



## CONTRACTUAL TERMS FREQUENTLY ASKED QUESTIONS

### INDEX

#### Adopting the new Contractual Terms

- Q.1 I want to adopt the New Contractual Terms in their entirety, what do I need to do?
- Q.2 Who and what is an 'Authorised person'; how do I find out if someone is an 'Authorised Person.
- Q.3 I am happy to continue to operate under the Terms of Work on which Barristers offer their Services to Solicitors and the Withdrawal of Credit Scheme in Annexe G1 of the Code of Conduct – why has this been annulled?
- Q.4 Can I simply ignore these new terms and carry on as I was before?
- Q.5 Do I need to have Terms? Do I need to do anything?

#### Contractual implications

- Q.6 BMIF – Insurance – Am I covered ?
- Q.7 Accepting new instructions – can I rely on what is published on my website?
- Q.8 What records should I keep of cases not based on the Standard Contractual Terms?
- Q.9 I did not respond promptly on receipt of instructions. The solicitor is saying that, in default of a prompt response, it was OK to assume that the instructions could be considered to have been accepted. I do not like the terms that they are offered on and I wish to refuse them. Can I do this?
- Q.10 An instructing solicitor says that he never received an acknowledgement letter referring to the New Terms (it would appear that one was not sent) and is now refusing to pay in 30 days on the basis that he has not agreed to this or indeed anything. I have referred him to our published terms on the website and he does not accept these. What is my position?
- Q.11 The lay client has asked me to enter into a contract in addition to the one that I have with the solicitor. Can I do this?

Q.12 Do I need to agree a new contract for each piece of work?

Q.13 I accepted a return from a fellow member of Chambers and I was not aware that a different set of Terms had been agreed with that firm. Am I stuck with those Terms or can I insist on my own standard terms or the new Contractual Terms in Annexe T?

Q.14 The solicitor and I have agreed contractual terms but cannot agree the quantum of the fee nor can we agree when the fees should be paid. How can we resolve this?

Q.15 What is date of delivery?

### Changing the contractual terms

Q.16 The solicitor wants to agree a modest variation to the Standard Terms Contractual Terms. Will an exchange of letters suffice?

Q.17 The solicitor wants many of the contractual terms changed. Where can I get advice on this?

Q.18 A solicitor has asked me to enter into a contract that would appear to offend the Code of Conduct. What should I do?

Q.19 The solicitor is insisting on a 'pay when paid' clause in the contract. In effect, does this remove any liability to pay barristers at all? What incentive is there for a solicitor to chase a client to pay barristers' fees before their own or indeed at all?

Q.20 One of Chambers biggest clients wants to agree a different set of standard terms with Chambers and not all members are agreeable to the penalty clauses. Their Terms have penalty clauses attached relating to poor service. Can Chambers as an entity sign up to this?

Q.21 A firm of solicitors wants to enter into a general contract with Chambers. The Terms are different to our Standard Terms but they are generally acceptable. Is this OK?

Q.22 A solicitor has inserted a term into a proposed contract that says that I am liable for consequential loss. Can I agree to this?

### Cab rank rule and withdrawal from a case

Q.23 I started a case under the Chambers Standard Contractual Terms and the solicitor now wants to agree modestly different terms prior to delivering the brief for the final hearing. I have objected to the new terms but the solicitor says that I am instructed on the case and cannot now decline to do the case. Can I refuse to accept the brief?

Q.24 The solicitor has not paid me in a timely way. The final hearing, which will involve a substantial amount of work, is imminent and I doubt the solicitor will pay for that either. The solicitor says that I cannot withdraw at this stage as it would prejudice the client. Can I withdraw?

## Fees

Q.25. Using the new Contractual Terms, the solicitor and I agreed the fees and I undertook the work. The solicitor is now disputing the amount of fees that was agreed. What options are available to me?

Q.26 The solicitor has not paid my fee – can I report him to the Bar Council for non-payment?

Q.27 Who is the contract actually agreed with? And do I sue the firm or the solicitor? Is it a personal liability?

