



# Standard Terms & Conditions

Posted on the websites of the Chambers at 9 Gough Square and treated as annexed to the Conditional Fee Agreement between solicitor and counsel

9 GOUGH SQUARE – OCTOBER 2009 – CFA STANDARD TERMS AND CONDITIONS

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## INTRODUCTION

1. These standard terms will be incorporated into an Agreement, called a “short form conditional fee agreement” which will be sent to the Solicitor in each case.

## TERMINOLOGY

2. The parties to the agreement in any particular case are defined in the short form conditional fee agreement which will be sent to the Solicitors.

## CONDITIONS PRECEDENT

### 3. Papers provided to Counsel

The Solicitor shall provide Counsel with the following documents:

- (1) all relevant papers and risk assessment material, including all advice from experts and other solicitors or barristers to the Client or any Litigation Friend in respect of the claim, which is currently available to the Solicitor;
- (2) any offers of settlement already made by the Client or the Opponent;

#### If requested by counsel:

- (3) a copy of the conditional fee agreement between the Solicitor and the Client and the Law Society's Conditions as they apply to the claim or a copy of any relevant collective conditional fee agreement; and
- (4) written confirmation that "after the event" or other similar insurance is in place, or a written explanation why it is not

### 4. Solicitor's Compliance with Statute

The Solicitor confirms that the conditional fee agreement between the Solicitor and the Client complies with sections 58 and 58A of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2000.

### 5. Binding Nature of the Agreement

Counsel is not bound to act on a conditional fee basis until he/she has completed, signed and sent to the solicitor a short form conditional fee agreement with a risk assessment form setting out counsel's success fee and the reasons therefore. The delivery of the first instructions to counsel in an individual case shall constitute an offer to counsel to undertake that case in accordance with the terms of this agreement with such a success fee between 0% and 100% as counsel deems appropriate. The return of the short form agreement with a risk assessment form shall constitute acceptance by counsel.

## OBLIGATIONS OF COUNSEL

### 6. To act diligently

Counsel agrees to act diligently on all proper instructions from the Solicitor subject to paragraph 6 hereof.

### 7. Inappropriate Instructions

Counsel is not bound to accept instructions:

- (1) to appear at any hearing where it would be reasonable
  - (a) for Counsel to consider that Counsel's fees would not be allowed on assessment
 or



- (b) for the Solicitor to instruct a barrister of less experience and seniority, (albeit that Counsel shall use his/her best endeavours to ensure that an appropriate barrister will act for the Client on the same terms as this agreement);
- (2) to draft documents or advise if a barrister of similar seniority would not ordinarily be instructed so to do if not instructed on a conditional fee basis;
- (3) outside the scope of this agreement.
- (4) where Counsel's fee would be unlikely to be recovered at any future assessment of fees.

## **OBLIGATIONS OF THE SOLICITOR**

### **8. The Solicitor agrees:**

- (1) to comply with all the requirements of the CPR, the practice direction about costs supplementing parts 43 to 48 of the CPR (PD Costs), the relevant pre-action protocol, and any court order relating to conditional fee agreements, and in particular promptly to notify the Court and the Opponent of the existence and any subsequent variation of the CFA with the Client and of this agreement and whether he / she has taken out an insurance policy or made an arrangement with a membership organisation and of the fact that additional liabilities are being claimed from the Opponent;
- (2) promptly to apply for relief from sanction pursuant to CPR part 3.8 if any default under part 44.3B(1)(c) or (d) occurs and to notify Counsel of any such default;
- (3) to act diligently in all dealings with Counsel and the prosecution of the claim;
- (4) to liaise with or consult Counsel about the likely amount of Counsel's fees before filing any estimate of costs in the proceedings, and to provide a copy of any such estimate to Counsel;
- (5) to consult Counsel on the need for advice and action following:
  - (a) the service of statements of case and if possible before the allocation decision; and
  - (b) the exchange of factual and expert evidence;
- (6) to deliver within a reasonable time papers reasonably requested by Counsel for consideration;
- (7) promptly to bring to Counsel's attention:
  - (a) any priority or equivalent report to insurers;
  - (b) any Part 36 or other offer to settle;
  - (c) any Part 36 payment into Court;
  - (d) any evidence information or communication which may materially affect the merits of any issue in the case;
  - (e) any application by any party to have the Client's costs capped;
  - (f) any costs capping order;
  - (g) any other factor coming to the Solicitor's attention which may affect Counsel's entitlement to fees whether before or after the termination of this agreement;
- (8) promptly to communicate to the Client any advice by Counsel:
  - (a) to make, accept or reject any Part 36 or other offer;
  - (b) to accept or reject any Part 36 payment in;
  - (c) to incur, or not incur, expenditure in obtaining evidence or preparing the case;
  - (d) to instruct Leading Counsel or a more senior or specialised barrister;
  - (e) that the case or a substantial issue in the case is likely to be lost;
  - (f) that damages and costs recoverable on success make it unreasonable or uneconomic for the action to proceed;
- (9) promptly to inform Counsel's clerk of any listing for trial or any hearing;



