 5.37 states that the ombudsman will take into account what decision a court might make, the relevant regulator's rules of conduct at the time, and what the ombudsman considers to have been good practice at the time of the act or omission. Therefore, we would encourage service providers to share their knowledge of any case law, rules or published best practice with the investigator, particularly if they believe it supports their view. Although the ombudsman is not bound by them, they will consider them.

[1] Complaints in focus: Wills and probate
[2] Complaints in focus: 'No win, no fee' agreements
[3] Losing the plot: Residential conveyancing complaints and their causes

What is fair and reasonable is not defined in either the Act or our Scheme Rules. However, it isn't the highest possible standard, or one of perfection, and instead will depend on the individual facts and circumstances of each case. So, for example, a delay of two days may be considered unreasonable in a conveyancing transaction whereas a delay of two months may not be, in the context of a complex probate or litigation case that spans a number of years.

Similarly, a firm may believe they have done everything that was required of them in terms of following any rules, regulations or a particular code of conduct, but their service may still have been unreasonable. For example, the firm may have provided the customer with an estimate of their costs at the outset, sent monthly invoices and kept them updated as to likely future costs. However, they may have ignored obvious signs that the customer was in significant financial trouble and unlikely to be in a position to pay any costs; and rather than discuss this with the customer, they continued to incur significant fees.

For these reasons, it is not possible to provide an exhaustive list of what is fair and reasonable in each and every circumstance or a single definition. However, we can set out some factors that may influence what we expect to see and illustrate these with some examples from cases we have dealt with.

1. Characteristics of the customer

In determining a complaint we will take into account the characteristics of the complainant. This can range from a vulnerability that impacts on their ability to access legal services, to their level of experience and knowledge. Where a customer is vulnerable, we will expect a firm to take this into account and to adapt their approach in order to meet their customer's needs.

For example, we investigated a case where a firm was defending an illiterate customer in criminal proceedings. The firm talked to him about how they could best communicate with him, including whether he needed support from a third party. This demonstrated that the firm had adapted their approach to take account of the customer's needs.

However, in a different case, a firm sent a customer letters full of technical and Latin phrases such as "*ab initio"* and "*prima facie*", despite knowing that the customer had a learning difficulty. As the customer had reminded them on a number of occasions that letters should be in plain English and any difficult concepts would need to be explained, this led to the customer being understandably and avoidably frustrated. We determined this was poor service.

In addition to whether or not their customer has any particular vulnerabilities, we will also take into account the knowledge and experience of the customer in deciding whether the service provided was reasonable. For example, we may expect firms to provide more detailed information and spend more time explaining matters to a first time buyer than

they would with a sophisticated customer purchasing their 10th property.

Miss A approached the firm to act for her in relation to her purchase of a new build property in December 2015. The firm were acting for the buyers of all of the plots in the development, however, other than Miss A, they were all commercial investors.

Shortly before contracts were exchanged, Miss A was told the completion date for the development was being pushed back by seven months to March 2017. Miss A told the firm she would wait until nearer completion before applying for her mortgage; as any offer would expire before March 2017, which was 14 months away.

The firm acknowledged Miss A's email and asked her to transfer her deposit of £40,000 in readiness for exchange of contracts which took place on 1 February 2016. In December 2016, Miss A's mortgage application was rejected by a number of lenders. As a result, Miss A had to pull out of the purchase and lost her deposit.

Miss A complained that the firm failed to advise her of the risks of exchanging contracts without having financial arrangements in place to enable her to proceed with completion.

The firm relied on an information pack they sent out to all buyers at the start of the process. While this pack set out some of the risks, such as those associated with breaching the contract and circumstances when the deposit might be lost, these were risks that generally applied to all conveyancing transactions and were not specific to Miss A's circumstances. It also used terminology and referred to processes that would be unfamiliar to a first time buyer like Miss A.

An ombudsman found that when Miss A told the firm she was going to delay applying for her mortgage, they should have explained the risks to her at that point rather than allowing her to exchange contracts with no arrangements in place to fund the purchase. Instead the firm treated Miss A like their commercial clients in terms of the information they provided and did not take into account that she was a private customer and first time buyer.

She was able to recover £20,000 of her deposit from the developer, however, the ombudsman directed that the firm reimburse the remaining £20,000 as Miss A would not have lost this sum if she had been better advised.

2. The expertise of the service provider/firm

The level of skill and care we would generally hold a service provider to, is that of a reasonably competent practitioner having regard to the standards normally adopted in their profession. In other words, we would expect service providers to have the appropriate skills and knowledge to be able to properly advise a customer about their case.

However, should the firm or service provider hold themselves out as an expert, specialist or leader within their field, we will hold them to a higher standard of care. It is also

important that the firm has systems in place to ensure staff are properly supervised, particularly where they are unqualified or trainees.