Q.28 A senior member of Chambers did a small piece of work for one of Chambers biggest clients. The solicitor is declining to pay as the client has cited some minor dissatisfaction with the work of that senior barrister. The senior barrister has said that he will sue for his fees unless he is paid and the firm has said that they will pull all of their work from Chambers if he does. Can Chambers stop him suing the solicitor or could Chambers just cover the fee? Is Chambers obliged to support the senior member of Chambers?

Q.29 I have an outstanding fee of £500 for which I wish to sue the solicitor in the small claims court. Where can I find out information about this? What is the maximum amount that I can sue for in the small claims court and does the amount that I sue for include interest?

Q.30 A firm owes me a substantial amount in fees but it has been taken over and the new firm says that the debt is not their problem. Who do I sue?

Q.31 What assistance will the Bar Council give me to sue for my fees?

## Invoices

Q.32 Invoices – I am using fee notes and wish to continue to do so but one client is insisting that I invoice him. Can I operate both systems concurrently?

## Interest

Q.33 How much interest can I charge? Do I have to charge interest?

## Copyright

Q.34 I have prepared an extensive advice and I understand that the solicitor is now using that advice for other clients of his. Can he do this?

## Adopting the new Contractual Terms

Q.1 I want to adopt the New Contractual Terms in their entirety, what do I need to do?

A. Under Regulation 8(1) of the Provision of Services Regulations 2009, "providers of services" such as barristers, should make their general terms and conditions of engagement available – and this would normally be on your website. You will therefore need to amend your website. You need not put the whole contract on your website. You can instead simply make reference to the relevant part of the Bar Code of Conduct (Annexe T). In addition, you do not have to publish your hourly rates.

You will need to advise your current solicitor clients of the change of your normal terms of engagement. This could also be used as a marketing opportunity. Allow sufficient time for your current solicitor clients to respond to you. Obviously you hope that you will never have to sue for your fees but you need to think in terms of worst case scenario – would you have the evidence in place to prove that your client knew that the instructions were being accepted on these new Contractual Terms?

Your acceptance of instruction letters/emails will need to reflect the fact that the instructions are being accepted on these Contractual Terms.

Any subsequent letters, for example chasing fees, would need to be amended. Your chamber's website or promotional material should be checked to ensure that the old terms are not being quoted.

Internal administrative procedures and policies should be reviewed – for example recording whether a variation or different terms have been agreed, whether there are changes to the billing and reminder cycles.

Work based on instructions accepted prior to the 31 January 2013 would be based on the old Terms/Withdrawal of Credit Scheme, even though the work is actually carried out after that date. Complaints of unpaid fees based on the old Terms of Work can still be made to the Bar Council under the transitional arrangements contained in the Rules relating to the List of Defaulting Solicitors and other Authorised Persons 2012. Check on the Bar Council's website <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/> on how to make such complaints after the 30 January 2013.

## **Q.2 Who and what is an 'Authorised person'? how do I find out if someone is an 'Authorised Person?**

A. Unlike the old Terms of Work/Withdrawal of Credit Scheme, these new Terms are for use by all Persons authorised by the SRA to carry out legal activities as defined under Section 18(1)(a) of the Legal Services Act 2007. The legal activities are listed in Section 12 of that Act as follows:

- (a) the exercise of a right of audience
- (b) the conduct of litigation
- (c) reserved instrument activities
- (d) probate activities
- (e) notarial activities
- (f) the administration of oaths

Schedule 2 of the Legal Services Act 2007 gives the definitions of those legal activities.

The SRA does not publish the names of Authorised Persons but does publish some names of Alternative Business Structures supervised by the SRA. Also, not all solicitors are listed on the Law Society's website. If in doubt about whether your prospective client is able to instruct, contact the SRA on 0870 606 2555 or email [contactcentre@SRA.org.uk](mailto:contactcentre@SRA.org.uk) to check the status of an individual or organisation.