- (10) to deliver the brief to Counsel in accordance with the agreement between the Solicitor and Counsel;
- (11) to inform Counsel promptly if the case concludes at any time before the date fixed for trial;
- (12) if any summary assessment of costs takes place in the absence of Counsel, to submit to the court a copy of Counsel's risk assessment and make representations on Counsel's behalf in relation to his/her fees;
- (13) to inform Counsel in writing within 2 days of any reduction of Counsel's fees on summary assessment in the absence of Counsel and of any directions given under PDCosts 20.3(1) or alternatively to make application for such directions on Counsel's behalf
- (14) where points of dispute are served pursuant to CPR part 47.9 seeking a reduction in any percentage increase charged by Counsel on his fees, to give the Client the written explanation required by PDCosts 20.5 on Counsel's behalf;
- (15) where more than one Defendant is sued, the Solicitor will write to the "after the event" insurers clarifying whether and when Defendants' costs are to be covered if the Claimant does not succeed or win against all of the Defendants, and send that correspondence to Counsel; and
- (16) when drawing up a costs bill at any stage of the case to include in it a claim for interest on Counsel's fees.

## TERMINATION

### 9. Termination by Counsel

Counsel may terminate the agreement if:

- (1) Counsel discovers the existence of any document which should have been disclosed to him under clause 3 above and which materially affects Counsel's view of the likelihood of success and/or the amount of financial recovery in the event of success;
- (2) Counsel discovers that the Solicitor is in breach of any obligation in paragraph 8 hereof;
- (3) the Solicitor, Client or any Litigation Friend rejects Counsel's advice in any respect set out in paragraph 8(8) hereof;
- (4) Counsel is informed or discovers the existence of any set-off or counter-claim which materially affects the likelihood of success and/or the amount of financial recovery in the event of success;
- (5) Counsel is informed or discovers the existence of information which has been falsified or should have been but has not been provided by the Solicitor, Client or any Litigation Friend, of which Counsel was not aware and which Counsel could not reasonably have anticipated, which materially affects the merits of any substantial issue in the case;
- (6) Counsel is required to cease to act by the Code of Conduct of the Bar of England and Wales or Counsel's professional conduct is being impugned; provided that Counsel may not terminate the agreement if so to do would be a breach of that Code, and notice of any termination must be communicated promptly in writing to the Solicitor;
- (7) a costs capping order is made which Counsel reasonably believes may adversely affect the recoverability of his or her normal fees and/or his or her percentage increase;
- (8) if the Opponent receives Community Legal Service funding.

### 10. Termination by the Solicitor

The Solicitor may terminate the agreement at any time on the instructions of the Client or any Litigation Friend.



#### 11. **Automatic Termination**

This agreement shall automatically terminate if:

- (1) Counsel accepts a full-time judicial appointment;
- (2) Counsel retires from practice;
- (3) the Solicitor's agreement with the Client is terminated before the conclusion of the case;
- (4) Legal Services Commission funding is granted to the Client;
- (5) the Client dies;
- (6) the court makes a Group Litigation Order covering this claim.

