

## CHANCERY BAR ASSOCIATION

### Guidance on Standard Contractual Terms

**This Guidance updates Members on the use of standard contract terms when a Barrister is instructed by a Solicitor (or other person regulated by the SRA). It has no application to instructions received under the licensed access or public access schemes.**

**The Association is aware that at least one set is advertising the use of the “Combar/COLLS Basis B” standard contract terms and that many other sets are using them as and when they see fit. The Guidance that follows is only intended to inform rather than direct, which the Association has no power and does not seek to do. Members are of course free to make their own decisions as to what is in their best interests and are encouraged to do so.**

1. With effect from 31 January 2013, the Bar Council’s standard *non-contractual* terms on which Barristers supply services to Solicitors were no longer deemed to apply. Instead, the terms on which a Barrister provides services to a Solicitor depend on what is agreed (expressly or impliedly) between the Barrister and the Solicitor.
  
2. The Legal Services Board approved the Bar Standards Board’s Standard Contractual Terms (“SCT”), to which the cab-rank rule of the Bar’s Code of Conduct attaches. This means that, subject to the usual exceptions to that rule, a Barrister cannot decline to accept instructions tendered on the SCT. However, before this change came into effect, it was predicted that in some cases Solicitors might be unwilling to agree to instruct a Barrister on the SCT.
  
3. Accordingly, Combar entered into negotiations with the City of London Law Society (“COLLS”) to attempt to agree a set of standard commercial terms for use by Solicitors and Barristers. Combar’s purpose was to seek to identify what terms

could be agreed. Combar has always emphasised that the Combar/COLLS General Terms and Conditions (“GTC”) are not its recommendation for use in any particular case. Indeed, final agreement could not be reached by Combar and COLLS, which is why the GTC include four alternatives (Basis A, B, C, D) for payment and billing arrangements. The process of agreeing the GTC, so far as this was achieved, involved some compromise on both sides.

4. The GTC were drafted and agreed with cases likely to involve Combar members and COLLS Solicitors in mind, i.e. substantial commercial cases. The GTC are headed “General Terms and Conditions for the Supply of Legal Service by Barristers to Solicitors in Commercial Matters”. They were not drafted for the purpose of being used in non-commercial cases, or in all commercial cases. In particular, Basis B, C and D of the payment and billing arrangements mean that it is the Barrister who takes the risk of the solvency of the lay client and its ability and willingness to pay.

5. The GTC, in particular Basis B, have become more generally used than was expected, and in cases other than commercial cases. Some chambers advertise themselves as willing to accept instructions on GTC Basis B, and some firms of solicitors try to insist on the use of these terms.

6. For the reasons that follow, we would advise that caution be exercised in the use of Basis B (and Basis C or D), especially in any case where the Barrister cannot be satisfied of the solvency of the lay client and its willingness and ability to pay the Barrister’s fees. We would also caution against advertising that chambers will accept instructions on GTC Basis B (or Basis C or D), or agreeing with solicitors at the outset that these terms will apply to all future work done in a particular case.

7. GTC Basis B operates on the basis that the Solicitor warrants to the Barrister that it has authority from the lay client to instruct the Barrister and that the lay client is obliged to pay the Solicitor in respect of the Barrister's services (c.18.1). Further, the Solicitor agrees to endeavour to collect the Barrister's fees in the same manner as it endeavours to collect its own fees (c.9.10) and, if the Barrister requests, the Solicitor must assign any cause of action in respect of the Barrister's fees to the Barrister (c.9.12).

8. The following are among the problems which arise:

- (1) The termination provisions of c.16.4, for non-payment of fees, do not apply because there is no "due date" for payment (unless one has been agreed in a billing and payment schedule).
- (2) If the Solicitor has obtained its fees on account, or decides not to pursue its fees, the Solicitor's agreement to seek to collect the Barrister's fees in the same manner as it endeavours to collect its own fees is arguably of no value.
- (3) The lay client will have no liability to pay the Solicitor unless the Solicitor has a retainer and has submitted a bill for its services complying strictly with the requirements of the Solicitors Act. Moreover, under GTC Basis B, there is no means of compelling the Solicitor to submit such a bill covering the Barrister's fees unless it takes that step in relation to its own fees.
- (4) The lay client can seek a solicitor/client taxation of the fees billed, on which the Barrister has no right to be represented. If the Barrister's fees are taxed down, there will be no liability on the lay client to pay the Solicitor in respect of that part of the Barrister's fees and therefore the Barrister will not be paid in full.

- (5) If the lay client has a cross-claim against the Solicitor, there may be no liability on the lay client to pay the Solicitor fees, including the Barrister's fees.
- (6) If a right of action against the lay client exists at all, the assignment contemplated by c.9.12 is very likely to be an equitable assignment (of part only of the lay client's debt to the Solicitor), which means that any proceedings will have to be brought in the name of or against the Solicitor as well as the lay client. Any right validly assigned will be subject to equities and cross-claims binding the Solicitor, in the usual way.
- (7) The Barrister has no right to see the retainer documents before bringing such an action. The Barrister will therefore have no means of knowing whether the claim is properly against the lay client for fees due or against the Solicitor for breach of warranty of authority.
- (8) There is no duty on the Solicitor to notify the Barrister if it becomes aware of any insolvency proceedings (or equivalent) affecting the lay client, only if the Solicitor has reason to believe that the lay client "will be unable to pay the Barrister's fees" (c.9.11).

9. These deficiencies suggest that a Barrister should be very cautious before agreeing to carry out work on GTC Basis B. It is possible to draft and seek to agree variations to the GTC to seek to ameliorate the Barrister's position. Some possible amendments are annexed. These suggested amendments do not mean that the Association endorses GTC Basis B as amended. Although the amendments mitigate the problems, they do not resolve them fully. Even with these amendments, the Barrister is taking risks in relation to the solvency and ability and willingness to pay of the lay client. In many commercial cases, such a risk will fairly be regarded as minimal and acceptable, but in other cases it may well not be so regarded. In some

cases, such a risk will be regarded as acceptable for limited work but unacceptable for other work, e.g. unsuitable for the brief fee for a lengthy trial.

10. The effect of chambers advertising that instructions are accepted on GTC Basis B is that the cab-rank rule attaches in principle to all instructions tendered on that basis, irrespective of the standing of the lay client: Code of Conduct, paras 602, 604(h). A Barrister may then be in breach of the Code of Conduct in refusing to accept instructions on those terms, though the Code is unclear in this regard. Para 604(e) states that a self-employed barrister is not obliged to accept instructions from anyone other than a professional client who accepts liability for the barrister's fees, and it may be that this exception has effect even where terms are advertised that operate differently. The right interpretation is, however, unclear, and until it is clarified it is recommended that chambers consider advertising that they accept instructions on the basis of the BSB's STC. Having done so, a Barrister is perfectly entitled to agree other terms in a suitable case.

11. The guidance given in this note does not mean that the Chancery Bar Association recommends the use of the GTC in any particular case. Even with the suggested amendments, which improve the Barrister's position to some extent, use of the GTC (other than on payment Basis A) may present a significant risk to the Barrister which, by virtue of the Barrister's remoteness from the lay client, the Barrister is unable properly to assess. GTC Basis B makes the solicitor more remote from responsibility for fees than was the case under the old non-contractual terms, without offering clear-cut machinery for direct enforcement against the lay client.

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