**Q.3 I am happy to continue to operate under the Terms of Work on which Barristers offer their Services to Solicitors and the Withdrawal of Credit Scheme in Annexe G1 of the Code of Conduct – why has this been annulled?**

A. As the Terms of Work were unenforceable, its efficacy was limited. This was exacerbated by the fact that it is no longer a matter of professional conduct for solicitors to pay barristers' fees and the Solicitors Regulation Authority does not deal with complaints of unpaid fees. In addition, the Terms had been criticised for some time as being obsolete and unclear.

**Q.4 Can I simply ignore these new terms and carry on as I was before?**

A. The Terms of Work/Withdrawal of Credit Scheme will not exist as from the 31 January 2013. It is not therefore possible to carry on as before if you were using those Terms as your normal Terms of engagement.

**Q.5 Do I need to have Terms? Do I need to do anything?**

A. The Terms of Work/Withdrawal of Credit Scheme were, in the Code of Conduct, the default terms in the absence of alternative Terms having been agreed. With the abolition of those Terms on the 31 January 2013, there are no default terms. If a barrister is unpaid, there is no protection available from the Bar Council as the Withdrawal of Credit Scheme is abolished and the List of Defaulting Solicitors would not apply. The new Contractual Terms are not default terms.

The presumption against barristers and solicitors intending to contract may no longer apply. Therefore you may find that a contract has been agreed in oral negotiations between solicitors and your clerk, or by exchange of emails or a Court may infer terms. A simple contract like that may extend the barrister's liability beyond the cover provided by BMIF. Therefore it is unsafe to do nothing.

### **Contractual implications**

**Q.6 BMIF – Insurance – Am I covered ?**

A. The new Contractual Terms do not create any liabilities for barristers that do not arise in any event at common law. Neither do they impose any further limitation of liability. BMIF Guidance on the impact of the contractual terms and insurance cover can be found at <http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf> Further advice can be found in answer to Question 17.

**Q.7 Accepting new instructions – can I rely on what is published on my website?**

A. There are no default terms in the Bar Code of Conduct on or after the 31 January 2013. Consequently you cannot assume that these new contractual terms or the terms on your website (if different) can be considered automatically as the basis upon which your instructing solicitors or authorised person is instructing you. Although not a professional requirement, it would be unwise not to refer to and to confirm in writing the basis upon which you are accepting instructions. Simply having the terms on your website may not be sufficient notice.

**Q.8 What records should I keep of cases not based on the Standard Contractual Terms?**

A. You should keep records of the terms upon which the cases were accepted; evidence of the instructions; and evidence of any agreement about fees.

**Q.9 Due to the pressure of other commitments I did not respond promptly on receipt of instructions. The solicitor is saying that he took the view that in default of a prompt response, it was OK to assume that the instructions could be considered to have been accepted. I do not like the terms that they are offered on and I wish to refuse them. Can I do this?**

A. Whether the delay was such that the solicitor or lay client has good ground to lodge a complaint to the Bar Standards Board is a matter of professional conduct and the decision would be based on the particular facts of the situation – for example, the type and complexity of the instructions, were the instructions marked urgent, how long was the period of delay. Did the acknowledgement of the instructions letter clearly explain that the acknowledgement of receipt is not an acceptance of the instructions? Clause 4.1 of the new Terms provide that a barrister has a reasonable time to review the instructions before informing the Authorised Person whether or not he accepts the instructions.

You are under no obligation to accept the instructions if the solicitor insists on terms other than new Contractual Terms or the barrister's published terms of engagement. However, whether you accepted the solicitor's instructions because of the delay in responding is a legal question and the answer is dependent on the particular circumstances of the situation.

**Q.10 An instructing solicitor says that he never received an acknowledgement letter referring to the New Terms (it would appear that one was not sent) and is now refusing to pay in 30 days on the basis that he has not agreed to this or indeed anything. I have referred him to our published terms on the website and he does not accept these. What is my position?**

A. You would need to consider whether on the facts you can prove that the contract between you and the solicitor was agreed on the new Contractual Terms. It may assist if the solicitor client received a communication advising of your intention to change your normal terms of engagement from the Terms of Work/Withdrawal of Credit scheme to the new Contractual Terms as suggested in the Q1 above. Ultimately, it is a matter of evidence.

