

Legal Ombudsman: November 2011

Legal Services Board call for evidence: probate and estate administration

The logo for the Legal Ombudsman features the word "LEGAL" in a bold, sans-serif font, with a stylized, flowing script element above it. Below "LEGAL" is the word "OMBUDSMAN" in a clean, sans-serif font.
LEGAL
OMBUDSMAN

Introduction

The Legal Ombudsman welcomes the Legal Services Board's call for evidence in this area. You have asked for evidence to assist you in considering how best to protect consumers as part of your formal investigation into probate and estate administration associated with will writing. In responding, we have considered your role as the oversight regulator for legal services and the positive contribution you have made to innovation, access to justice, choice and consumer benefit.

As you are aware, the Legal Ombudsman is also a creation of the Legal Services Act 2007. The establishment of our service was an active response by Parliament to simplify the system for consumers, so, in this changing world of legal services, there is a clear and accessible route to a safety net of redress.

Our role is two-fold: to provide consumer protection and redress when things go wrong in individual transactions within the legal services market, and also to feed the lessons we learn from complaints back to the profession, regulators and policy makers to allow the market to develop and improve. In this document we provide you with a summary of some of the issues we have found from investigating complaints that fall within our jurisdiction (i.e. they relate to services provided by a lawyer. We hope that they will assist you to develop your approach to the issues of regulation and redress in relation to probate, estate administration and will writing.

Legal Services Consumer Panel report

In support of your earlier call for evidence in relation to will writing, we have shared with the Legal Services Consumer Panel statistics and complaint information about wills, probate and estate administration. This information was useful in helping the Panel understand and articulate key issues for consumers in relation to will writing¹ and is set out in their report². We will not seek to replicate the detail here. Rather, we wish to build on this evidence and share some of our insights that we have garnered through our assessment processes and case handling to assist this review of probate and estate administration.

¹ Note: access to Legal Ombudsman information by the Legal Services Consumer Panel is authorised by section 152 of the Legal Services Act 2007. Further details can be found in the Panel's report.

² Legal Services Consumer Panel *Regulating will writing (2011)*

To the end of September, wills and probate accounted for 14% of cases investigated by the Ombudsman, the third most common area of law for complaints after conveyancing (20%) and family law (19%). The description by the Consumer Panel of complaints in this area is apt. However, it is also important to remember the context in which these complaints occur. Complaints about probate and estate administration often occur during distressing circumstances, as the legal process is usually triggered by the death of a close family member or friend. The emotional context for these complaints is well illustrated in the Panel's report, with the impact of poor service adding tension and additional stress to what were already strained relationships. It is also worth remembering that this is the context in which providers of legal services must work, and that, on the whole, most providers navigate their way through these complex issues with skill and sensitivity.

Complaints in the area of wills and probate (which the Legal Ombudsman, up until recently, has classified together in its reporting) have much in common with service issues raised in other areas of law, though there does seem to be some indication that there are more complaints about delay in this area compared with other areas of law. As the Panel report illustrates in more detail, consumers come to the Ombudsman concerned about the costs of a case, lack of communication about changing costs, delays, lack of progress in a case, and failure (or perceived failure) by lawyers to keep them up to date or to act on their wishes.

Wills and probate cases can be complex; there can be trusts, multiple beneficiaries and issues with the drafting of wills to consider, in addition to any issues that might arise during estate administration. The Panel report illustrated the impact on consumers of complaints in this area. Here we include two case studies that we believe illustrate the complexities that complaints in this area can throw up – for the consumer, beneficiaries, the lawyer and also the Ombudsman:

Lost in transition

Area of law:

Wills and probate

Complaint reason(s):

Costs information deficient; costs excessive; failure to follow instructions; failure to keep informed; failure to progress; delay

Remedy:

To pay compensation of £300 for inconvenience caused, to limit fees and complete the work at the firm's own expense.

Outcome:

Ombudsman's decision rejected by the complainant

Mr C's aunt died, leaving him her house and naming a number of other beneficiaries in her will. Naturally enough, he wanted the firm appointed as executors to get on with it. They needed to make sure the house was sold as quickly as possible and transfer the proceeds to Mr C without delay.

Mr C waited, but saw no apparent progress. He couldn't understand why things were taking so long: what was the problem with the sale of the property, and why were the solicitor's bills so high?

In the midst of all this, the lawyer named as the executor retired, but no one else had taken on the job after he left. The firm itself was still functioning perfectly normally, but everything seemed to have got stalled. Frustrated by the lack of any progress and poor communications with the firm, Mr C came to the Legal Ombudsman for help.

