

THE CHANCERY BAR ASSOCIATION'S CONDITIONAL FEE AGREEMENT

NOTE

The Chancery Bar Association's CFA

The latest version of the Chancery Bar Association's CFA incorporates the Chancery Bar Association's Conditional Fee Conditions 2023. The 2023 Conditions are in 2 Parts – Part 3 will only need to be incorporated if it is a Discounted CFA i.e., you are being paid part of your fee regardless of the outcome.

This Note is intended to highlight certain points that you will need to consider when completing the CFA.

Standard Terms

Please note that the Agreement and the Conditions are intended to operate in conjunction with either the Standard Contractual Terms, or alternative terms governing the wider relationship between the parties. It would not normally be appropriate to delete the reference to the Standard Contractual Terms in clause 2 of the Agreement without substituting appropriate alternative terms. The Agreement and Conditions do not include, for example, provisions for billing and payment (including disbursements), or a data protection clause. Counsel will normally wish either to incorporate appropriate provisions (such as those in the Standard Contractual Terms) by reference, or to draft bespoke provisions for insertion into the Agreement. Counsel should give careful consideration to whether it might be appropriate to include express bespoke terms in the circumstances of a particular case. By way of example only, it might be appropriate, in a case which requires Counsel to travel, for an express agreement about travel costs and any payment in respect of travel time to be included in the Agreement, to avoid any later dispute about whether such costs are recoverable.

Parties to the CFA

The CFA is normally between the barrister and the solicitor. The solicitor may require the CFA to be entered into directly with the client. So long as a solicitor is also instructed this would not amount to public access.

Whilst it is possible to enter into a CFA with a public access client Counsel should consider very carefully whether it is appropriate to do so including what steps can be taken to ensure that Counsel gets paid in the event of success. Counsel cannot receive any award and deduct any fees from that award.

The firm of solicitors should be a party to the CFA rather than the individual solicitor.

The Client

It is important to ensure that the CFA names all of the clients both individual and corporate (see the decision in *Radford v Frade* [2018] EWCA Civ 119)

Description of the Action

It is suggested that this be drafted in very wide terms so that it encompasses all possible causes of action and remedies. Note, the Conditions include an appeal and so if it is not intended for the CFA to apply to any appeal this should be stated expressly in the definition of the Action.

The Opposing Party

The Opposing Party should be widely defined as the identity of the same may only become apparent during the course of the matter or it may be necessary to add a defendant at a later stage which had not been anticipated when the CFA was signed. Suggested wording “... *and any other party against whom the Client proceeds in this Action or in claims heard with this Action, or any one or more of them.*”

Base Rate

The Base Rate is counsel’s normal hourly rate and the success fee should be calculated with reference to the Base Rate even if counsel is entering into a Discounted CFA (see *Gloucestershire CC v Evans* [2008] 1 WLR 1883). For example if counsel’s base rate is £300 per hour but counsel is to be paid £150 per hour regardless of the outcome the success fee will be calculated with reference to the Base Rate (i.e in the example £300) and not with reference to the discount or amount at risk (i.e. in the example £150). The success fee can still theoretically be 100% of the Base Rate even though only some of counsel’s fees are “at risk” although it may be difficult to justify the same (see *Addleshaw Goddard LLP v Nicholas Stewart Wood, Kevin John Hellard as General Administrators of the Estate of Platon Elenin (formerly Boris Abramovich Berezovsky)* - [2015] 4 WLUK 85)

The Uplift

As previously stated the Uplift cannot be more than 100% and in personal injury actions the success fee (which can be up to 100%) will be capped at 25% of damages recovered at first instance (where damages exclude future pecuniary loss and are net of any sums recoverable by the Compensation Recovery Unit).

Reasons must be given for setting the Uplift at the particular rate. Whilst it may be tempting to insert generic standard reasons the reasons should be particular to the action and will be considered if the success fee is challenged. The fact that the opposing party may not be able to pay any award can only be a reason if the definition of success includes the recovery of sums awarded.

Success

Whilst it may be reasonable for Counsel to enter into a CFA and therefore take on the risk that the claim may not succeed Counsel should be wary of agreeing to a CFA whereby Counsel is only paid out of sums recovered. Counsel will rarely be in a position to assess the ability of the other side to meet any award.

Disclaimer

The CFA was drafted by a sub-committee on behalf of the Chancery Bar Association in the light of statutory provisions in force as at 30 September 2023. It is up to those using the Agreement to satisfy themselves as to its appropriateness and legality. In this respect it is stressed that the legislative and regulatory framework is subject to change and any CFA which does not comply with that framework may be unenforceable.

The Chancery Bar Association would be grateful for any comments you may have in the light of your experience. It is intended to update the Agreement and the Conditions in the light of experience. If you have any comments these should be addressed to Francesca Compton, Administrator, Chancery Bar Association – admin@chba.org.uk.

Finally, the Agreement and the Conditions have been drafted by volunteers with, perhaps, no greater expertise than any counsel using them for the purposes of a conditional fee agreement. You must satisfy yourself that the Agreement and the Conditions are lawful and are appropriate for the particular circumstances of the relevant proceedings. The Chancery Bar Association and the draftsmen of the Agreement and the Conditions assume no responsibility to you or anyone else.

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