**Q.11 The lay client has asked me to enter into a contract in addition to the one that I have with the solicitor. Can I do this?**

A. So long as you continue to receive instructions from the solicitor, you can enter into a contract with the lay client – for example for the payment of fees. Barristers should make sure that the terms with the lay client do not conflict, but dovetail, with the contractual terms agreed with the solicitor. You should ensure that the contract does not give rise to liability that is wider than the cover provided by the BMIF.

**Q.12 Do I need to agree a new contract for each piece of work?**

A. Ultimately, the answer depends on whether you have sufficient evidence should you need to sue for the fees; and whether the solicitor is seeking to rely on different terms. The Bar Council considers that it is probably sufficient if you have advised your existing clients of the change to new terms and that the written acceptance of instructions restates that the new terms are being used. If, however, the solicitor is seeking to rely on different terms, you will have to negotiate directly with the solicitor.

**Q.13 I accepted a return from a fellow member of Chambers and I was not aware that a different set of Terms had been agreed with that firm. Am I stuck with those Terms or can I insist on my own standard terms or the new Contractual Terms in Annexe T?**

A. If you have accepted the return, then you have accepted the terms upon which the instructions were given, including the different set of terms. Once you have accepted the instructions, you are bound by them.

**Q.14 The solicitor and I have agreed contractual terms but cannot agree the quantum of the fee nor can we agree when the fees should be paid. How can we resolve this?**

A. These matters can only be resolved by negotiation. You may wish to bear in mind that the Code of Conduct, at paragraph 604(b) entitles a barrister to refuse instructions if the instructions are offered at an improper fee. In addition, as the standard Contractual Terms provide for payment within 30 days, the amended Cab Rank Rule entitles the barrister to refuse the instructions if the instructing solicitor or Authorised Person declines to use those Terms or the barrister's own published terms. Consequently the barrister is able to refuse the instructions on the basis that the payment date is not accepted at 30 days (assuming the barrister's own published terms of engagement do not provide a payment date which meets the solicitor's demand).

The dispute resolution and joint tribunal procedures are generally suitable for when there are disputes over what has been agreed, rather than what should have been agreed.

**Q.15 What is date of delivery?**

A. The date of delivery is important for the purposes of being sure when you can start to charge interest or take enforcement action for unpaid barristers' fees. It is the date that the Invoice (which includes a fee note not amounting to a VAT invoice) was received by the solicitor under Clause 12.2 of the Contractual Terms. Dates of deemed receipt are set out in Clause 18.2.

**Changing the Contractual Terms**

**Q.16 The solicitor wants to agree a modest variation to the Standard Terms Contractual Terms. Will an exchange of letters suffice?**

A. Yes. Clause 2.2 of the Terms states that the Terms can be varied by the parties, in writing, including by exchange of emails. Be sure to retain the evidence of the change of Terms.

**Q.17 The solicitor wants many of the new Contractual Terms changed. Where can I get advice on this?**

A. The Bar Council strongly advises that great caution is exercised before entering into a contract which varies from the Standard Contractual Terms. You need to be very sure that the proposed Terms do not conflict with the Bar Code of Conduct. What is more likely to be a danger is that a barrister might be extending his potential liability beyond the limits of his BMIF cover. The new standard Contractual Terms exclude barristers' liability beyond that which exists at common law in the absence of a contract.

Clause 3.1(x) of the Bar Mutual Indemnity Fund's 2013 Terms of Cover excludes "*Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that (a) such liability would have been incurred irrespective of the terms of such contract and would otherwise fall within the provisions of these Terms of Cover .....*"

BMIF Guidance on the impact of the contractual terms and insurance cover can be found at <http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf> The BMIF guidance seeks to explain the types of contractual term which may, and those which do not, have an impact on the extent to which barristers are insured against claims, and it includes Q&As on this topic. If the guidance note does not address the particular situation, or gives rise to concern over insurance cover, then it may be prudent to check with BMIF directly (the guidance note contains the necessary contact details) before agreeing to alternative terms potentially affecting liability.