#### 12. **Client becoming under a Disability**

If the Client at any time becomes under a disability then the Solicitor will:

- (1) consent to a novation of his Conditional Fee Agreement with the Client to the Litigation Friend and
- (2) where appropriate, apply to the Court to obtain its consent to acting under a conditional fee agreement with the Litigation Friend. Thereafter, the Litigation Friend shall, for the purposes of this agreement, be treated as if he/she was and has always been the Client.

#### 13. **Counsel taking Silk**

If Counsel becomes Queen's Counsel during the course of the agreement then either party may terminate it provided he/she does so promptly in writing.

### **COUNSEL'S FEES AND EXPENSES**

#### 14. **Counsel's Normal Fees**

- (1) Counsel's fees upon which a success fee will be calculated (the normal fees) will be calculated on the basis of the figures contained in the agreement between the Solicitor and Counsel.
- (2) To the extent that the hours of preparation set out in that agreement are reasonably exceeded then Counsel's hourly rate will apply to each additional hour of preparation.
- (3) If the case is settled or goes short Counsel will consider the Solicitor's reasonable requests to reduce his/her brief fees as set out in the agreement.
- (4) Counsel's normal fees will be subject to review with effect from each successive anniversary of the date of this agreement

#### 15. **Counsel's Success Fee**

The rate of Counsel's success fee and if it is not fixed by the Civil Procedure Rules, the reasons for the success fee will be as set out in the agreement between the Solicitor and Counsel.

### **COUNSEL'S ENTITLEMENT TO FEES**

#### **(A) If the Agreement is not Terminated**

#### 16. **Definition of "success"**

- (1) "Success" means the same as "win" in the Conditional Fee Agreement between the Solicitor and the Client.
- (2) Subject to paragraphs 16, 19 & 22 hereof, in the event of success the Solicitor will pay Counsel his/her normal and success fees.



- (3) If the client is successful at an interim hearing Counsel may apply for summary assessment of Solicitor's basics costs and Counsel's normal fees.

**17. Part 36 Offers and Payments**

If the amount of damages and interest awarded by a court is less than an effective Part 36 offer then:

- (1) if counsel advised its rejection he/she is entitled to normal and success fees for work up to receipt of the Part 36 offer but is not entitled to any fees for other subsequent work;
- (2) if counsel advised its acceptance he/she is entitled to normal and success fees for all work done."

**18. Failure**

Subject to paragraph 19 (1) hereof, if the case is lost or on Counsel's advice ends without success then Counsel is not entitled to any fees or expenses.

**19. Errors and Indemnity for Fees**

- (1) If, because of a breach by the Solicitor of his/her duty to the Client, the Client's claim is dismissed or struck out:

- (a) for non compliance with an interlocutory order; or
- (b) for want of prosecution, or
- (c) by rule of court or the Civil Procedure Rules; or becomes unenforceable against the MIB for breach of the terms of the Uninsured Drivers Agreements or the Untraced Drivers Agreements:

the Solicitor shall (subject to sub paragraphs (3) - (6) hereof) pay Counsel such normal fees as would have been recoverable under the Agreement.

- (2) If, because of a breach by Counsel of his/her duty to the Client, the Client's claim is dismissed or struck out:

- (a) for non compliance with an interlocutory order; or
- (b) for want of prosecution, or
- (c) by rule of court or the Civil Procedure Rules

Counsel shall (subject to sub paragraphs (3) -(6) hereof) pay the Solicitor such basic costs as would have been recoverable from the Client under the Solicitor's agreement with the Client.

- (3) If, because of non-compliance by the Solicitor of the obligations under sub-paragraphs (1), (2), (12) or (13) of paragraph 8 above, Counsel's success fee is not payable by the Opponent or the Client then the Solicitor shall (subject to sub-paragraphs (5) to (7) hereof) pay Counsel such success fees as would have been recoverable under the Agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any non-negligent breach by the Solicitor or Counsel.

