



Guarantee Fund

Guidelines

In these guidelines a “solicitor” means a solicitor holding a practising certificate under the Solicitors (Scotland) Act 1980 and includes a firm of solicitors and an incorporated practice and also a registered foreign lawyer and a multinational practice.

1 General principles

- (a) The object of the Fund is to replace client money misappropriated by a solicitor or his or her employee(s). Although an applicant for a grant must be a person who has suffered loss through the actions of the solicitor, he or she need not necessarily be or have been the solicitor's client.
- (b) A grant out of the Fund is made wholly at the discretion of the Council of the Law Society of Scotland/Guarantee Fund Committee (“Council”). 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 even handed and consistent manner.

In exercising discretion Council is bound, and in law is entitled, to give priority to those classes of claims which they regard, for sustainable reasons, as having the most pressing claim to be met, wholly or in part, out of the fund. The core priorities are in respect of dishonesty by the solicitor, where his benefit is the claimant's loss, and hardship is suffered as a result of such loss.

- (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 some other means.
- (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.

- (e) The Council require that the "dishonesty" referred to in Section 43 of the Solicitors (Scotland) Act must have occurred within the course of a solicitor/client transaction of a kind which is part of the usual business of a solicitor.
- (f) An application for a grant must be made in the form prescribed by Council from time to time and which is available on the Society's website or on request from the Guarantee Fund Department of the Society, subject to the following:

An application must be notarised unless the sum claimed is less than £250 or in circumstances where Council exercises its discretion to waive that requirement

Claims arising in relation to a solicitor, where a judicial factor has been appointed to that solicitor, may, at the discretion of Council, be made using the same claim form submitted by the claimant to the judicial factor where a copy of that form is provided to Council together with a report from the Judicial Factor in a form prescribed by Council.

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 solicitor outside his or her practice as such or by a solicitor's employee acting outside the scope of his or her employment;
- (b) losses arising solely by reason of professional negligence by a solicitor;
- (c) losses which are the personal or trading debts of a solicitor where the facts would not otherwise give rise to a claim on the Guarantee Fund;
- (d) losses where the Council is satisfied that no evidence of dishonesty is available.

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

There are certain losses in respect of which it is not normally the practice of the Council to make a grant. Examples are where:

- (a) losses which result from, but do not form part of any misappropriation of money or money's worth.
- (b) the loss was in any way attributable to 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) following the authorisation of a principal grant, a supplementary grant for a sum in lieu of lost interest.
- (e) the Society was not notified of the applicant's loss within one year of the date upon which the loss first came or ought to have come to the applicant's knowledge, and there are no exceptional circumstances which, in the opinion of the Council, justify the delay.
- (f) the application is based on the failure by a solicitor to comply with an undertaking. The Fund does not generally underwrite a solicitor's undertaking. Failure on the part of a 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.

The Council does not consider the giving of an undertaking in circumstances which amount to the 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 solicitor, and such an undertaking would therefore not normally be regarded as having been given within the course of a solicitor/client transaction.

4 Requirements to be satisfied

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

- (a) that he, she or it has suffered or will suffer actual loss of money or money's worth;
- (b) that such loss has been occasioned by the dishonesty of a 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 solicitor was at the material time, a professional Trustee;
- (c) that any alleged dishonesty is evidenced either by the conviction of the 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 dishonesty.
- (d) that the loss is not recoverable from any other source.

5 Claims where the defaulting solicitor is or was in partnership

- (a) Losses caused by the dishonesty of a partner or employee will normally be recoverable from the Master Policy.
- (b) Accordingly, applicants should proceed with a claim against the remaining partners who, in turn, will make a claim against the Master Policy.

6 Institution of civil proceedings

As the Fund is a fund of last resort, in some cases the Council may require an applicant to institute civil proceedings including, where appropriate, insolvency proceedings against the 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.

7 Prosecution of dishonest solicitors

In all appropriate cases, the applicant will be expected to assist the Police in connection with enquiries into the commission of any criminal offence by the solicitor in respect of the alleged acts giving rise to the application.

8 Personal liabilities of a solicitor

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

9 Applicant's own behaviour

When considering any application, the Council takes into account the actings of the applicant and/or the applicant's staff 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 staff or agents to have contributed to the circumstances of the loss by failing to exercise a reasonable standard of care, or to have failed to submit an application for a grant within a reasonable time, 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.

10 Deduction from grants

- (a) The Council may deduct from any grant the costs that would have been due to the 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.
- (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.

