

Solicitors' Compensation Fund Regulations 2010 [Schedule]

Guidelines

These guidelines form part of the Solicitors Compensation Fund Regulations 2010 made by the Council on 24th February 2010

In these guidelines, reference to a practitioner/solicitor shall include registered European lawyers practising in partnership with a practitioner/solicitor or a registered European lawyer; and recognised bodies.

1. General Principles

- (a) The basic object of the Fund is to replace "clients' money" misappropriated by a practitioner/solicitor or his or her employee(s), but, although an applicant for a grant must be a person who has suffered loss through the actions of the practitioner/solicitor, he or she need not necessarily be or have been the practitioner/solicitor's client.
- (b) A grant out of the Fund is made wholly at the discretion of the Council of the Law Society of Northern Ireland. No person has a right to a grant enforceable at law, but the intention of the Council is to seek to administer the Fund in an evenhanded and consistent manner.
- (c) The Fund is administered as a fund of last resort. This means that a grant may be limited or refused to an applicant where the loss is an insured risk or where the loss is capable of being made good by recourse to another person.
- (d) The burden of satisfying the Council that a loss has been suffered within the ambit of the Fund rests with each applicant, but the Society will give guidance and, so far as possible, for the purpose of the application, allow the applicant reasonable access to records under the Society's control or to which the Society has access.
- (e) A grant may be made out of the Fund to a practitioner/solicitor applicant, usually by way of a loan, in circumstances where a loss within the ambit of the Fund has been suffered by reason of misappropriation of clients' money by his or her partner or employee, provided that the application is not tainted with the default. A practitioner/solicitor applicant would, however, be required to pursue a claim against their Professional Indemnity Insurance cover.
- (f) The Council normally require that the "dishonesty" or "failure to account" referred to in Articles 56 and 57 of the Solicitors' (Northern Ireland) Order 1976 must have occurred within the course of a practitioner/solicitor client transaction of a kind which is part of the usual business of the practitioner/solicitor.

2. Losses which cannot be the subject of a grant

Certain losses are outside the ambit of the Fund because the Council has no power to make a grant. Examples are:

- (a) losses arising as a result of misappropriation of money by a practitioner/solicitor outside his or her practice as such or by a practitioner/solicitor's employee acting outside the scope of his or her employment;
- (b) losses arising solely by reason of professional negligence by a practitioner/solicitor;
- (c) losses arising by reason of the failure of a practitioner/solicitor to satisfy a money judgement against him or her where the facts of the judgement would not otherwise give rise to a claim on the Compensation Fund;
- (d) losses where the Council is satisfied that either no evidence of dishonesty is available or, where in the case of failure to account, an applicant is not suffering material hardship.

3. Losses in respect of which a grant may not be made

Notwithstanding the statutory provisions of section 56, there are certain losses in respect of which it is not normally the practice of the Council to make a grant. Examples are:

- (a) losses which result from, but do not form part of any misappropriation of, or failure to account for, money or money's worth. This is subject to certain exceptions, e.g. legal costs incurred in applying for a grant and interest on the amount of the grant.
- (b) the application is tainted with the applicant's own dishonesty.
- (c) the applicant has contributed to his, her or its loss as a result of his/her or its activities, omissions or behaviour either before, during or after the transaction giving rise to the application or thereafter.
- (d) in the case of an applicant who is a member of a profession, or is engaged in trade or business or performs a function, where the loss arises in connection with that profession or in the course of that trade, business or function, and there is evidence that the applicant and/or the applicant's servants or agents contributed to the loss by failing to exercise a reasonable standard of care.
- (e) the loss amounts to a claim for contractually agreed interest between the applicant and the practitioner. Where, following the authorisation of a principal grant, the Council makes a supplementary grant for a sum in lieu of lost interest, the sum is calculated at such reasonable rate as the Council may deem appropriate in all the circumstances (see Regulation 10 of the Solicitors Compensation Fund Regulations 2010).
- (f) the Society was not notified of the applicant's loss within six months of the date upon which the loss first came or ought to have come to the applicant's knowledge, and there are not exceptional circumstances relating to the delay which, in the opinion of the Council, justify the delay (see Regulation 7 of the Solicitors Compensation Fund Regulations 2010).

- (g) the application is based on the failure by a practitioner to comply with an undertaking. The Fund does not generally underwrite a practitioner/solicitor's undertaking. Failure on the part of a practitioner/solicitor to comply with an undertaking is a matter of misconduct which may be the subject of a complaint but does not of itself entitle the recipient to make a successful application for a grant out of the Fund.