Our Ombudsman looked into this aspect of the complaint and concluded that there had indeed been some problems with the way the firm had handled the administration of the will. But that wasn't the only issue for Mr C. He'd also complained that the work done to sell the house was of a poor standard. Although there was some disagreement between Mr C and the firm about how the work had been done, the Ombudsman decided that the firm had tried to explain all the whys and wherefores to Mr C in a letter that he'd signed. But they also accepted that the firm could have been clearer in how it explained the process to Mr C - the risks and benefits of the different options available to him, and so on. The way the firm approached the case was confusing and resulted in delays

and inconvenience to Mr C. We decided that the firm should reduce their overall bill.

Another part of the problem as it turned out was poor office admin by the firm. They hadn't separated their charges for sorting out the estate as a whole from any costs associated specifically with the house sale, which would be down to Mr C alone to cover. This meant that their bills got muddled up, so it was harder to work out who was being charged for what.

The Ombudsman acknowledged that there was an ongoing debate about whether a lease extension to do with the property itself was valid. But this wasn't something we could resolve. This was a legal matter and nothing to do with the standard of service provided by the firm.

We were also asked to consider whether the way the work was done acted as a barrier to selling the house in the future. We couldn't say one way or the other – it would all depend on what any future buyer might want.

Mr C said the firm had been slow to pay some fees owing to a nursing home, and that the outstanding work needed to finish the administration of the estate still hadn't been done. The Ombudsman agreed and decided the firm should take immediate practical steps to manage the handover properly, all at their own expense, and get on with bringing the administration to a swift conclusion.

Finally, the Ombudsman decided there was no evidence that Mr C had suffered any financial loss. There had been a few problems, but nothing to suggest that he had lost any money as a result.

Nevertheless, because of the delays and confusion, the Ombudsman awarded Mr C £300 as a good will payment. If the Ombudsman's decision was accepted by Mr C, the firm would also be told to reduce their final bill and complete the work at their own expense.

Lack of trust

Area of law:

Wills and probate

Complaint reason(s):

Delay; failure to keep informed

Remedy:

Lawyer to refund an amount for incomplete work (£255.63) and pay additional legal fees incurred (£776.37), plus £200 compensation for distress and inconvenience and the return of all documents and papers.

Outcome:

Ombudsman's decision accepted by the complainant

Mr F complained to us as he was unhappy with the way his lawyer had handled drawing up a will and Trust Deed for him. He had signed his will after it had been drawn up, but didn't receive the approved draft Trust Deed. After paying the lawyer's bill for the will writing, Mr F waited for another two months before chasing the Trust Deed. He eventually received an email from the lawyer to say his documents were ready to sign, followed swiftly by a second bill, for the trust declaration, which included a Land Registry fee.

Mr F took the signed documents into the lawyer's office and paid the latest bill. But he later received another bill for the same work. Although the firm confirmed that this had been sent in error, Mr F's confidence in the firm was beginning to fade fast.

When Mr F hadn't received some of the paperwork he still needed, he tried to contact his lawyer. Having got no response to his numerous phone calls and emails, he decided to visit the office in person. His lawyer came to the door and assured Mr F that everything was in hand. But he failed to mention that he'd actually ceased trading two months earlier.

Mr F thought it would be wise to contact the Land Registry himself to chase progress and was told that no application had been made. He decided at that point to write a letter of complaint to the firm, but again got no response.

In the end, Mr F had to employ another lawyer to complete the work. This firm told him that the draft trust declaration drawn up by the original lawyer was unusable, which meant the work had to be started again.

Mr F came to us with a string of complaints – the delay, the fact that the work hadn't been completed, that he'd had to pay for it to be done again, and that his first lawyer hadn't bothered to tell him he'd ceased trading.

Our investigation found that, although the original lawyer had done some of the work required, this hadn't been completed. And it was clear that Mr F had spent a lot of time chasing progress. We agreed as well that Mr F had been obliged to employ another lawyer to complete the work, leaving him to pay all over again.

