



## **Barristers fees when a solicitor or firm becomes insolvent**

<b>Purpose:</b>	To provide information to barristers in relation to their fees in circumstances where a solicitor or their firm becomes insolvent.
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Remuneration Committee
<b>Last reviewed:</b>	July 2017
<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

1. A barrister’s entitlement to payment of fees from a solicitor is entirely dependent upon the terms of the contract made between the barrister and the solicitor<sup>1</sup> who instructed the barrister. Insolvency of the solicitor does not change the terms of the contract but may limit the remedies available to enforce performance of the solicitor’s payment obligations under the Contract. Reference must always be made to the terms of the applicable contract to determine what contractual rights exist.

### **Insolvent Solicitors**

2. A barrister to whom fees are owed by an insolvent solicitor under any contract<sup>2</sup> will be a creditor in respect of any outstanding fees due from the solicitor and so will

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1 For purposes of clarity this note refers to the party who contracts with a barrister as a solicitor. The contracting party may be any Authorised Person, which means any person or body authorised by the Solicitors Regulation Authority under section 18(1)(a) of the Legal Services Act 2007 to carry out reserved legal activities.

2 Under the Bar Council’s Standard Contractual Terms and under the Basis A option under the Combar Standard Contractual Terms a solicitor is liable for a Barristers fees whether or not he has been paid by the lay client so a barrister may prove for

be entitled to prove in the bankruptcy or liquidation of the solicitor as an unsecured creditor for the amount of such fees. There is no further remedy available against any individual solicitor personally following the making of a Bankruptcy Order against that individual.

3. Where the lay client has already paid or still owes money to the solicitor in respect of outstanding barrister's fees, proving for the outstanding fees (when this is possible) may not be the only available claim that can be made in or as a result of the insolvency process.

4. First, any rights in relation to sums payable by lay clients which arise under the terms of the contract or as a result of the Solicitors Accounts Rules will continue to exist so a barrister can request in accordance with whatever rights the contract terms<sup>3</sup> or the Solicitors Accounts Rules<sup>4</sup> provide that the insolvent solicitor's Administrator, Liquidator or Trustee in Bankruptcy should either

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such fees. Under the Basis B option under the Combar Standard Contractual Terms a solicitor must endeavour to collect a barrister's fees but is only liable to make payment after the client pays so there will be no provable debt unless the client pays or has paid the Solicitor. Under the Basis C and D options under the Combar Standards Terms a solicitor is under no liability to pay a barristers fees so there will be no provable debt.

For the Bar Council's Standard Contractual Terms see:

[http://www.barcouncil.org.uk/media/278543/12\\_7\\_27\\_approved\\_contractual\\_terms\\_updated\\_bsb\\_handbook.pdf](http://www.barcouncil.org.uk/media/278543/12_7_27_approved_contractual_terms_updated_bsb_handbook.pdf)

For the Combar Standard Contractual Terms see

[https://app.pelorous.com/media\\_manager/public/260/Combar%20CLLS%20v%202.1.pdf](https://app.pelorous.com/media_manager/public/260/Combar%20CLLS%20v%202.1.pdf)

3 The Basis B option under the Combar Standard Contractual Terms includes a provision in clause 9.11 which provides:-

*"If the Barrister requests, the Solicitor shall promptly assign any cause of action against the Lay Client in respect of the Barrister's fees to the Barrister without any further consideration and shall give the Barrister such additional assistance as the Barrister reasonably requests to assist the Barrister to take action to recover the Barrister's fees from the Lay Client (including, without limitation, the production of documents reasonably requested by the Barrister and the delivery by the Solicitor of a bill of costs in accordance with the requirements of section 69 of the Solicitors Act 1974)".*

4 Under the present Solicitors Accounts Rules Rule 12.2(c) money held or received for payment of unpaid professional disbursements is held on trust as client money and so must be paid immediately into a client account (unless rule 17(1)(b) applies in which case it can be paid temporarily into an office account and then by the end of the second working day following receipt either paid to the barrister or transferred into a client account).