**Adjudication on disagreement**

- (5) In the event of any disagreement as to whether there has been an actionable breach by either the Solicitor or Counsel, or as to the amount payable under sub paragraph (1), (2) or (3) hereof, that disagreement shall be referred to adjudication by a panel consisting of a Barrister nominated by PIBA and a Solicitor nominated by APIL who shall be



requested to resolve the issue on written representations and on the basis of a procedure laid down by agreement between PIBA and APIL. The costs of such adjudication shall, unless otherwise ordered by the panel, be met by the unsuccessful party.

- (6) In the event of a panel being appointed pursuant to sub paragraph (5) hereof:
- (a) if that panel considers, after initial consideration of the disagreement, that there is a real risk that they may not be able to reach a unanimous decision, then the panel shall request APIL (where it is alleged there has been an actionable breach by the Solicitor) or PIBA (where it is alleged that there has been an actionable breach by Counsel) to nominate a third member of the panel;
  - (b) that panel shall be entitled if it considers it reasonably necessary, to appoint a qualified costs draftsman, to be nominated by the President for the time being of the Law Society, to assist the panel;
  - (c) the Solicitor or Counsel alleged to be in breach of duty shall be entitled to argue that, on the basis of information reasonably available to both the Solicitor and Counsel, the claim would not have succeeded in any event. The panel shall resolve such issue on the balance of probabilities, and if satisfied that the claim would have been lost in any event shall not make any order for payment of fees or costs.

#### **Cap**

- (7) the amount payable in respect of any claim under sub paragraph (1) or (2) or (3) shall be limited to a maximum of £25,000.

#### **(B) On Termination of the Agreement**

##### **20. Termination by Counsel**

- (1) If Counsel terminates the agreement under paragraph 9 then, subject to sub-paragraph 2 hereof, Counsel may elect either:
- (a) to receive payment of normal fees without a success fee which the Solicitor shall pay not later than three months after termination: ("Option A"), or
  - (b) to await the outcome of the case and receive payment of normal and success fees if it ends in success: ("Option B").
- (2) If Counsel terminates the agreement because the Solicitor, Client or Litigation Friend rejects advice under paragraph 8(8) (e) or 8(8)(f) Counsel is entitled only to "Option B".

##### **Termination by the Solicitor**

- (3) If the Solicitor terminates the agreement under paragraph 9, Counsel is entitled to elect between "Option A" and "Option B".

##### **Automatic Termination and Counsel taking silk**

- (4) If the agreement terminates under paragraphs 11 or 12 Counsel is entitled only to "Option B".

##### **21. Challenge to fees**

If the Client or any Litigation Friend wishes to challenge:

- a) the entitlement to fees of Counsel or the level of such fees following termination of the agreement ;or



b) any refusal by Counsel after signing this agreement to accept instructions,

the Solicitor must make such challenge in accordance with the provisions of paragraphs 14 and 15 of the Terms of Work upon which barristers offer their services to Solicitors (Annexe D to the Code of Conduct of the Bar of England and Wales).

## **22. Return of Work**

If Counsel in accordance with the Bar's Code of Conduct is obliged to return any brief or instructions in this case to another barrister, then:

- (1) Counsel will use his/her best endeavours to ensure that an appropriate barrister agrees to act for the Client on the same terms as this agreement;
- (2) If Counsel is unable to secure an appropriate replacement barrister to act for the Client on the same terms as this agreement Counsel will not be responsible for any additional fee incurred by the Solicitor or Client.
- (3) Subject to paragraph 22(3) hereof, if the case ends in success Counsel's fees for work done shall be due and paid on the conditional fee basis contained in this agreement whether or not the replacement barrister acts on a conditional fee basis; but
- (4) If the Solicitor or Client rejects any advice by the replacement barrister of the type described in paragraph 8(8) hereof, the Solicitor shall immediately notify Counsel who shall be entitled to terminate this agreement under paragraph 9(3).