Potential consumer detriment

As part of their review of will writing, the Consumer Panel highlighted that consumers potentially face many problems, in relation to probate and estate administration. While the writing of a will and then later probate and estate administration could be viewed as separate transactions (not least from a legal service providers point of view), this seems at odds with the way many consumers approach this area and their experience of buying legal services. The Panel highlighted that inherent features of will-writing services, such as consumers' lack of knowledge to identify technical problems or assess whether additional services offered are necessary or represent good value for money, place consumers at risk of detriment. This is also true for probate and estate administration; very often consumers simply use the lawyer who wrote their deceased Mother's or Father's will for the probate stage, as this might seem a straightforward option during a time of stress. It is possibly useful to look at the issues thrown up holistically rather than as steps of a process, at least for some consumers.

It is not for the Ombudsman to comment on whether regulation might be the appropriate response to the issues highlighted from this review. Instead, our focus is on access to redress, a key tenet of the Legal Services Act 2010 and an area where both UK and EU approaches are developing within a broad principle of the importance of joined-up redress within sectors and across different markets.

As you are aware, the market is innovating. Since our opening in October 2010, there have been innovations and changes in the way legal services are delivered and we have seen their impact on consumers. The advent of ABS is part of an overall pattern for the legal services market,

encouraging further initiatives by the market to diversify. We thought it might be useful to outline some of these innovations to you here in summary, as these issues might assist you refine your approach to developing a framework in relation to will writing, probate and estate administration.

Consumer confusion

As previously stated, we are seeing the consumer confusion that is caused by the overlap between unregulated and regulated services. In such a complex system, it is little wonder that consumers of services are unclear and confused about how to seek help and redress as we often have to put considerable effort into establishing whether an act or omission was conducted by a lawyer and therefore falls within our jurisdiction. We shared some evidence in our Annual Report 2010-2011; since then we have commissioned and published research by Leicester University into the issue of consumer confusion in seeking redress. Academics at Leicester University looked in to redress issues around will writing in depth, and found that access to redress in this area, along with probate, was confusing and posed some risk of consumer detriment. The report also looked into other areas where similar issues were at play; we have included a copy of this research report with this submission.

A key tenet of the Act was to bring consumer benefit from innovation and increased choice through competition in the legal services arena. The cases we are seeing highlight that - as is to be expected - business innovation can, and is, happening independently of regulatory structures and frameworks. The area of wills and probate has shown itself to be at the forefront of some of these market developments, with a rise in use of legal products in relation to wills, diverse providers in the marketplace - from the post office, to banks and then to professional and specialised online providers. Online firms are also often engaged in sub-contracting arrangements which see the reserved legal activity being conducted by different organisations / firms. This has resulted in the evolution of multi layered and complex business structures, some of which can fall within regulation, and some outside.

As an Ombudsman scheme we have significant concerns about the impact that these innovations are having on consumers with regards to rights and access to redress. We are interested to learn how your proposed approach to regulation will help us all achieve greater clarity in this increasing complex market place.

For us, these examples leave us with a need to clarify the bounds of our jurisdiction – consumers deserve clarity about when and why they are able to access redress for some of these business models and service providers but not for others. The complaints we are seeing tell us that companies are finding ways to develop and innovate, leaving evidence of consumer confusion about how to find help when things have gone wrong. Rather than just being part of a changing legal services market, it seems we are seeing a changing approach to how the more complex consumer services are delivered more generally – a joining up across financial, accountancy and other services, as illustrated in the broad spectrum of providers of estate administration services. We believe this requires a less segmented response to regulation and redress.

Outcomes for consumers

The Panel recommended a suite of tools to drive standards in the area of will writing. The recommendation included provision for redress, stating that providers should be insured, contribute to a compensation fund (if estate administration falls within scope) and fall within the jurisdiction of the Legal Ombudsman. Some of their other suggestions, such as clear codes of conduct, are also critical to support effective redress, as it is key that providers understand the standards expected of them more generally.

As we have said previously, we are keen to ensure that the other aspects of consumer protection – speedy discipline and compensation arrangements – tie up with redress and insurance. This is vital in ensuring that, when things do go wrong and impact on consumers, the system has robust mechanisms in place to provide an adequate, joined up, safety net. In our recently published Strategy 2012-2015 and Business Plan 2012-2013 we committed to look at how we could use the provisions in the Legal Services Act to create a voluntary jurisdiction under section 164 to fill these gaps and ensure access to free and fair redress for consumers of legal services. We look forward to developing this approach with you as you continue to grapple with the vital issue of how regulation and redress should interact in these broader areas of legal services.

Thank you again for the opportunity to respond to this discussion paper. If you would like to discuss in more detail any of the issues raised here, please contact Sian Lewis, Policy and Research Officer, Legal Ombudsman at sian.lewis@legalombudsman.org.uk.