- a. collect any sums due from lay clients in respect of outstanding barrister's fees that were not paid prior to the commencement of the bankruptcy and account for any monies so collected; or
- b. assign any right the solicitor may have to collect any such unpaid fees to the barrister.

The extent to which such a claim can be made will depend entirely upon the terms of the contract, and of the Solicitors Accounts Rules<sup>5</sup>.

5. It should be noted that it may be in the best interests of the insolvent estate for outstanding fees to be collected from lay clients even if they are being collected for a barrister and so will not themselves swell that estate. This is because such collection will, where the Solicitor is already liable for payment of such fees, reduce the value of the claims against the insolvent estate and so increase the possible dividend for other creditors. If the right to collect such fees is not assigned to the barrister and the Insolvency Practitioner concerned does agree to collect such sums it is possible they may claim to deduct from any sum so collected the costs they incur in making such collections<sup>6</sup>.

6. Second, and in addition to whatever rights the contract terms or Solicitors Account Rules confer, if an Administrator, Court appointed Liquidator, or Trustee in Bankruptcy (or before his appointment the Official Receiver)<sup>7</sup> of an insolvent solicitor

5 The SRA has recently concluded a consultation in relation to the Solicitors Accounts Rules after proposing that disbursements should no longer be treated as client money. Following the consultation review – see <http://www.sra.org.uk/sra/consultations/accounts-rules-review.page#download> - this proposal was revised to propose that disbursements should continue to be treated as client money. Instead, it is now proposed that if the only client money a Solicitor ever holds is such disbursements and sums paid on account of the Solicitor's own fees then the Solicitor need not keep such client money in a client account provided the client has been informed where and how such monies are to be held. If this proposal comes into effect there may be a risk that counsel may not know that a client account is not being maintained and that in such cases money actually paid on account of disbursements prior to insolvency may no longer be traceable as a trust asset and so have ceased to be available for payment to Counsel.

6 Any such claim to costs would be made under the *Berkeley Applegate* jurisdiction (*Re Berkeley Applegate (investment Consultants) Ltd* [1989] Ch 32, *Re Berkeley Applegate (investment Consultants) Ltd (No 3)* [1989] 5 BCC 803; but see also *Re Birchall* [2015] EWHC 1541 (Ch), [2017] 1 WLR 667 where a trustee in bankruptcy of an insolvent solicitor was not permitted to rely upon this jurisdiction.

7 The Insolvency Practitioner must be an Officer of the Court for this principle to apply.

recovers any sums due in respect of a barrister's fees from a lay client or from an opposing party in litigation the barrister concerned may demand payment from the relevant Insolvency Practitioner of all fees so received and can enforce such a demand by means of an application to the Court<sup>8</sup>. If that Insolvency Practitioner has already expended or distributed the amount of the fees at the time when that demand is made the Insolvency Practitioner can be directed to pay over a sum equivalent to the amount of the fees from out of any other assets of the insolvent estate then in (or later coming into) their possession<sup>9</sup>. That was the settled legal position before contractual fees for barristers became the norm with effect from 31 January 2013, and the same principles should continue to apply notwithstanding that fees are now paid on a contractual basis<sup>10</sup>.

7. A barrister may in some limited circumstances also be entitled to seek payment from the Insolvency Practitioner from an insolvent solicitor's estate when the amount of the fees in question was paid to the solicitor by the lay client **before** the commencement of the bankruptcy. Such a claim can only be made if and to the extent that the insolvent estate of a solicitor has actually been increased in size by the amount of a barrister's fees that were paid to and wrongly retained by that solicitor. Such a claim can in theory be made when the fees have become mixed with other property of a solicitor so as to be indistinguishable from the rest of that solicitor's property in the hands of the Insolvency Practitioner<sup>11</sup>. However, it is necessary that there be property against which such a claim can be made so if the fees were paid into an overdrawn office account then there is no basis for any such claim<sup>12</sup>.

