

**APIL / PIBA 5
CONDITIONAL FEE AGREEMENT
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CONDITIONAL FEE AGREEMENT
between
SOLICITORS AND COUNSEL

THE NATURE OF THE AGREEMENT

1. [see Short Form Agreement]
2. [see Short Form Agreement]
3. This agreement relates to
 - 1) issues of jurisdiction;
 - 2) issues of breach of duty;
 - 3) issues of causation;
 - 4) issues of limitation
 - 5) issues of damages;
 - 6) any appeal by the client's opponent(s);
 - 7) any appeal by the client against an interim order;
 - 8) any appeal by the client advised by counsel;
 - 9) any proceedings to enforce a judgment or order.

It does not cover:

- 10) any other appeal by the client;
- 11) any counterclaim or defence by way of set-off;
- 12) any part 20 claim
- 13) part only of the proceedings unless specifically incorporated in this agreement.

[NOTE: delete those parts of the proceedings to which the agreement does NOT relate]

4. This agreement is not a contract enforceable at law. The relationship of counsel and solicitor shall be governed by the Terms of Work under which barristers offer their services to solicitors and the Withdrawal of Credit Scheme as authorised by the General Council of the Bar as from time to time amended and set out in the Code of Conduct of the Bar of England and Wales, save that where such terms of work are inconsistent with the terms of this agreement the latter shall prevail.
5. Counsel has been provided with:
 - 1) 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;
 - 2) written confirmation that "after the event" or other similar insurance is in place, or a written explanation why it is not; and
 - 3) where more than one defendant is sued, copies of correspondence between the solicitor and 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
 - 4) 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.
 - 5) Any offers of settlement already made by the client or the defendant.
6. The solicitor confirms that:
 - 1) he/she has complied with Regulation 4 of the Conditional Fee Agreements Regulations 2000 no 692 and the client has confirmed by signing the solicitor/client agreement that Regulation 4 has been complied with; and
 - 2) the client or any Litigation Friend has consented to the terms and conditions set out in this agreement insofar as they relate to the client.
 - 3) Either:
 - (a) there are no other methods of financing costs available to the client, or
 - (b) Notwithstanding there are other methods of financing costs available to the client, namely the client has reasonably decided to fund this claim with conditional fees.
7. Counsel is not bound to act on a conditional fee basis until he/she has signed this agreement.

OBLIGATIONS OF COUNSEL

8. Counsel agrees to act diligently on all proper instructions from the solicitor subject to paragraph 9 hereof.
9. Counsel is not bound to accept instructions:
 - 1) to appear at an interlocutory hearing where it would be reasonable
 - (a) to assume that counsel's fees would not be allowed on assessment or
 - (b) to instruct a barrister of less experience and seniority, provided that counsel has first used 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.

OBLIGATIONS OF THE SOLICITOR

10. The solicitor agrees:
 - 1) promptly to supply a copy of this agreement to the client or any Litigation Friend;
 - 2) 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 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.
 - 3) 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.
 - 4) to act diligently in all dealings with counsel and the prosecution of the claim;
 - 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 other factor coming to the solicitor's attention which may affect counsel's entitlement to success 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 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;
 - 10) the solicitor agrees to deliver the brief for trial not less than 14 days before the trial of all issues or of any preliminary issue and the brief shall be deemed delivered 14 days before the trial for the purpose of counsel's entitlement to a brief fee;
 - 11) 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;
 - 12) 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;
- 13) 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;
 - 14) 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.
 - 15) 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 OF THE AGREEMENT BY COUNSEL

11. Counsel may terminate the agreement if :
 - 1) Counsel discovers that the solicitor is in breach of any obligation in paragraph 10 hereof;
 - 2) the solicitor, client or any Litigation Friend rejects counsel's advice in any respect set out in paragraph 10(8) hereof;
 - 3) 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;
 - 4) Counsel is informed or discovers the existence of information which has been falsified or knowingly withheld 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;
 - 5) 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.

TERMINATION OF THE AGREEMENT BY THE SOLICITOR

12. The solicitor may terminate the agreement at any time on the instructions of the client or any Litigation Friend.

AUTOMATIC TERMINATION OF THE AGREEMENT

13. 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.

CLIENT BECOMING UNDER A DISABILITY

14. 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.

COUNSEL TAKING SILK

15. 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 NORMAL FEES

16. 1) Counsel's fees upon which a success fee will be calculated (the normal fees) will be as follows:-
- (a) See short form agreement
 - (b) Court appearances
 - (i) **Brief fee**
See short form agreement
 - (ii) **Refreshers**
See short form agreement
 - (iii) **Renegotiating counsel's fees**
 - (a) To the extent that the hours of preparation set out above are reasonably exceeded then counsel's hourly rate will apply to each additional hour of preparation.
 - (b) If the case is settled or goes short counsel will consider the solicitor's reasonable requests to reduce his/her brief fees set out above.
- 2) The normal fees will be subject to review with effect from each successive anniversary of the date of this agreement but counsel will not increase the normal fees by more than any increase in the rate of inflation measured by the Retail Prices Index.