It is impossible to list possible variances which would expose barristers to greater liability than their BMIF cover but possible areas could be where the barrister is made liable for the solicitor's loss of profits, or is made strictly liable for the advice given (i.e. liable even in the absence

of negligence or failure to take reasonable care), or where the barrister is held responsible for loss suffered by clients of the solicitor other than those on whose behalf he was instructed (e.g. where the advice is used generally instead of for the specific case for which it was given).

There are other terms you will need to consider: for example, you need to ensure that contract terms do not breach the cab rank rule by purporting to restrict clients from whom you can accept work in the future.

Further, very great caution would have to be exercised before entering into a contract which bound chambers as a whole, because that might give rise to common interests which would prevent members of chambers from acting against each other. Further, you might become liable for each other, which would be outside the scope of BMIF's cover.

The Law Society issued a Practice Note on the 24 January 2013 on the contractual terms and, as a consequence, a number of solicitors are seeking changes to the contractual terms, particularly in respect of Money Laundering, Intellectual Property, liability of barristers and fees. Chambers are strongly advised to read the Bar Council's Guide in respect of this Practice Note before agreeing to these changes. The Guide can be found on the Bar Council's Fees Collection webpage, at <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/guidance-on-law-society's-practice-note/>

Other amendments being suggested by some solicitors give particular cause for concern. For example, amendments which purport to create an absolute assignment of intellectual property rights in barristers' work leave open the possibility of that work being used inappropriately for other matters.

This issue is also addressed in paragraph 3 of the Bar Council's Guide to the Contractual Terms, which can be found at <http://www.barcouncil.org.uk/guidetocontractualterms>

Solicitors have also asked that the barrister carry out conflicts checks within chambers, which is wholly inappropriate in the context of individual, self-employed barristers, who could find themselves in breach their duties of confidence to other clients.

As regards liability for and timing of the payment of fees, whilst amendment of those terms would not affect professional indemnity cover, barristers should carefully consider the effects of any proposed amendments, which could in some cases result in giving almost unlimited free credit, or in having to rely on recovery from a third party over whom the barrister has limited control.

**Q.18 A solicitor has asked me to enter into a contract that would appear to offend the Code of Conduct. What should I do?**

A. Refuse. You are under no obligation to accept the instructions if the solicitor refuses to use the new Contractual Terms or the barrister's published terms of engagement and any breach of the Code of Conduct may lead to disciplinary proceedings.

**Q.19 The solicitor is insisting on a 'pay when paid' clause in the contract. In effect, does this remove any liability to pay barristers at all? What incentive is there for a solicitor to chase a client to pay barristers' fees before their own or indeed at all?**

A. You are correct that such a clause would leave barristers vulnerable to non-payment in the manner you describe. Obviously whether or not you agree to such a clause is a matter of negotiation. Possibly an option to consider is to have a time limit, so that the solicitor is obligated to pay after a period of time irrespective of being placed in funds. Also think about ensuring that the solicitor will agree to chase your fees properly and will assign to you the right to pursue the client in the event of non payment.

**Q.20 One of Chambers biggest clients wants to agree a different set of standard terms with Chambers and not all members are agreeable to the penalty clauses. Their Terms have penalty clauses attached relating to poor service. Can Chambers as an entity sign up to this?**

A. Part of the answer lies in the constitution of your chambers. As noted above, agreeing contracts as a chambers may have consequences in terms of being unable to act against each other and/or being liable for each other's defaults. However, it should be pointed out that the new Contractual Terms are between the barrister (not his chambers) and the Authorised Person who is instructing. We strongly advise that barristers do not agree to extending their potential liability beyond the limits of their BMIF cover. The new Contractual Terms do not extend nor restrict the liability of barristers that existed prior to the 31 January 2013. Clause 3.1(x) of the Bar Mutual Indemnity Fund's terms of cover excludes "*Claims or Disciplinary Proceedings in respect of any liability incurred under any contract, save to the extent that (a) such liability would have been incurred irrespective of the terms of such contract and would otherwise fall within the provisions of these Terms of Cover .....*" BMIF Guidance, which includes Q&As on the type of contractual terms which might cause difficulties in this respect can be found at <http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf>

Paragraph 604(h) of the Code of Conduct enables a barrister to refuse instructions where the potential liability for professional negligence in respect of the case could exceed the level of professional indemnity insurance which is reasonably available and likely to be available in the market for him.