8. If an insolvent solicitor collected sums due in respect of fees due to a barrister prior to the commencement of the insolvency process and then improperly retained

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8 See *Wells v Wells* [1914] P. 157. The Barrister's entitlement to claim the fees in such circumstances arises as a result of the application of the rule in *Ex Parte James* - see *Ex parte James Re Condon* [1874] LR 9 Ch. App 609 which rule requires a trustee in bankruptcy, as an officer of the court, to do the fullest equity and to act with the utmost fairness. Once again a claim might be made to deduct costs of collection under or by analogy with the *Berkeley Applegate* jurisdiction.

9 See *Ex parte Simmonds Re Carnac* [1885] 16 QBD 308.

10 The pre-2013 authorities must however now be read on the basis that what they state about barristers then not having any a legal entitlement to claim unpaid fees is no longer the case.

11 See *Wells v Wells* at pp. 166-167 and *Re Clark* [1975] 1 WLR 559 at 564H.

12 Applying *BIM v Homan* [1995] Ch 211 and *Re Goldcorp, Exchange Ltd* [1995] 1 AC 74.

such monies for his own purposes, a remedy may also exist in the form of a claim on the Solicitors Regulation Authority's Compensation Fund<sup>13</sup>.

### **Special Cases (1) Deceased Insolvent Solicitors**

9. The position in the case of a deceased insolvent solicitor is the same as that in the case of insolvent living solicitor with one possible qualification. Unless the estate of the deceased insolvent solicitor is being administered by a Trustee in Bankruptcy under an Insolvency Administration Order<sup>14</sup>, a barrister has no entitlement to seek payment from the deceased solicitor's estate of sums due under the principles considered in paragraph 6 above. This is because the rule in *Ex Parte James* is one which the Court will only apply to its own officers<sup>15</sup> and personal representatives are not officers of the court even when a deceased insolvent solicitor's estate is being administered by his personal representatives under the provisions of the Administration of Estates Act 1925 as qualified by the provisions of the Administration of Insolvent Estates of Deceased Persons Order 1986.

### **Special Cases (2) Solicitors subject to Individual Voluntary Arrangements**

10. An Individual Voluntary Arrangement ("IVA") is an increasingly common alternative to Bankruptcy. The Supervisor of an IVA is an officer of the court<sup>16</sup> with the result that subject only to any qualifications imposed by the terms of the IVA itself, the Rule in *Ex Parte James* is again potentially applicable with the results set out in paragraph 6 above.

### **What to do when a Solicitor becomes Insolvent**

11. Upon learning that a solicitor has become insolvent it is prudent to make contact with the Insolvency Practitioner who has been appointed as soon as possible in order to make a claim for any outstanding fees and also to seek to persuade them to collect any unpaid fees from the lay clients. Any such claim should be supported with full documentation such as signed contract terms and copies of rendered fee

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13 <http://www.sra.org.uk/consumers/problems/solicitor-owes-money/claim-professional-fee.page>

14 See the Administration of Insolvent Estates of Deceased Persons Order 1986. Accordingly, no such claim may be made when the insolvent estate of a deceased solicitor is being administered by a personal representative.

15 See *Re Sandiford (No 2) [1935] Ch. p.681*

16 See *King v Anthony [1998] 2 BCLC 517*

notes. It is possible to search for the insolvency status of individuals, corporate entities and LLPs in order to obtain details of the Insolvency Practitioner. In cases of Bankruptcy and IVA's the Individual Insolvency Register can be searched online at <https://www.insolvencydirect.bis.gov.uk/eiir/> In the case of Insolvent LLP's and Companies the Companies House registers can be searched online at <http://wck2.companieshouse.gov.uk//wckframe?name=accessCompanyInfo> and most filed documents can be downloaded free of charge from <https://beta.companieshouse.gov.uk/>

27 July 2017: Bar Council Remuneration Committee in consultation with Bar Council Ethics Committee

### **Important Notice**

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