COUNSEL'S SUCCESS FEE

17. (1) See short form agreement
- (2) The reasons, briefly stated, for counsel's success fee are that at the time of entry into this agreement:
- (i) the prospects of success are estimated by counsel as set out in the short form agreement and as more fully set out in counsel's risk assessment, and the percentage increase reflects those prospects
 - (ii) the length of postponement of the payment of counsel's fees and expenses is estimated at 12 months, and a further increase of 0% relates to that postponement
 - (3) The reasons for counsel's success fee are more fully set out in counsel's risk assessment which is available upon request

COUNSEL'S EXPENSES

18. If a hearing, conference or view takes place more than 25 miles from counsel's chambers the solicitor shall pay counsel's reasonable travel and accommodation expenses which shall:
- 1) appear separately on counsel's fee note;
 - 2) attract no success fee and
 - 3) subject to paragraph 21 be payable on the conclusion of the claim or earlier termination of this agreement.

COUNSEL'S ENTITLEMENT TO FEES - WINNING AND LOSING [IF THE AGREEMENT IS NOT TERMINATED]

19. 1) "Success" means the same as "win" in the Conditional Fee Agreement between the solicitor and the client.
2) Subject to paragraphs 20, 23 & 26 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 solicitors base costs and counsels normal fees.
20. If the amount of damages and interest awarded by a court is **less than a Part 36 payment into Court or 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 notice of Part 36 payment into Court or offer but only normal fees for subsequent work;
 - 2) if counsel advised its acceptance he/she is entitled to normal and success fees for all work done.
21. Subject to paragraph 22(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.

ERRORS AND INDEMNITY FOR FEES

22. 1) If, because of a breach by the solicitor but not 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; or
- becomes unenforceable against the MIB for breach of the terms of the Uninsured Drivers Agreement:
the solicitor shall (subject to sub paragraphs (3) - (6) hereof) pay counsel such normal fees as would have been recoverable under this agreement.
- (2) If, because of a breach by counsel but not 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
- 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 but not by counsel of the obligations under sub-paragraphs (2), (3), (11), (12) or (13) of paragraph 10 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 this agreement.
- (4) No payment shall be made under sub paragraph (1), (2) or (3) hereof in respect of any breach by the solicitor or counsel which would not give rise to a claim for damages if an action were brought by the client;

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:
- 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;
 - 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;
 - 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 solicitor and barrister, 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.

COUNSEL'S ENTITLEMENT TO FEES ON TERMINATION OF THE AGREEMENT

23. (1) **Termination by counsel** If counsel terminates the agreement under paragraph 11 then, subject to sub-paragraphs (b) and (c) hereof, counsel may elect either:
- 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
 - 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 10(8)(e) hereof counsel is not entitled to any fee.
- (3) If counsel terminates the agreement because the solicitor, client or Litigation Friend rejects advice under paragraph 10(8)(f) counsel is entitled only to "Option B".
- (4) **Termination by the solicitor** If the solicitor terminates the agreement under paragraph 12, counsel is entitled to elect between "Option A" and "Option B".
- (5) **Automatic Termination and counsel taking silk**
- If the agreement terminates under paragraph 13(1) (judicial appointment) or 13(2) (retirement) or 15 (counsel taking silk) counsel is entitled only to "Option B".
 - If the agreement terminates under paragraph 13(3) (termination of the solicitor/client agreement) then counsel is entitled to elect between "Option A" and "Option B" save that:
 - if the solicitor has ended the solicitor/client agreement because he considers that the client is likely to lose and at the time of that termination counsel considers that the client is likely to win, and the client goes on to win, the solicitor will pay counsel's normal and success fees;
 - if the solicitor has ended the solicitor/client agreement because the client has rejected the advice of the solicitor or counsel about making a settlement the solicitor will pay counsel's normal fee in any event and, if the client goes on to win the case, will also pay counsel's success fee.

- c) If the agreement terminates under paragraph 13(4) (Legal Services Commission) or paragraph 13(5) (death of client) or paragraph 13 (6) (group litigation order) counsel is entitled only to "Option B".
24. 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).

RETURN OF WORK

25. 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) 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.
 - 2) Subject to paragraph 25(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
 - 3) if the solicitor or client rejects any advice by the replacement barrister of the type described in paragraph 10(8) hereof, the solicitor shall immediately notify counsel whose fees shall be paid as set out in paragraph 23(1) hereof.

ASSESSMENT AND PAYMENT OF COSTS / FEES

26. 1) If:
- (a) 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
 - (b) the costs of an interlocutory hearing are agreed between the parties in favour of the client; or
 - (c) an interlocutory order or agreement for costs to be assessed in detail and paid forthwith is made in favour of the client:
then
 - (i) the solicitor will include in the statement of costs a full claim for counsel's normal fees; and
 - (ii) the solicitor will promptly conclude by agreement or assessment the question of such costs; and
 - (iii) 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.
27. 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 within one month after receipt of such costs the solicitor will pay to counsel the full sum due under this agreement.
28. 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.
29. 1) The solicitor will inform counsel's clerk in good time of any challenge made to his 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 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 under Regulation 3(2)(b) of the CFA Regulations 2000 for an order that the client should pay the success fee and make such application on counsel's behalf;
 - b) subject to any appeal, counsel will accept such fees as are allowed on that assessment and will repay forthwith to the solicitor any excess previously paid.

30. 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 17 (1) 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.

31. Counsel's fees in the event of assessment or agreement

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.

32. If the Opponent offers to pay the client's legal 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.

Dated: _____

Signed by counsel _____

or by his/her clerk [with counsel's authority] _____

*[Additional interlocutory counsel _____]

*[Additional interlocutory counsel _____]

**see paragraph 1*

Signed by : _____

Solicitor/employee in Messrs: _____

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