POL00203973

From: Swil, Jonathan GRO
Sent: Thur 24/04/2014 5:26:18 PM (UTC)
To: David Oliver GRO
Cc: Belinda Crowe GRO carolyn.low@ GRO Band, Christa GRO
Subject: RE: Further questions
Attachment: A18064365 v0.2 Post Office Limited_ex gratia.docx

David

I attach a short note on ex gratia payments. To be clear, ex gratia payments do not have legal consequences (if a release is not obtained) and so the points we make are on the basis of common sense rather than a reflection of legal principles.

As to conditional fee arrangements, it is hard to know exactly what effect they will have without knowing their terms. On the one hand, the solicitors will not be paid – or paid as much – if the client is not "successful." On the other hand, solicitors are usually unwilling to do further work if they think that the claim has very low prospects of success as they will be working either for free or for reduced rates. The following points should be borne in mind:

- Conditional fee agreements ("CFAs") by definition involve a party agreeing to pay their solicitor's fees only if the party is "successful". If the party is successful, then they will usually have agreed also to pay an additional success fee which is statutorily limited to be up to 100% of the solicitor's base fees (i.e. not including other costs such as disbursements etc.).

- What constitutes "success" for the purpose of a CFA will depend on the terms of each particular CFA. This will be important. For example, if success means obtaining the full value of the amount claimed, then it may be that there will be little incentive for a solicitor to encourage his client to agree any settlement. Of course, because the solicitor does not get paid (as much or at all) if he does not achieve "success" for his client, he may not wish to take the risk of encouraging hopeless cases and "throwing good money after bad". Accordingly, the extent of any such incentive to engineer a protracted settlement process may (at least in the context of the Scheme) be more limited than it might appear. In any event, it is difficult to know whether and if so to what extent such incentive exists in any particular case because we do not know the terms of the CFAs. Further, if, by contrast, success means obtaining only a modest monetary (or other) upside for the client, then the solicitor might be expected to more readily encourage their client to agree a settlement.

We should point out that solicitors' duties require them to act in the best interests of their clients regardless of the solicitors' remuneration or how its payment is structured, so in principle, we would not expect the motives of a solicitor subject to a CFA to influence any settlement. Whether that will be the case in the present context, particularly in light of the Post Office's experiences to date, is another matter.

- If the outcome of any settlement still leaves an applicant liable for his solicitor's fees (we assume this could be the case although it is perhaps somewhat unlikely, notwithstanding the Post Office's existing agreement to pay limited amounts for legal assistance in respect of applications to the Scheme), then he would have incentive to achieve an outcome which, while still favourable to him, does not constitute "success" under the CFA so that he will not be liable to pay the success fee as well. This may provide incentive for the applicant to settle more readily with the Post Office and more so in the Post Office's favour.

- The Post Office should be aware that if it agrees to pay an applicant's costs in any settlement those costs might include a success fee in addition to the other party's solicitor's base fees (although it would be open to the Post Office to negotiate as it sees fit to avoid paying any success fee or any of the applicant's legal costs). To the extent a claim were to progress to litigation and the relevant CFA was agreed on or after 1 April 2013, then the Post Office cannot be ordered to pay any success fee (even if it were ordered to pay the other party's solicitor's base fees i.e. if the Post Office lost the case). The Post Office could be ordered to pay success fees under CFAs agreed before 1 April 2013.

Do let us know if you have any questions about the note or our thoughts above.

Kind regards

POL00203973

Jonathan

From: David Oliver GRO
Sent: 23 April 2014 11:16
To: Swil, Jonathan
Cc: Belinda Crowe; carolyn.low GRO Band, Christa
Subject: RE: Further questions

Jonathan

Thanks for this. We are reviewing here at the moment. One initial thought would you be able to provide a similar (but shorter) treatment of ex-gratia payments?

Also we have been informed that the majority of our applicants have entered conditional fee arrangements. What would Linklaters view be on the impact that is likely to have on settlement?

Many thanks

david

David Oliver
Programme Manager
Initial Complaint and Mediation Scheme
GRO
Mobile GRO

From: Swil, Jonathan GRO
Sent: 22 April 2014 19:19
To: David Oliver GRO
Cc: Belinda Crowe; carolyn.low GRO Band, Christa
Subject: RE: Further questions
Importance: High

David

I attach a suggested first draft of the letter to the Chairman of the Working Group and the settlement principles document you have requested.

You will see that the later parts of the letter cover the legal principles, which should largely be familiar as they are drawn from our initial report. The opening section of the letter is a first attempt at pitching the message you might want to send to the Working Group and others who will see the letter. We fully appreciate that the message will require fine tuning and so that section may well need amending according to precisely how you would like it put (there are currently two suggested comments which if you agree with them will require your input in any event). We hope you find our first attempt at the opening message helpful and are happy to suggest amendments and/or further wording, and to implement them to the extent you would like us to "hold the pen".

Do also let us know if you have any comments on the settlement note.

Kind regards

Jonathan

POL00203973

From: David Oliver GRO
Sent: 22 April 2014 12:35
To: Swil, Jonathan
Cc: Belinda Crowe; Carolyn.Low GRO
Subject: Further questions

Jonathan,
Thanks for the quick chat just now.

As discussed it would be helpful to have a document on the principles against which we might make a settlement payment as well as your thoughts on the circumstances and the Quantum (accepting that you won't be able to produce a figure as that would be case specific).

In terms of format I think it would be helpful to have as a document so that we could annex to a Board paper if appropriate. Grateful if it can be sent over with the letter later today.

Many thanks

david

David Oliver
Programme Manager
Initial Complaint and Mediation Scheme
GRO
Mobile GRO

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