**Q.21 A firm of solicitors wants to enter into a general contract with Chambers. The Terms are different to our Standard Terms but they are generally acceptable. Is this OK?**

A. As described above, the new Contractual Terms are between the barrister (not his chambers) and the Authorised Person who is instructing. Barristers are self-employed individuals. Barristers are not employed by the chambers. Besides the question of whether a chambers could agree a general contract which binds the barristers, agreeing contracts as a chambers may have consequences in terms of barristers being unable to act against each other, and/or in being liable for each other's defaults. However chambers can of course come to an arrangement or an understanding as regards terms for particular professional clients, which the chambers' barristers would usually use for accepting instructions.

**Q.22 A solicitor has inserted a term into a proposed contract that says that I am liable for consequential loss. Can I agree to this?**

A. Barristers are free to agree whatever terms they wish, provided they are legal and do not conflict with the Bar Code of Conduct.

With regard to consequential loss, we would urge great caution before agreeing to this. The new standard contractual terms do not create, extend or reduce any liabilities for barristers that do not arise in any event at common law and consequently do not extend the barrister's potential liability beyond the limits of BMIF cover. Extending the barrister's liability to cover consequential loss may extend the barrister's liability beyond that which is covered by his BMIF insurance. It must be borne in mind that paragraph 604(h) of the Bar Code of Conduct enables a barrister to refuse instructions where the potential liability for professional negligence could exceed the level of professional indemnity insurance which is reasonably available and likely to be available in the market for the barrister to accept. Paragraph 204(c) of the Bar Code of Conduct provides that a barrister may supply legal services to the public only if he is covered by insurance against claims for professional negligence arising out of the supply of his services. If the proposal is regarding the solicitor's consequential loss, then agreement is very likely to be outside the scope of BMIF's cover. If the proposal is about the lay client's consequential loss, then it is likely to be within the scope of BMIF's cover. Further guidance from the Bar Council and BMIF on this matter can be found at <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/guidance-on-law-society's-practice-note/> and <http://www.barmutual.co.uk/fileadmin/uploads/barmutual/Guidance%20Note%20to%20Members%20-%20February%202013.pdf> respectively.

### **Cab rank rule and withdrawal from a case**

**Q.23 I started a case under the Chambers Standard Contractual Terms and the solicitor now wants to agree modestly different terms prior to delivering the brief for the final hearing. I have objected to the new terms but the solicitor says that I am instructed on the case and cannot now decline to do the case. Can I refuse to accept the brief?**

A. Having agreed terms, neither party (barrister and the instructing Authorised Person) is entitled to demand, unilaterally, that different terms be substituted.

However, the Bar Code of Conduct is paramount and, under paragraph 610(d) of the Code, barristers should not return any instructions or withdraw from a case in such a way or in such circumstances that the client is unable to find other legal assistance in time to prevent prejudice being suffered by the client.

If you are using the Bar Council's new Standard Contractual Terms, then you should note that clause 11.2.1 does allow for the periodic review by the barrister of his fees if the fees had been agreed on a hourly rate basis or if there has been a significant change in his status or seniority.

**Q.24 The solicitor has not paid me in a timely way, the final hearing, which will involve a substantial amount of work, is imminent and I doubt the solicitor will pay for that either. The solicitor says that I cannot withdraw at this stage as it would prejudice the client. Can I withdraw?**

A. Clause 12.6.3 in the new contractual terms provides that, if fees in a case remain unpaid for 30 days or more, the barrister is able to refrain from doing any further work on the case unless payment for that further work is made in advance, subject to the barrister's obligations to the Court and paragraph 610 of the Bar Code of Conduct. Of particular importance is paragraph 610(d) of the Code which forbids the barrister from returning the instructions or withdrawing in such a way that the client is prejudiced through lack of time to obtain alternative legal assistance.

