

LEGAL SERVICES BOARD

BARRISTERS' ABILITY TO CONTRACT AND RECOVER FEES, UNDER CURRENT AND PROPOSED ARRANGEMENTS

THE CURRENT POSITION

Currently, where a barrister accepts instructions from a solicitor, the "Terms of Work on which Barristers offer their Services to Solicitors and the Withdrawal of Credit Scheme 1988" (the "**Terms of Work**") apply by default, unless they are excluded in writing. The Terms of Work are expressly stated not to have contractual force.

Existence of contract

Previous case law arguably had the effect of preventing a barrister from contracting in respect of his services or suing for his fees. However, at least since the implementation of s. 61 of the Courts and Legal Services Act 1990 (the "**CLSA**"), a barrister is expressly able to enter into a contract for his services. In law, barristers may contract with solicitors on whatever terms they wish (including "The Contractual Terms of Work on which barristers Offer their Services to Solicitors"). Where such a contract is entered into but its terms are not complete it is possible that provisions of the Terms of Work would still apply insofar as they did not conflict with any agreed contractual terms.

There is an argument (based on common law) that it must be agreed in writing that a barristers' retainer should be contractually binding, although the case law is unclear on this. If it is possible for a contract to be established orally then, in each case, it will be necessary to establish an intention to contract for such an oral agreement to have contractual effect. That requires no more than a reference to a contractual basis in the communications between solicitor and barristers, but would need to be evidence. Where there is no express indication of intention, current market practice may be used as an indicator of the parties' intention. The Bar Council consultation paper suggests that current market practice is for barrister/solicitor relationships to be non-contractual. This means that it would be difficult to establish an intention to contract in the absence of express evidence to that effect.

Where barristers do contract, the usual terms may be implied into the contract (eg under the Supply of Goods and Services Act 1982) unless those terms are excluded, where it is possible to do so. In addition, under the principle of business efficacy, the court may imply any terms necessary in order to make the contract workable.

Right to sue

There is an argument (based on C19th case law) that there was, at least until the CLSA, a common law bar to barristers' suing for fees. This common law bar on the right to sue has not been expressly overturned, which leaves it arguable that barristers may not sue for fees, even where there is a lawful contractual payment obligation. However, we do not consider this argument to be strong for the following reasons:

- a) s. 61 of the CLSA gives an express right to contract;
- b) contemporaneous Hansard records indicate that the legislative purpose was that the removal of the bar on contracting would ensure that barristers could sue for fees;
- c) a right to contract without a commensurate right to enforce that contract is arguably perverse;
- d) under the relevant case law, if indeed any bar to suing for fees existed (which is not clear), it could be argued to be so heavily linked to the bar on contracting that one principle is incapable of holding when the other falls;
- e) the status of barristers has changed – they are now liable for negligence and much more heavily regulated, for example – which makes it anachronistic to suggest that their fees are recovered only "ad honorarium"; and
- f) a bar on bringing proceedings may amount to a breach of the access to court provisions of Article 6 ECHR, and a court would have to interpret s. 61 CLSA compatibly with that requirement.

If these arguments are correct, then a barrister is free to enter into a contract and to sue for fees under the usual contractual mechanisms.

Where the relationship is purely non-contractual (for example, where it is based on the terms of work) the only remedies open to a barrister are restitution and to seek for a claim to be heard before a tribunal.

