

AUCKLAND DISTRICT LAW SOCIETY INC.

JAMIE WAUGH- BARRISTER TERMS OF ENGAGEMENT

IMPORTANT INFORMATION FOR INSTRUCTING SOLICITORS AND CLIENTS

Currently, with limited exceptions, as a barrister I am required to have an instructing solicitor. An instructing solicitor is a law firm or sole practitioner practising on their own account in New Zealand. They often perform an intermediate role between You and me and between me and other parties to the Brief (for instance, other disputants).

Strictly speaking *my* “client” is my Instructing Solicitors’ firm and the person named as “You” in the schedule on the next page, is their client. This can cause confusion. It is in the interests of all three parties that the understanding between us is clear. These Terms of Engagement are to bind all three of us, and if any further party or parties guarantee payment of my fees, it will bind them as well.

The work done by instructing solicitors varies. It depends on their and my capacity to do work, Your ability to pay, urgency, the importance of the case in monetary or other terms, the nature of the Brief, their and my expertise and experience, and Your confidence in them and me. In criminal matters it is common for the barrister to either do all the work or to be assisted by another barrister. The instructing solicitors often perform a relatively small role. In civil and commercial matters it is common for the barrister to work more closely with the instructing solicitors. These are not hard and fast rules.

The full extent of what needs to be done for You in this brief may not be clear at this stage. As a result, my Instructing Solicitors and I may agree to vary the role or tasks we perform from time to time. If we do this we will tell You.

IMPORTANT TERMS

These Terms of Engagement disclose the terms upon which I will accept engagement. Among these, some of the most important are:

- My agreement to carry out my work for You in accordance with the section headed “My Obligations” below;
- How my fees are calculated, when You will have to pay them, my best fees estimate, and Your agreement to pay the Initial Retainer to my Instructing Solicitors;
- Your agreement, if specified in the Schedule, that my liability to You is limited to the extent of my professional indemnity cover (if any);
- Our agreement about termination of my engagement and the consequences of termination including my right to suspend work if I am not paid or a guarantee has not been provided or complied with

SCHEDULE

YOU:

| | |
|------------------------------------|-----------------|
| Your Full Name(s): | Your Title: Mr. |
| Your Physical address: | |
| Your Postal address: | |
| Your Telephone No: | Your Fax No: |
| Your Mobile No: | Your Email: |
| Are you Registered for GST: YES/NO | Your GST No: |

NOMINATED REPRESENTATIVE:

Your Nominated Representative(s):
Physical address:
Postal address:
Telephone No:
Fax No:
Mobile No:
Email:

Note: Your Nominated Representative is a person or persons that I can take instructions from and report to

INSTRUCTING SOLICITORS

| | |
|----------------|----------------------|
| Firm Name: | Responsible Partner: |
| Person Acting: | Physical address: |
| Postal address | |
| Telephone: | Fax: |
| Mobile: | Email: |

GUARANTOR(S):

Full Name(s):
Physical address:
Postal address:
Telephone No:
Fax No:
Mobile No:
Email:

BRIEF: *Note: If instructions are lengthy or complex they may be continued in an addendum which shall form part of this Agreement.*

MY CHARGES:

- A fixed fee of \$ _____ plus GST, if any.
- Normal Fees, an hourly rate of \$200.00 plus GST, if any.

***Note:** Fees are charged in accordance with guidelines laid down by the Rules of Conduct and Client Care of the New Zealand Law Society. The time taken is just one factor and fees may exceed the hourly rate multiplied by the time taken. A cancellation fee can apply in certain circumstances. A Premium is payable under a Conditional Fee Agreement (see discussion below).*

INITIAL RETAINER: \$ _____

IS THIS A CONDITIONAL FEE AGREEMENT (“CFA”)?

No

***Note:** A CFA is an agreement under which a lawyer agrees with a client that some or all of the fees and expenses in respect of the Brief are payable only if the outcome of that Brief is successful. Unless specified above Your Brief is not being done on a CFA. If it is a CFA, the addendum at page ____ should be completed and attached.*

ESTIMATE: \$ _____ plus GST, if any.

***Note:** This figure represents my genuine opinion of a reasonable **estimate** of the fees I will charge to carry out the Brief. It is **not** a quote. It does not include disbursements such as Court filing and hearing fees, witness or arbitrator expenses, expert witness costs.*

COMPLAINTS PROCEDURE

If You have a complaint about any aspect of my work You should in the first instance speak to, or meet with, me or my Instructing Solicitors. If You or my Instructing Solicitors do not wish to meet or speak with me, or are dissatisfied with the outcome of the initial discussion, then You or they should write to me setting out the complaint and reasons for dissatisfaction, as well as a proposal for resolution of the complaint. I will then attempt to resolve the matter. If resolution is not possible then the matter can be referred to the NZLS for determination.