## **ASSESSMENT AND PAYMENT OF COSTS / FEES**

### **23. Costs Assessment**

If:

- (1) a costs order is anticipated or made in favour of the Client at an interlocutory hearing and the costs are summarily assessed at the hearing; or
- (2) the costs of an interlocutory hearing are agreed between the parties in favour of the Client; or
- (3) an interlocutory order or agreement for costs to be assessed in detail and paid forthwith is made in favour of the Client:

Then:

- (a) the Solicitor will include in the statement of costs a full claim for Counsel's normal fees; and
- (b) the Solicitor will promptly conclude by agreement or assessment the question of such costs; and
- (c) within one month of receipt of such costs the Solicitor will pay to Counsel the amount recovered in respect of his/her fees, such sum to be set off against Counsel's entitlement to normal fees by virtue of this agreement.

### **24. Solicitor's Obligation to pay**

- (1) The amounts of fees and expenses payable to Counsel under this agreement:
  - (a) are not limited by reference to the damages which may be recovered on behalf of the Client; and
  - (b) are payable whether or not the Solicitor is or will be paid by the Client or Opponent.
- (2) Upon success the Solicitor will promptly conclude by agreement or assessment the question of costs and will pay Counsel promptly and in any event not later than one month after receipt of such costs the full sum due under this agreement.



**25. Interest**

The Solicitor will use his best endeavours to recover interest on costs from any party ordered to pay costs to the Client and shall pay Counsel the share of such interest that has accrued on Counsel's outstanding fees.

**26. Challenge to Success Fee**

(1) The Solicitor will inform Counsel's clerk in good time of any challenge made to his normal or success fee and of the date, place and time of any detailed costs assessment the Client or Opponent has taken out pursuant to the Civil Procedure Rules and provide Counsel with the opportunity to make written or verbal representations in support of his/her fees at any assessment and unless Counsel is present or represented at the assessment hearing will place Counsel's risk assessment, relevant details and any written representations before the assessing judge and argue Counsel's case for his/her success fee.

(2) If Counsel's fees are reduced on any assessment then:

(a) the Solicitor will inform Counsel's clerk within seven days and confer with Counsel whether to apply for an order that the Client should pay the success fee and make such application on Counsel's behalf;

(b) subject to the Solicitor complying with paragraph 26(1) and to any appeal or order, Counsel will accept such fees as are allowed on that assessment and will repay forthwith to the Solicitor any excess previously paid.

**27. Disclosing the reasons for the success fee**

(1) If;

(a) a success fee becomes payable as a result of the Client's claim and

(b) any fees subject to the increase provided for by paragraph 14 hereof are assessed and

(c) Counsel, the Solicitor or the Client is required by the court to disclose to the court or any other person the reasons for setting such increase as the level stated in this agreement, he / she may do so.

**28. Reduction on Assessment**

If any fees subject to the said percentage increase are assessed and any amount of that increase is disallowed on assessment on the ground that the level at which the increase was set was unreasonable in view of the facts which were or should have been known to Counsel at the time it was set, such amount ceases to be payable under this agreement unless the court is satisfied that it should continue to be so payable.

**29. Agreement on Fees**

If the Opponent offers to pay the Client's legal fees or makes an offer of one amount that includes payment of Counsel's normal fees at a lower sum than is due under this agreement then the Solicitor:

(a) will calculate the proposed pro-rata reductions of the normal and success fees of both Solicitor and Counsel, and



(b) inform Counsel of the offer and the calculations supporting the proposed pro-rata reductions referred to in paragraph (a) above, and  
(c) will not accept the offer without Counsel's express consent.  
If such an agreement is reached on fees, then Counsel's fees shall be limited to the agreed sum unless the court orders otherwise.

**30. Severance**

If any provision of this agreement is found by any competent court to be invalid, illegal or unenforceable in whole or in part for whatever reason, then it shall be deemed to be severed from this agreement to the extent only of such invalidity, illegality or unenforceability and the remaining provisions of this agreement and the remainder of the provision in question shall continue in full force and effect unimpaired by such severance.

Signed by: -----

On behalf of: -----

Date: -----

END