PROPOSED CHANGES	THE IMPACT OF THE PROPOSED CHANGES ON THE RECOVERABILITY OF FEES	HOW MIGHT THE RELATIONSHIP BETWEEN BARRISTER, SOLICITOR AND CLIENT BE CHARACTERISED?	ACCORDANCE WITH LSB OBJECTIVES
<p>The proposed changes to the Code relate to:</p> <ul style="list-style-type: none"> - barristers (and not other advocates); - solicitors (and not licensed access or public access clients); and - privately funded work. <p>The following key changes are proposed:</p> <ul style="list-style-type: none"> - new contractual terms (the "New Terms"), use of which will be recommended by the Bar Council, and which state they apply by default unless expressly excluded; - a purported right to sue for fees as a term of the New Terms; - limitation of the cab rank rule by allowing barristers to turn down instructions where the New Terms are not accepted; - dispute resolution by way of a Voluntary Joint Tribunal; and - abolition of the Withdrawal of Credit Scheme. <p>A number of points remain unclear, including:</p> <ul style="list-style-type: none"> - whether the New Terms have any impact on the relationship between barristers and their clients (and they do not exclude the Contracts Rights of Third Parties Act 1999 ("CROTPA"); and - what would happen if there was clear evidence that the parties had sought to exclude the New Terms orally (which is important as it would undermine the argument that the parties intended to form a contractual relationship on that basis). 	<p><u>Existence of contract</u></p> <p>If accepted, the proposed changes may increase entry into contracts. If it becomes normal for barristers and solicitors to enter into contracts, there would be a stronger argument, where arrangements are discussed orally, that those arrangements were made with an implied intention to contract (market practice being an indicator of intention).</p> <p>However, at present, barristers are already able to enter into contractual arrangements and need only use words such as "on a contractual basis" during the dialogue between a solicitor and barrister/barrister's clerk in order to give the arrangements contractual force.</p> <p><u>Right to sue</u></p> <p>The proposed changes seek to address the possible bar on barristers' suing for their fees by including a term that expressly allows the barrister to sue the solicitor for fees. However, even if a common law bar does persist (which is doubtful), the proposals cannot change the position: that is for legislation or a judicial decision only.</p> <p><u>Other effects</u></p> <ul style="list-style-type: none"> - Limitation of cab rank rule - Abolition of blacklist - New complaints procedure 	<p>Case law suggests that solicitors are ordinarily deemed to be agents for their clients, acting under a broad scope of authority.</p> <p>Given the anomalous nature of the duties owed by both solicitor and barrister to the lay client (as to which there is substantial case law) it may not be helpful to try to analyse the barrister-solicitor-client relationship in terms of the general principles of agency. To the extent it is necessary to do so, there does not appear to be any reason why the characterisation of solicitor as agent could not logically extend to the situation in which a solicitor instructs a barrister on behalf of a lay client (irrespective of whether this is done on a contractual or non-contractual basis).</p> <p>It may, however, be equally possible to characterise such instructions as being entered into by the solicitor as principal, with rights of action against the barrister accruing to the lay client by virtue of the operation of CROTPA (where the arrangement is contractual) and/or the duty of care owed by the barrister to the lay client, only. There may be other circumstances where the relationship is most accurately seen as between the barrister and the solicitor, with the client having rights against the solicitors; this may be the case, for example, where the solicitor has instructed a specialist barrister to advise on a specific legal issue as part of broader advice being given to the client by the solicitor. There are likely to be situations where, as a matter of public policy, one characterisation is preferable to the other.</p> <p>The New Terms purport to impose liability on a solicitor for payment of the barrister's fees, while granting only the solicitor's client a right to sue the barrister. Such terms, whether effective or not, appear compatible with both the general principles of the law of agency and the law of contract but arguably provide contradictory indications as to whether, for the purposes of instructing the barrister, the solicitor should be construed as agent or principal. In particular, in recognising that the solicitor may be acting on behalf of the lay client, they do nothing to address existing uncertainties and indeed may add to the confusion.</p>	<p>It is unclear that this is a case where regulatory action is needed, as barristers are at liberty to contract (and can do so easily) and it is strongly arguable that barristers already have a right to sue for fees.</p> <p>If the proposed changes are intended to give barristers a right to sue solicitors for fees, then they do not achieve it. That is because, if any legal barrier to enforcement remains (which is doubtful), it can only be removed by Parliament or judicial decision.</p> <p>Beyond the question of enforceability, the proposed changes may increase competition (through the removal of the blacklist) and improve transparency (through the use of publicly available standard terms), both of which are approval criteria.</p> <p>However, the New Terms also limit the cab rank rule, which may not improve access to justice or be in the public interest. Furthermore, a "one size fits all" set of terms may be inappropriate in certain situations and so detrimental to the public interest.</p> <p>Given the limited positive effect (particularly in terms of achieving the principle intention behind the terms), as compared with the negative impact and the remaining uncertainties, it is arguable that the proposed changes are unnecessary and disproportionate.</p> <p>An alternative way of changing usual practice and encouraging barristers to contract with solicitors would be to produce guidance, including tailored example terms, that may be used in certain situations and also explaining the advantages of entering into contracts.</p> <p>It is possible that necessary procedures have not been complied with.</p>