Mr B had approached the firm for advice on evicting a tenant from a property he owned. The firm drafted and served a notice on the tenants and once it expired, Mr B applied to the court for possession of the property. Defending the claim, the tenant said the section 21 notice was invalid as the property should have been licenced under a Selective Licensing Scheme and it was not. Mr B complained that the firm failed to advise him that he required a licence, especially when they had acted for him when he bought the property and knew he intended to rent it out.

The firm argued that Mr B should have told them the property was in a licensing area. However, the evidence showed that Mr B was not aware of this; as a lay person he also would not have known this issue was relevant to serving a section 21 notice and obtaining possession of the property.

The firm specialised in landlord and tenant matters and on their website they said they were "*experts in the eviction of tenants*" who could "*provide specialist advice on the complex and technical requirements of serving valid notices to tenants*".

The ombudsman concluded that the firm should have been aware of any schemes, rules or regulations which would have impacted on the validity of any notices served, and to have made appropriate enquiries to determine whether such schemes applied to the property before advising their client on the course of action they needed to take.

3. Promises, assurances and service level agreements

In order to prevent complaints about poor communication, it is important that service providers agree a level of service with their customers at the outset. For solicitors this is encouraged in their Code of Conduct, and so it is not surprising that we see a lot of firms with service level agreements in place telling customers how often they will be updated and how soon their calls, emails and letters will receive a response.

Generally, we expect service providers to do what they said they would within the timescales they said they would do it, and if they cannot, to tell the client in advance where possible. However, in some cases, even where service levels have been met, this may be unreasonable if, for example, it was clear from the nature of the correspondence that a response was reasonably required and expected sooner.

In the case of **Mr C**, the firm set out their standards of service in their client care letter, which included a promise to respond to emails within three working days.

The firm were acting for Mr C in relation to his divorce. They had sent him two letters confirming the date and time of the next hearing but each letter referred to a different court.

Mr C noticed the problem the day before the hearing as he was getting his paperwork ready. He asked the firm to confirm the correct court by both phone and email. His solicitor was unavailable and so he left a message asking for a call back as soon as possible.

Mr C did not hear from the firm and ended up attending the wrong court before getting a taxi to the right court. The day after the hearing the firm responded to Mr C's email explaining which court was dealing with his case.

Mr C complained that the firm failed to respond to his email or return his call prior to the hearing, which led to him going to the wrong court. Although the firm apologised, they felt they had done nothing wrong as they responded within three working days as per their service level agreement.

An ombudsman found that it was apparent from the content of Mr C's email that he required a response sooner than three working days. He was due to attend the hearing the next day and so would need to know which court to go to. Had his solicitor been too busy to respond, he could have delegated the task to an assistant.

4. Reliance on the advice of others

We often see cases involving multiple service providers. For example, in a personal injury claim it is not unusual for a solicitor and a barrister to be involved. Consequently, it is not uncommon for a client to complain about both of them when something goes wrong or for service providers to blame each other.

Under Scheme Rule 5.16, we have the option of investigating complaints about two different service providers together where they relate to connected circumstances. Doing so often prevents duplication and allows us to consider the case as a whole and apportion any responsibility, and therefore any remedy, to each service provider.

Mr and Mrs D instructed a solicitor to act for them in September 2012 when they bought a new property. Upon the advice of the firm that they had "*everything to gain and nothing to lose*" and the procedure was "*practically fool proof*", Mr and Mrs D entered into a stamp duty mitigation scheme which they were told would reduce their stamp duty liability of £8,248.50 by 50% to £4,124.25.

Around 12 months after completion, HMRC wrote to Mr and Mrs D stating that the purchase price for the property had been understated on the stamp duty return form and based on what they actually paid for the property, they were required to pay the full stamp duty amount along with any penalties and interest.

Mr and Mrs D complained that the firm failed to properly advise them about the risks of using the scheme.

The firm said they had received advice from a barrister about the viability of the scheme and did not believe they were responsible for its failure. They felt Mr and Mrs D were responsible for paying interest on the stamp duty they owed.

However, an ombudsman decided that the solicitor could not escape responsibility by claiming reliance on the barrister's advice and it was not reasonable for them to *"blindly follow such advice"*. The firm was expected to consider whether the advice given by the barrister was correct in light of their own specialist skill, knowledge and experience in this area, and whether it was best for that particular client.

The firm portrayed themselves as specialists in conveyancing matters and they had detailed knowledge of how tax avoidance schemes worked and what they entailed. By September 2012, stamp duty mitigation schemes were well known, as was their failure, with the Solicitors Regulation Authority having issued a warning to solicitors choosing to get involved. Therefore, the firm was well placed to offer advice to Mr and Mrs D about the risks and the benefits, and to reach their own conclusion as to whether to follow the advice from the barrister. The firm were therefore directed to reimburse Mr and Mrs D for the expenses they incurred.

Further information

If you have any questions about the guidance provided in this document please contact

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