11 Payment of interest on claims

Interest is not normally paid on claims. However, in exceptional cases, the Council may consider an application for a supplementary grant in lieu of lost interest on the amount of the grant from the date of the loss. If paid, a grant in lieu of interest will be at the discretion of the Council which will take into account that a grant is a gift and is therefore not subject to tax. A rate of base less 3.25% will be applied to sums under £10,000 and base less 2% to sums of £10,000 or over.

12 Staged Process

In terms of Section 43 of the Solicitors (Scotland) Act 1980 the Council require to adopt a staged process in the consideration of any applications for grants. These stages involve asking the following questions:-

- 1 Has pecuniary loss been suffered (and not otherwise made good)?
- 2 Has the loss been caused by the dishonesty of a solicitor?
- 3 Is the dishonesty of the solicitor in connection with the solicitor's practice?
- 4 Is the claim against the Guarantee Fund a claim of last resort?
- 5 Should the Council exercise its residual discretion to refuse a grant?
- 6 In the event that the Council consider that a grant should otherwise be made, has there been negligence on the part of the applicant which has contributed to their loss?
- 7 If there has been negligence which has contributed to the loss, should the Council refuse to make a grant or only make one to a limited extent?

13. Timescales

All applications for grants require to be submitted within one year of the loss coming to the applicant's attention. The Council may extend this period if satisfied that there are circumstances which justify the extension of the time limit.

The Council seeks to process all incoming correspondence, providing a response, where applicable, within 14 days. Where there has been no incoming correspondence for a period of 3 months, unless a longer period has been agreed between the parties, a written update of the position regarding the claim will be sought. A response will be required within 21 days. If no response is received a reminder letter will be sent allowing a further 14 days for a response. If no response is received the claim will be deemed to be abandoned and will not be reopened except on demonstration of a good cause.

14. Assignment

Where a grant is made it will only be paid on completion of an assignment of the applicant's rights of recovery. If the assignment is not returned, duly completed, within 28 days, the claim may be deemed to be abandoned.

15. Maximum grant

Other than in exceptional circumstances the maximum grant that will be made is £1.25 million.

16. Expenses

The applicant may also be able to claim all or part of their present solicitor's fee in bringing the claim to the Council. A simple claim does not normally require the assistance of a solicitor but if the claim is complex then consideration will be given to a payment of reasonable legal fees. Any fee of more than £250 will be considered in detail and may not be paid in full. Approval should be sought in advance of the work being carried out, where the fee will be or is expected to be in excess of £500, otherwise the fee may not be paid in full

17. Multi profession claims

Where the loss has been sustained as a result of the combined activities of more than one profession (e.g. a solicitor conspires with an accountant or surveyor, or is assisted by a negligent accountant or valuer), the Council will consider the role of each contributing factor in causing the applicant's loss. The Council will base any grant on its assessment of that portion of the loss primarily attributable to the acts of the solicitor as opposed to that portion which is primarily attributable to the acts or omissions of the other professional parties, or to the 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 solicitor's dishonesty.

Guarantee Fund

Particular types of loss

1. Applications for stamp duty/SDLT and the costs of registration

Please provide the following with your application.

- 1 A copy of the solicitor's completion statement for the purchase (or remortgage) and any related sale, together with copies of his or her bills, if available.
- 2 Evidence that the solicitor was paid any amount needed to complete the transaction..

Note - You will need to prepare a cash statement showing the money paid to the solicitor, and the money the solicitor paid out. Documentary evidence to show the payments and receipts is required.

2. Applications relating to mortgages

Please provide the following information and documents.

- 1 Is the person applying insured against the loss they have suffered (including any mortgage guarantee policy)?
- 2 If you have answered 'Yes' to question 1, please describe the type of policy and whether there is an excess or limit (if so, what is it?). Please say whether the person applying has made a claim on the policy and, if so, with what result.
- 3 Has the lender repossessed or sold the property? If so, please indicate the expected or actual amount recovered, including any payment received or expected under any mortgage guarantee policy.
- 4 A copy of the valuation report for the property and copies of any correspondence with the valuer or surveyor. If there is no valuation report, please explain why.
- 5 Is there any reason to believe that the property has been overvalued? If so, please explain why, and explain what action (if any) you have taken, or are thinking of taking, against the valuer.
- 6 Has the alleged misuse of the mortgage advance been reported to us or the police? If so, please provide details of the Fraud Squad or police station it was reported to, and any reference number.
- 7 Does someone live in the property at the moment? If so, who?
- 8 Details of any repayments (whether capital or interest) made on the advance, including the dates and amounts of the payments. We would prefer to see a print-out of the mortgage account.
- 9 What original title documents are available in relation to the transaction?
- 10 Do you know where the borrower is? If you do not know, what have you done to trace him or her?
- 11 Was the mortgage arranged through a mortgage broker or other agent? If so, please provide details.

