Regulation Report

Legal Ombudsman Update - Judicial reviews 2016

Although the Legal Ombudsman ("LeO") is threatened with judicial review on a fairly regular basis, only a small number of cases have reached a hearing since the LeO was first set up in October 2010. However, in an unusual flurry of activity there have already been two cases heard in the Administrative Court during 2016. By way of background, an application for judicial review is the only method of challenging a determination of the LeO.

The first case which was heard in the Administrative Court in Birmingham in March resulted in a successful challenge to the jurisdiction of the LeO. In *John Stenhouse v Legal Ombudsman & Lucy de La Pasture [2016] EWHC 612 (Admin)*, the claimant who is a barrister applied for judicial review of the LeO's determination that he acted in an aggressive and discourteous manner towards one of his direct access clients during a dispute over his outstanding fees due under a CFA and had also unreasonably issued debt proceedings in the county court.

The claimant firstly contended that the LeO did not have jurisdiction to make findings about his conduct and that this should be dealt with by the Bar Standards Board. This argument was rejected on the basis that there was nothing in the Legal Services Act 2007 that made a distinction between services and conduct., The Act covered all acts and omissions in respect of services provided which embraced both what was done and how it was done. So the finding that the claimant had acted in a discourteous and aggressive manner was upheld by the court.

The claimant was more successful on the second ground of his application. The court held that the LeO had not had jurisdiction to make findings concerning the issue of proceedings when they had not been the subject of the client's original complaint and therefore the LeO findings had breached the rules of natural justice. The claimant had in fact issued the proceedings whilst the LeO was still investigating the client's complaint. It was recognised that the claimant had been working for the client for three and a half years without payment and was entitled to claim his fees. He was not obliged to wait for the conclusion of the LeO process.

This judgment is an important reminder that the LeO has an extensive jurisdiction which enables it to consider complaints not only about the delivery of the legal service whilst the retainer is in place but also any service and conduct issues after the legal work has been completed. Firms should be cautious as to how they approach a fees dispute bearing in mind that the LeO can add insult to injury if it finds that there has been unreasonable conduct which caused the client particular distress. Further, although there does not appear to be an automatic bar against issuing debt collection proceedings whilst a LeO complaint is ongoing, this was an exceptional case where no fees had been paid for over 3 years. So, again, caution should be exercised and a reasonable approach taken if debt proceedings are being considered.

In the second judicial review of 2016, the LeO's determination was upheld. In *Leonard Ejiofor T/A Mitchell & Co Solicitors v Legal Ombudsman & J Patel [2016] EWHC 1933 (Admin)*, Mr Ejiofor had been ordered by the LeO to refund to a client £34,000 of his £37,000 fee due under a CFA. Mr Ejiofor, who is a solicitor, was acting for a client in a probate dispute. The client indicated that she could not afford any further upfront fees so a CFA was agreed. The probate dispute was then settled shortly after the CFA was signed.

The LeO determined that there was no significant activity from the firm in relation to the case; that the firm had not set out the pros and cons of the CFA and adequately advised the client on the CFA; and that the firm had put its own interests ahead of its client's. The Administrative Court agreed and in particular that the LeO had been entitled to find that there had been *"pressure bordering on duress"* on the client.

Mr Ejiofor has indicated that he is appealing to the Court of Appeal on the basis that the LeO exceeded his jurisdiction in undoing *"a contractual agreement that was freely entered into by solicitor and client"* because the LeO was of the view that the agreement was not appropriate or fair in the circumstances.

This second judgment brings into sharp focus the challenging position of firms negotiating a CFA with a client. It is almost impossible for a firm to remain truly independent and comply with Principle 3. The interests of the client and of the firm naturally conflict. It is unrealistic for the LeO and the courts to say otherwise. It is a dilemma as the ability of clients to fund litigation from their own resources becomes more of an issue. The only guaranteed protection for a firm in such a situation would be to insist that the client seek independent legal advice – which may be a worthwhile debate for another day.

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