### **Fees**

**Q.25 Using the new Contractual Terms, the solicitor and I agreed the fees and I undertook the work. The solicitor is now disputing the amount of fees that was agreed. What options are available to me?**

A. You can seek to resolve the matter by use of any dispute resolution procedure. However, the Joint Tribunal service is still available for use by barristers and solicitors for any fee disputes. The Joint Tribunal service is free and is run jointly by the Bar Council and the Law Society. The Tribunal itself is made up of a member appointed by the Bar Council and a member appointed by the Law Society and usually reaches a decision on the basis of written statements from barrister and solicitor. Information on the Joint Tribunal service can be found on the Bar Council's website at <http://www.barcouncil.org.uk/jointtribunalservice>

**Q.26 The solicitor has not paid my fee – can I report him to the Bar Council for non-payment?**

A. Complaints can be made against solicitors and Authorised Persons in the following situations:

1. The barrister has obtained a judgment for fees against the solicitor or Authorised Person
2. The solicitor has not paid a joint tribunal award
3. Where the instructions were covered by a full publicly funded certificate, but remains unpaid due to the failures of the instructing solicitor. The solicitor may have failed to submit the final claim to the Legal Services Commission or, where there is eventually no claim on the legal aid fund because costs are to be recovered from the other side, the instructing solicitor fails to recover those costs or pass on the monies received to the barrister so that the barrister remains unpaid.
4. Where work was based on instructions accepted before 31 January 2013 on the basis of the former '*Terms of Work*', a complaint about non-payment of fees for that work may be made without having first to obtain a judgment or a joint tribunal award.

On receipt of a complaint regarding unpaid fees, the Chairman of the Bar Council will write to the solicitor in question requiring payment to be made. Normally, the Chairman of the Bar Council will place the solicitor on the advisory '*List of Defaulting Solicitors and other Authorised Persons 2012*' if two or more such complaints have been made, unless the Chairman is persuaded that it would be inappropriate to do so.

The Rules relating to the advisory '*List of Defaulting Solicitors and other Authorised Persons 2012*' and the Scheme for *Complaining to the Bar Council for Publicly Funded matters* on the Bar Council's website can be found on the Bar Council's website <http://www.barcouncil.org.uk/listofdefaultingsolicitors> and information on making complaints can be found on <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/fees-collection/>

**Q.27 Who is the contract actually agreed with? And do I sue the firm or the solicitor? Is it a personal liability?**

A. The new Contractual Terms are stated to be an agreement between the barrister and the Authorised Person. The Authorised Person is defined as the person approved by the SRA (see Q2 above) and includes all successors and assignees. Although the Authorised Person can be an individual, it is likely to be the "firm" and therefore you would sue the firm. If the firm is a true partnership, then the partners are likely to be joint and severally liable. Save for that, there is no provision in the new Contractual Terms that an individual solicitor is personally liable for the instructions given in the name of the firm.

**Q.28 A senior member of Chambers did a small piece of work for one of Chambers biggest clients. The solicitor is declining to pay at this stage saying that the client has cited some minor dissatisfaction with the work of that senior barrister. The senior barrister has said that he will sue for his fees unless he is paid and the firm has said that they will pull all of their work from Chambers if he does. Can Chambers stop him suing the solicitor or could Chambers just cover the fee? Is Chambers obliged to support the senior member of Chambers?**

A. The introduction of the contractual terms does not affect the provisions of the Code of Conduct in respect of the position of chambers and the responsibility of the Head of Chambers to ensure that fee notes of all former members, pupils and members irrespective of their standing, are sent expeditiously and pursued efficiently. The Bar Council is not in a position to comment on the procedures or decisions of a chambers unless such procedures or decisions conflict with the Bar Code of Conduct.

**Q.29 I have an outstanding fee of £500 for which I wish to sue the solicitor in the small claims court. Where can I find out information about this? What is the maximum amount that I can sue for in the small claims court and does the amount that I sue for include interest?**

A. The maximum amount that you can sue for in the small claims court is £5,000. However, creditors can make a claim on line for any amount through the new County Court Money Claims Centre (the CCMCC). The CCMCC centralises the administrative functions and manages the early

stages of claims, up to allocation of the case in the relevant court. Information can be found in <https://www.gov.uk/make-court-claim-for-money/overview> See also the answer to question 33.