3. Applications relating to failure to pay off a mortgage

Please remember the following, and send the following information and documents with the application form.

- 1 As long as the solicitor had enough money available to pay off the mortgage, a grant will normally pay off the full amount. If the solicitor did not have enough money, any payment will normally be based on the amount that the solicitor had available to put towards paying off the mortgage. You will have to pay any difference.
- 2 Applications may only be made by or on behalf of either the borrower, who is still responsible for the mortgage, or the buyer or their lender, who will suffer a loss if the mortgage is not paid off.
- 3 The Council will only consider an application from the lender whose mortgage has not been paid off if:
 - a receipt has already been released; or
 - it is acting as an agent for the borrower, the buyer or the buyer's lender, and the application contains a declaration confirming this.
- 4 The Council will need evidence of the exact amount that was originally needed to pay off the mortgage. The up-to-date amount needed to pay off the mortgage on the date on which the Council will decide your application will be requested. Please send the mortgage account number and the lenders' address. If the Council authorise a grant, we may make the payment direct to the lender.
- 5 Please confirm whether payments have been made to the mortgage account since the date of completion, the amount of those payments and details of mortgage interest charged and paid.
- 6 Please let us know where the title deeds are currently being held.
- 7 Please send a copy of the solicitor's completion statement and bill, if available.
- 8 If you cannot get a completion statement, you will need to prepare a cash statement. This should show how much money the solicitor received and paid out (supported by documentary evidence to show this) for both the sale and any related purchase. This should include:
 - (a) the sale price;
 - (b) the amount of your mortgage that the solicitor should have paid off;
 - (c) the estate agent's fees;
 - (d) information from the solicitor about the costs that he or she had agreed would be charged;
 - (e) the purchase price;

- (f) money the solicitor received in the form of the mortgage advance;
- (g) the deposit paid;
- (h) money the client has paid; and
- (i) other expenses (for example, stamp duty, land registry fees and searches).

4. Applications relating to state or trust funds

You should send in the following information and documents with the application form.

- 1 Copies of any ledger sheets which the solicitor may have sent you.
- 2 Copies of the most recent estate accounts that the solicitor prepared.
- 3 Copies of any bills that the solicitor may have presented for payment, or claimed to have presented.
- 4 Because the Council are concerned with actual loss, if the solicitor's estate accounts are out of date, challenged or missing, you will need to prepare a cash statement so we can find out the exact amount the solicitor has failed to account for. This should be a simple document that lists all the assets the solicitor has received, all the payments the solicitor has made and his or her costs for the work done so far. This should give a net balance (after deductions) which is the amount of the application. You should send supporting documents, for example, a letter from the person making the payment to the solicitor.
- 5 If a payment the solicitor has made is challenged, you will need to say why.
- 6 A copy of the will, grant of probate, grant of letters of administration or trust deed, as appropriate.
- 7 If the solicitor is the only executor or administrator of the estate, you may need to replace him or her before the Council can deal with an application. You should get guidance from us beforehand if you want to claim the costs of doing so from the fund.

5. Unpaid counsel's, expert's or agent's fees

Please remember the following points.

- 1 You should send us the application for a grant for these fees, along with:
 - copies of all unpaid fee notes;
 - the name of the client on whose behalf the instructions were given;
 - details of the case (for example, litigation, divorce proceedings, conveyancing and so on); and
 - the date the fee note was first delivered to the solicitor.

- 2 The Council need to receive evidence that the solicitor had received the money to pay the fees, but this may not be possible if the fee note has not been paid for a long time. If this evidence cannot be provided the Council may reject the application.

6. Overcharging of fees

1. You should send us the application for a grant for these fees, along with:

- Copies of all fee notes issued
- Details of fees already paid or taken
- Any evidence showing the extent of the overcharging e.g. account taxed by the auditor.

7. Applications for general client money or other losses

Please send the following information and documents with the application form.

- 1 Evidence to support your application. You will need to provide documents to show the amount that was paid to the solicitor. This could be receipts issued by the solicitor, bank statements or copies of any cheques paid to the solicitor (usually you can get these from your bank).
- 2 Details of why you sent the money to the solicitor, and of any money the solicitor paid out.
- 3 Copies of any bills that the solicitor may have presented for payment. If you cannot get these, details of the fee you agreed with the solicitor for the work.
- 4 Details of any other matters the solicitor was dealing with.