Financial Ombudsman Service response to Solicitors Regulation Authority Consultation: Protecting consumers from excessive charges in financial service claims

13 July 2023

About us

We were set up by Parliament under the Financial Services and Markets Act 2000 to resolve individual complaints between financial businesses and their customers fairly and reasonably, quickly, and with minimal formality.

Our service has a wide remit that extends to all kinds of regulated financial services. It is free to access for eligible complainants which include consumers and some businesses. We don't expect complainants to use a professional representative when bringing a complaint to us, but some do. We are committing to improving our service so that more complainants have the confidence to bring a complaint without representation. Over the last six months 21% of our cases have been represented.

We share the insight we gain from resolving thousands of disputes a year to improve outcomes for all customers of financial services products. This includes the insight we gain from our work dealing with both complaints brought by professional representatives but also from complaints about FCA regulated claims companies themselves which fall within our remit.

Read more about how we make decisions, including the types of cases we can consider, who we can help and the awards we can make.

Introduction

The Financial Ombudsman Service welcomes the opportunity to respond to the Solicitors Regulation Authority (SRA) consultation on protecting consumers from excessive charges in financial service claims.

Our response will focus on the complaints that are eligible to come to our service. Many of the questions in the consultation are not directly relevant to us and so we are sharing our general position below.

In recent years we have seen an increase in SRA regulated firms acting as representatives in complaints brought to our service. We have therefore engaged more regularly with the SRA to ensure that information is shared effectively. We welcome the opportunity to increase this engagement and are happy to discuss this consultation and its potential impacts, as well as other areas of shared interest, at any point.

Our response

We welcome the intention of the SRA to limit the fees chargeable by solicitors and SRA-regulated law firms conducting financial services claim management activities with the aim of mirroring – for the most part – the rules implemented by the Financial Conduct Authority (FCA) applicable to claims management companies regulated by it in March 2022.

Represented consumers who complain to a financial business, and then our service, often feel that they have already suffered a detriment, and so being charged what can sometimes be seen as an excessive sum of money by their representative can compound potential suffering at a time of vulnerability and stress.

As both the SRA and FCA regulate businesses that provide claims management activities in financial services which can represent consumers, we think it important to have consistency across the regulatory landscape. This is in order to prevent confusion, ensure trust in regulators, and prevent regulatory arbitrage or 'regulator shopping' by firms looking to avoid scrutiny or maximise what they can charge consumers.

The consultation currently sets out three scenarios which the SRA considers are unsuitable for the framework of maximum charges. In such cases, the SRA is consulting on the application of an exemption to the fee cap rules. Instead of the fee cap applying in such cases, charges for work conducted by solicitors and SRA-regulated firms would have to be "reasonable".

The scenarios are:

- representation on a claim that is eligible for direction initially to a statutory redress scheme but that is subsequently prevented from further progression through that scheme or another scheme – for example, where the scheme's conditions for eligibility cannot be met, or the scheme determines the claim should first be directed to a court

- representation on a claim with circumstances that are particularly complex, novel, or connected to group processes and that, as part of the solicitor's discussion of options with the consumer and acting in the client's best interests, result in agreement to pursue redress through the courts rather than a statutory redress scheme

- representation on a claim that is eligible for progression and determination through a statutory redress scheme, but that has particularly novel or complex characteristics which means that the cost of representation exceeds the maximum amount the firm would be able to recover under the fee restrictions framework. The firm would be subject to our requirements to inform the consumer of their options (including for the consumer to bring the claim themselves) and to act in the consumer's best interests

In the case of the third scenario above, the SRA is seeking further evidence on how this may work in practice, given that there are divergent views among stakeholders.

We consider consistency across the FCA and SRA as the two regulators in this field is the best thing for all parties and any divergence could lead to confusion and differing standards and expectations. We understand the SRA's rationale for the first two exemptions set out but would recommend caution and that requirements be set out to ensure that representatives are clear about the expectations on them minimising risk of abuse.

We suggest that for cases falling under the first exemption, there should be a fixed or maximum fee payable for any work linked to utilising the statutory redress scheme – so only work that is undertaken once the complaint can no longer be progressed under the statutory redress scheme can be charged outside of the banding framework.

With regards to the second exemption, we would suggest that there should (to the extent it is not already required under SRA rules) be requirements on representatives to:

- clearly explain that consumers have the option to use a free statutory redress scheme
- highlight the costs of using the representative to help with the statutory redress scheme process
- explain clearly why they don't recommend use of a relevant statutory redress scheme

- where possible, provide an illustration of the costs involved for utilising a different method, such as an individual court case or collective action

The SRA may also wish to consider introducing exemption reporting requirements on firms, for example requiring firms to provide data annually on how often they have relied on the exemptions. If there are solicitors and firms that have a high-volume use of exemptions, the SRA could consider taking further action – for example, an audit of the relevant firm, to ensure that the exemptions are being used validly and fairly.

In relation to the third exemption, we have some concerns about the extent to which some cases will be caught by the designation novel or complex characteristics. As above and like all financial services statutory redress schemes our service is free to access for complainants and designed to be accessible without the need for formal representation, regardless of individual circumstances and/or the complexity of the issues involved.

Further, we don't expect complainants to be able to articulate complex legislative arguments or display in-depth technical knowledge of the product or service they are complaining about. We work with complainants to understand what has happened in their own circumstances, what they think went wrong/are unhappy with and what outcome they are looking for when bringing the complaint. We then work with the financial business to find out what happened and if steps should be taken to put things right. That may involve the payment of redress.

In reaching our assessments we will consider what is fair and reasonable in all the circumstances of the complaint. This is also the basis of any final decisions reached by an ombudsman which is required when complaints can't be resolved at an earlier informal stage in our complaint handling process.

In considering what is fair and reasonable, we take into account relevant: law and regulation, regulators' rules, guidance and standards, codes of practice and (where appropriate) what they consider to have been good industry practice at the relevant time.

We understand that not all complainants will want or be able to use our service directly for a range of reasons, and some may choose to use a representative – either a friend/family member or a regulated representative who charges a fee. We work closely with professional regulated representatives to make sure that they are aware of our expectations in complaint handling, but we don't expect them to be able to make complex legal or technical arguments, as that is part of our role.

We think the third exemption could lead to difficulties in both assessment and application potentially leading to further dispute and a rise in complaints against professional representatives. Determining whether a claim is "novel" and/or "complex" is difficult to do in a consistent and objective manner – we are aware of this first-hand. As part of our funding review, we looked to define what was a complex complaint, but despite working with a significant number of stakeholders, it became very clear that this is a highly subjective term, and any definition would be open to challenge.

Due to the challenge in definition and the potential for a significant number of complainants to be impacted by this exemption (for example we received over 7,000 pension complaints last year a significant number of which could be classified as complex) we would suggest this additional exemption is either not taken forward or that further work is done to set relevant criteria and likely impact on complainants.