If You or my Instructing Solicitors are unsatisfied with the result of those steps then You and the Instructing Solicitors have the right to lodge a written complaint with the New Zealand Law Society's complaints service – details of which are available on www.lawsociety.org.nz.

TERMS OF ENGAGEMENT

1 **General**

Interpretation

- 1.1 In these Terms of Engagement, words and phrases have meanings that correspond to those words or phrases in the Schedule and Addenda.

Importance of Timely Instructions

- 1.2 I reserve the right to cease to act where You cannot or will not provide instructions required in a timely manner or at all, or where I am of the opinion that You have misled or deceived me or my Instructing Solicitors in any material way.

Partially Completed Form

- 1.3 Non completion of any part of this form is not intended to render it inoperative. The key parts are who I am acting for, what the Key Objectives are, and how I will charge. It is recognised that all or some of the other parts of this form may not be known at the time this form is used.

Adoption of These Terms by Instructing Solicitors

- 1.4 These terms of engagement do not bind the Instructing Solicitors until they have confirmed their acceptance in writing or have otherwise indicated their acceptance by conduct.
- 1.5 If the Instructing Solicitors confirm their acceptance of these Terms of Engagement, these Terms of Engagement shall be enforceable by the Instructing Solicitors as if they were a party to them from the outset.

2 **What are My Obligations to You and What are The Limits?**

Client Care Rules

- 2.1 You have the benefit of the Client Care Rules available from any District Law Society or the New Zealand Law Society. Those Rules require that in all events, subject to duties owed to the Courts and to the justice system, I must:
- 2.1.1 act competently, in a timely way, and in accordance with any arrangements made between You and me;
 - 2.1.2 protect and promote Your interests and act for You free from compromising influences or loyalties;
 - 2.1.3 discuss Your objectives and how they should best be achieved;
 - 2.1.4 provide You with information about the work to be done, who will do it and the way in which my services will be provided;
 - 2.1.5 charge You a fee that is fair and reasonable, and let You know when You will be billed;
 - 2.1.6 give You clear information and advice;
 - 2.1.7 protect Your privacy and ensure appropriate confidentiality;
 - 2.1.8 treat You fairly, respectfully and without discrimination;
 - 2.1.9 keep You informed about the work being done and advise when it is completed;

- 2.1.10 let You know if the instructions are of the sort where You may be eligible for legal aid and if so whether I am prepared to undertake the Brief if paid by legal aid;
- 2.1.11 let You know how to make a complaint, and deal with any complaint promptly and fairly.

Division and Sharing of Work by Me and Instructing Solicitors

- 2.2 Clause 16, and if this is a CFA the Schedule, set out the work that the Instructing Solicitors and I will carry out in relation to the Brief. As matters evolve, we may agree that I will carry out some of that work or that they may carry out some of the work that in normal litigation practice I would carry out. Decisions about the sharing and collaboration of work are relatively flexible. You should advise me and my Instructing Solicitors if You have any preferences or wish a certain approach to be taken.

Limits on My Liability and Instructing Solicitors' Liability

- 2.3 If:
 - 2.3.1 I hold professional indemnity insurance on terms and for amounts which exceed the minimum standards specified by the New Zealand Law Society; and
 - 2.3.2 You have initialled the section of the Schedule relating to limitation of my liability acknowledging this limitation clause and clause 2.4 and that you are obtaining my services for a business purpose,

then my liability to You and my Instructing Solicitors for any loss (as defined in clause 2.5 below) for which I am liable is limited to the Maximum Liability (also as defined in clause 2.5 below). This clause applies whether or not clause 2.4 does.

- 2.4 If:
 - 2.4.1 My Instructing Solicitors hold professional indemnity insurance on terms and for amounts which exceed the minimum standards specified by the New Zealand Law Society; and
 - 2.4.2 You have initialled the section of the Schedule relating to limitation of liability acknowledging this limitation clause and clause 2.3 and that you are obtaining my services for a business purpose,

then my Instructing Solicitors' liability to You for any loss (as defined in clause 2.5 below) for which they are liable is limited to the Maximum Liability (also as defined in clause 2.5 below). This clause applies whether or not clause 2.3 does.