**Q.30 A firm owes me a substantial amount in fees but it has been taken over and the new firm says that the debt is not their problem. Who do I sue?**

A. It is unlikely you would be able to sue the new firm unless (exceptionally) the new firm took over the debts of the old firm. Who or whether you can sue depends very much upon the constitution of the firm who instructed. Was the firm a sole practice or a partnership? If the answer is yes, possibly the individual practitioner or partners can be held liable. However if the "firm" was a limited company or an LLP, you will only be able to sue the old practice – which may or may not have assets.

**Q.31 What assistance will the Bar Council give me to sue for my fees?**

A. Regrettably the Bar Council does not have the resources to provide practical assistance in enabling barristers to sue for his fees, though of course the Bar Council will happily give advice on these Terms and on the Code of Conduct.

### **Invoices**

**Q.32 Invoices – I am using fee notes and wish to continue to do so but one client is insisting that I invoice him. Can I operate both systems concurrently?**

A. Yes, but you would have to be very careful with your records as it affects the barrister's tax situation. Essentially, a fee note is not deemed to be an invoice and is not treated as an invoice until the fee note is reissued as a combined receipt and VAT invoice. This practice arises from the Regulation 92 of the VAT (General) Regulations 1995, whereby the barrister's liability for payment of VAT does not arise until the fees are paid. With invoices, the barrister's liability for payment of VAT arises when the invoice is issued, not when the fees are paid. Further information is available on page 48 of the Bar Council's 'Taxation and Retirement Benefits Guidance' [http://www.barcouncil.org.uk/media/171635/taxation\\_and\\_retirement\\_benefits\\_-\\_6th\\_edition.pdf](http://www.barcouncil.org.uk/media/171635/taxation_and_retirement_benefits_-_6th_edition.pdf)

### **Interest**

**Q.33 How much interest can I charge? Do I have to charge interest?**

A. The new Contractual Terms provide at clause 12.6.1 that interest can be charged in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 and the Terms also provide that the interest can be charged from 30 days after the date of the delivery of the fee note. At present, the rate of interest is governed by the Late Payment of Commercial Debts (Rate of

Interest) (No 3) Order 2002 (SI 2002 no 1675) and provides for interest to be charged at 8% above the Bank of England bank (base) rate. The Bank of England's link to the bank rates is <http://www.bankofengland.co.uk/boeapps/iadb/Repo.asp?Travel=NixIRx>

Remember, it is entirely optional as to whether interest is charged. The contractual terms say the barrister is "entitled" to charge interest. This does not mean he "has" to charge interest. In addition, of course, the barrister and instructing person can agree a different rate of interest or agree not to charge interest at all.

The Late Payment of Commercial Debts Regulations 2002 (SI 2002 no 1674) allows the barrister to charge a fixed sum, in addition to the interest charged under the Commercial Debts (Interest) Act 1998, to compensate for the costs of collecting the debt. The sum is £40 for a debt of less than £1,000, £70 for a debt of £1,000 or more but less than £10,000 and £100 for a debt of £10,000 or more.

### **Copyright**

**Q.34 I have prepared an extensive advice and I understand that the solicitor is now using that advice for other clients of his. Can he do this?**

A. Clause 9.1 of the standard Contractual Terms clearly require that the barrister's written permission is obtained by the solicitor before he can use that advice for purposes other than those for which it was prepared. The work was carried out by the barrister for a particular case and for a particular purpose and it must not be used for other purposes without the barrister's written consent.

**For queries or further information** please contact the Fees Collection Office, General Council of the Bar, by telephone 020 7611 1318, email [fees@barcouncil.org.uk](mailto:fees@barcouncil.org.uk) or by post: Fees Collection Office, General Council of the Bar, 289-293 High Holborn, London WC1V 7HZ (DX 240 London Chancery Lane).