An application may, however, be considered favourably if it can be shown that an undertaking was given in the course of the practitioner/solicitor's usual business as a practitioner/solicitor acting on behalf of a client, that the recipient acted reasonably in accepting the undertaking and placing reliance on the practitioner/solicitor in his or her capacity as such and that:

- (i) the undertaking was given with dishonest intent for the purpose of procuring money or money's worth, or
- (ii) the undertaking, although not given with dishonest intent, is subsequently dishonestly not performed by the practitioner/solicitor for the purpose of procuring money or money's worth.

The Council does not consider the giving of an undertaking in circumstances which amount to the practitioner/solicitor giving a bare guarantee either of his or her personal liabilities or the financial obligations and liabilities of a client or third party to form part of the usual business of a practitioner/solicitor and such an undertaking would therefore not normally be regarded as having been given within the course of a practitioner/solicitor client transaction.

- (h) for the avoidance of doubt, applications for grants may be made by one or more beneficiaries to an Estate, but it is in practice more likely that one composite claim is made by the Executor(s) or Personal Representatives.

4. Requirements to be satisfied

Every applicant for a grant out of the Compensation Fund must satisfy the Council: -

- (a) that he, she or it has suffered or is likely to suffer actual loss of money or money's worth;
- (b) that such loss has been occasioned by (i) the dishonesty of a practitioner/solicitor (or his or her employee) acting in the course of his or her practice as such or in connection with a Trust of which the practitioner/solicitor was at the material time, a professional Trustee or (ii) the failure of a practitioner/solicitor (or his or her employee) to account for money received in the course of his or her practice or in connection with a Trust of which the practitioner/solicitor was, at the material time, a professional Trustee;
- (c) that any alleged dishonesty is evidenced either by the conviction of the practitioner/solicitor (or his or her employee), or by a finding of fraud in a civil action, or by evidence leading to an inevitable presumption of theft. Where an application is based on failing to account, the application must be supported by sufficient

documentation to substantiate that a failure to account has occurred and that the applicant is suffering or is likely to suffer hardship; and

(d) that the loss is not reasonably recoverable from any other source.

5. Interim grants

In an application where it appears that there is severe hardship, the Council may make an interim grant before the full investigation of the whole application has been completed and without the full application being admitted. However, the Council must be satisfied that there has been a loss of an amount at least equal to that to be paid out by way of an interim grant.

6. Claims where the defaulting practitioner/solicitor is or was in partnership

- (a) Losses caused by the dishonesty of a partner or employee will normally be recoverable under the Solicitors' Professional Indemnity Insurance. The Council may, however, make a grant to an applicant in respect of part of his or her claim which is not covered by the firm's insurance e.g. where the remaining partners are unable to settle all or part of the claim from their own resources.
- (b) Accordingly, applicants should proceed with a claim against the remaining partners who, in turn, will make a claim against their Professional Indemnity Insurance.

7. Institution of civil proceedings

In some cases the Council may require an applicant to institute civil proceedings including, where appropriate, insolvency proceedings against the practitioner/solicitor in respect of the loss suffered. The purpose of the proceedings may be to recover all or part of the alleged loss or to quantify precisely the amount of such loss. No applicant should institute proceedings unless and until the written consent of the Society has been obtained and the question of who is to be responsible for the costs has been decided, otherwise any application for a grant in respect of such costs may be rejected by the Council. If any successful applicant for a grant behaving in such a manner as is likely to prejudice such proceedings, the Council may require repayment of all or part of a grant and will exercise appropriate civil remedies to do so. An applicant will be required to acknowledge the foregoing in a receipt to be signed by him/her before payment of a grant is issued.

8. Prosecution of dishonest practitioners/solicitors

In all appropriate cases, the applicant will be expected to assist and co-operate with the Police in connection with enquiries into the commission of any criminal offence by the practitioner/solicitor in respect of the alleged acts giving rise to the application. Applicants will also be expected to assist the Society in its taking of Disciplinary Tribunal proceedings against the practitioner/solicitor. If any successful applicant fails to assist the police, or withdraws their complaint, the Council may require repayment of all or part of a grant and will exercise appropriate civil remedies to do so. If a complaint to the Police is withdrawn, the Society should be informed. An applicant will be required to acknowledge the foregoing in a receipt to be signed by him/her before payment of a grant is issued.

