

# Exercising our discretion to make a payment (Rule 2)

5 July 2021

## *Status*

This guidance is to help you understand how we make decisions on applications received for payments out of the SRA Compensation Fund (the Fund).

## *Who is this guidance for?*

This guidance is for all applicants seeking a payment from the Fund and for those assisting applicants with their application.

## *Purpose of this guidance*

This guidance explains how we will exercise our residual discretion when considering applications for payments out of the Fund.

## *Discretionary fund*

The Fund is a discretionary fund – no applicant has an enforceable right to a payment. The Fund has finite resources and is financed by those we regulate. It has never been intended that the Fund would assume an open-ended liability for applications properly brought under the rules. We give priority to applications or classes of applications that we think are the most pressing to be met out of the Fund.

There may therefore be cases where, even though a loss may have been caused by dishonesty, failure to account or failure to insure by someone we regulate, we will nonetheless refuse to make, or reduce, a payment out of the Fund.

This may be due to the application of our rules – such as when the application is out of time or the applicant caused their own loss; or it may be that we exercise our general discretion to refuse the payment – we refer to this as our residual discretion.

## *When will we use our residual discretion?*

This guidance cannot identify all circumstances when this discretion will be exercised. However, we will always do so in a way that:

- is reasonable, fair and in accordance with our public law duties
- is consistent with our regulatory objectives, and

- prioritises payments to the most deserving applicants – the courts have confirmed that the highest priority cases are those where the solicitor has personally taken money due to the client.

We have listed below some factors we may consider in deciding whether to exercise our residual discretion to refuse to consider an application, to make a payment or even reduce a payment. It should be noted that these applications may also be refused on other grounds in the rules, and applications may be refused for more than one reason.

- The applicant is exceptionally wealthy and will suffer no material hardship if we do not make a payment out of the Fund for the loss claimed.
- The loss arose in a speculative enterprise offering very high returns but carrying a commensurate level of risk. This might include, for example, crowd funding of speculative litigation with little prospect of success.
- The money was lost in tax avoidance schemes or other schemes where the purpose is contrary to public policy.
- The involvement of the solicitor was peripheral in the loss being incurred.
- The loss has been partially covered by another compensation scheme or form of redress which has limits to the amount it pays.
- The costs of investigating the application would be disproportionate or unreasonably burdensome.
- The applicant will not receive the benefit of any payment we make.
- The character, honesty and integrity of the applicant.

### *Example 1*

An individual paid £600,000 to a solicitor who improperly paid the money away to third parties. The applicant was able to recover £500,000 from the third parties and made an application to us for a payment out of the Fund for the balance.

The individual was very wealthy with a seven-figure annual income, numerous properties and extensive savings. They cannot show that the loss of £100,000 would cause them material hardship.

Even though the solicitor failed to account for the money, we refuse the application under our residual discretion as the applicant will not suffer any material hardship if a payment is not made.

### *Example 2*

A two-partner firm was acting for a client in a property purchase. One partner misappropriates the sale proceeds of £200k. The client

makes a claim against the firm which refers the claim to its insurer. The insurer initially suggests it may decline cover on the basis the other partner should have done more to prevent the theft. However, after threat of proceedings, the insurer makes an offer to settle of £150, 000.

The client accepts the offer and then makes an application to the Fund for the balance.

The Fund exercises its residual discretion and refuses a payment on the basis the applicant has reached a commercial settlement in full and final settlement of their claim.

### *Example 3*

A convicted fraudster makes an application to the Fund for an inheritance of £25,000 which has been misappropriated. They are serving a 10-year sentence for involvement in a series of frauds which has seen victims lose over £100m.

Although the legacy has been stolen by a solicitor, the Fund rejects the application under its residual discretion given the applicant's conviction for fraud.

### *Further guidance*

Read more information about our Compensation Fund

[<https://www.sra.org.uk/consumers/compensation-fund/>] .

### *Further help*

If you require further assistance, please contact the Contact Centre

[<https://www.sra.org.uk/contactus/>] .