9. Personal liabilities of a practitioner/solicitor

The Council will not normally make a grant in respect of the personal or trading debts or liabilities of a practitioner/solicitor or a practitioner/solicitor's firm or where the monies form part of a commercial transaction or business venture between the applicant and the practitioner/solicitor outside the normal solicitor/client relationship.

10. Applicant's own behaviour

When considering any application, the Council takes into account the conduct of the applicant and/or the applicant's servants or agents both before and after the loss was sustained. If the Council, in the exercise of its discretion, considers an applicant and/or an applicant's servants or agents to have inter alia contributed to the circumstances of the loss, or to have failed to submit an application for a grant within a reasonable time (see also Regulation 7 of the Solicitors' Compensation Fund Regulations), or to have failed to pursue an application diligently, then the application may be rejected in its entirety or the amount of any grant substantially reduced.

11. Deduction from grants

- (a) The Council may deduct from any grant the costs that would have been due to the practitioner/solicitor provided that the work had been properly completed so that the applicant will not be in a better position by reason of a grant than he or she would otherwise have been in. A deduction in respect of notional costs may be made by the Council notwithstanding the fact that the defaulting practitioner/solicitor may not have held a practising certificate at all material times. If a defaulting practitioner/solicitor did the work so badly, or did not complete it, with the result that the applicant has had to instruct another practitioner/solicitor to carry out or finish the work, then a grant may be made for the additional reasonable costs incurred by the applicant.
- (b) The Council will normally seek to deduct from any grant all monies already recovered by an applicant and monies which either will be or should have been recovered. For example, if an application is for a sum of £10,000 but an applicant has already recovered, from whatever source, a sum of £2,000, the Council will normally seek to base any grant on the balance of £8,000. This principle will usually apply even when an applicant believes that he is receiving payments at a contractually agreed rate, but where the practitioner/solicitor has, in fact, actually misappropriated the money advanced and is, for example, making payments in lieu of interest in an effort to allay suspicion.

12. Payment of interest on claims

In appropriate cases, the Council will consider an application for a supplementary grant in lieu of lost interest on the amount of the grant from the date of the loss (see Regulation 10 of the Solicitors Compensation Fund Regulations 2010). If paid, interest will be calculated at such reasonable rate as the Council may deem appropriate in all the circumstances and take into account that a grant is a gift and not, therefore, subject to tax.

13. Payment of costs of application

The Council has the power to make a further grant in respect of the reasonable costs of an applicant's practitioner/solicitor or other professional adviser relating to a claim where a grant is authorised (see Regulation 11 of the Solicitors Compensation Fund Regulations 2010). The Council may not, however, be prepared to make such a further grant or may grant less than the full costs if it is of the opinion that all or part of the costs should not have been incurred, or might have been saved by an earlier approach to the Society, or were not incurred wholly or exclusively in connection with the claim, or is of the view that the costs incurred are unreasonable or excessive.

14. Multi-profession frauds

In an application where the loss has been sustained as a result of the combined activities of more than one profession (e.g. a practitioner/solicitor conspires with an accountant or surveyor, or a dishonest practitioner/solicitor is assisted by a negligent accountant or valuer) the Council will normally consider how each contributing factor affected the applicant's loss. The Council will normally endeavour to base any grant on its assessment of that portion of the loss primarily attributable to the acts of the practitioner/solicitor as opposed to that portion which is primarily attributable to the acts or omissions of the other professional parties, or to other factors. The Council may decide to make a grant on a pro-rata basis in accordance with its assessment of the importance of each contributing factor in the loss, or may reject an application in its entirety if it is of the opinion that the loss was primarily due to other factors rather than the practitioner/solicitor's dishonesty.

15. Normal maximum payout

For any loss sustained, or any sum of money that came into the possession of a defaulting practitioner/solicitor, subsequent to *John Pieren 2010*, it is the Council's policy not to authorise a grant to any applicant which would result in an aggregate sum exceeding £750,000, inclusive of all interest and costs paid pursuant to Regulations 10 and 11, being paid from a combination of the Compensation Fund and any applicable Insurance. The Council may also, in considering any claim, take into account the need to maintain sufficient funds in the Compensation Fund to meet the claims of other applicants.

16. Rejection of claim

The most common ground for rejection of an application is that it does not come within the Compensation Fund's statutory framework. When the Council refuse or are unable to make a grant, the applicant will be informed in writing of the reason for this decision. The fact that an application has been rejected does not prevent a further application being submitted, or the rejected application being reconsidered, provided that substantial new relevant evidence, information or submissions are produced in support of the new application or the request for reconsideration.