- 2.5 In clauses 2.3 and 2.4 above:
 - 2.5.1 "loss" includes any liability, cost, expense, or loss, suffered or incurred directly or indirectly as a direct or indirect result of any action or omission whatsoever, including negligence, breach of contract, breach of fiduciary duty or breach of statutory duty.
 - 2.5.2 "Maximum Liability" means
 - 2.5.2.1 In clause 2.3 (which relates to the limit of **my** liability), the greater of (1) five times the fees actually received by me in relation to the Brief and (2) the amount payable by my professional indemnity insurers in respect of the relevant claim;
 - 2.5.2.2 In clause 2.4 (which relates to the limit of my **Instructing Solicitors'** liability), the greater of (1) five times the fees actually received by them in relation to the Brief and (2) the amount payable by their professional indemnity insurers in respect of the relevant claim.

- 2.6 The limitation of my liability shall not apply to the extent I am liable to You or my Instructing Solicitors due to any fraud or dishonesty on my part.
- 2.7 The limitation of my Instructing Solicitors' liability shall not apply to the extent they are liable to You or me due to any fraud or dishonesty on their part or that of any of their employees.
- 3 **How do I charge?**
- 3.1 You agree to pay "My Charges" which are specified in the Schedule.
- 4 **Cancellation Fees**
- 4.1 If You have initialled the section of the Schedule relating to cancellation fees, then You agree to reasonably compensate me for any time that I have committed to any future hearing, mediation or similar event that is cancelled or terminated at a time when I am not reasonably able to re-employ all or part of the time on work for other clients.
- 5 **Estimate of Costs**
- 5.1 Any costs estimate is my genuine opinion as to what the fees for my work are likely to be. It is based on what I know of the Brief at the time it is given. It is not possible to predict how each known and some unknown factors may affect the final costs.
- 5.2 If the work does not proceed as expected due to unexpected complications, or if the work proves more complicated than originally anticipated, I will charge for all additional work.
- 5.3 If it appears that the estimate will be exceeded, I will promptly advise You of the reasons and obtain further instructions from You.
- 5.4 All statements made by me in relation to fees are subject to the qualification that they exclude GST and GST can be charged in addition to the amount stated.
- 6 **Credit Policy**
- 6.1 You may be allocated a credit limit by the Instructing Solicitors which:
- 6.1.1 will be confidential between You and the Instructing Solicitors (and persons such as myself and expert witnesses instructed with Your consent);
- 6.1.2 will be the maximum amount that the Instructing Solicitors will allow to be owed or due to the Instructing Solicitors by You at any time;
- 6.1.3 will be able to be increased or decreased or withdrawn by the Instructing Solicitors at any time.
- 6.2 Both my Instructing Solicitors and I have the right to make reasonable and confidential credit enquiries from an appropriate information provider from time to time. You and each Guarantor (as appropriate) will sign authorisation(s) in the attached form (or such other form as we reasonably require) to enable such enquiries to be made.
- 6.3 The Instructing Solicitors may stop doing work (and instruct others – including me - to stop doing work) for You if Your credit limited is exceeded or if payment is not received by the Instructing Solicitor within 7 days of issue of the Instructing Solicitor invoice. Neither I nor my Instructing Solicitor will be responsible for any loss suffered by You when work is stopped for this reason.
- 6.4 My Instructing Solicitor may, from time to time, as a condition of the provision of further legal services require You to provide adequate security for the payment of all amounts that are then, or may become, payable to the Instructing Solicitors and me, in the form of a mortgage or General

Security Agreement. The terms under the heading “Security” at the end of this form will apply to any such security.

7 When Will You be Billed?

7.1 My Instructing Solicitors and I will, unless we have both indicated to the contrary, usually bill You each month or upon completion of any material part of the Brief. My invoices will be sent to my Instructing Solicitors with a copy to You.

8 What About Out Of Pocket Payments?

8.1 Payments may have to be made to other people for goods or services, for example filing fees, search fees, agency fees, photocopying, discovery, and expert witnesses’ fees (called disbursements).

8.2 Neither I nor my Instructing Solicitors are required to pay these amounts unless my Instructing Solicitors have first received payment from you. Both my Instructing Solicitors and I have the right to ask for funds to cover these expenses to be paid in advance to ensure that neither they nor I am out of pocket.

8.3 If my Instructing Solicitors or I instruct any other person to provide any goods or services in relation to the Brief both of us have the right to require payment of that person’s estimated fees into my Instructing Solicitor’s trust account beforehand. By instructing that person, both my Instructing Solicitors and I undertake an obligation to pay that person’s fees and accordingly require to be protected for them. I may require You to enter a payment arrangement directly with that person.

9 When Do You Have to Pay?

9.1 My invoices and those of my Instructing Solicitors are due for payment in full within 7 days of issue.

9.2 My Instructing Solicitors may require You to make a payment or payments for the provision of the Instructing Solicitors’ legal services in relation to the Brief.

9.3 I require You to deposit the Initial Retainer with my Instructing Solicitors so that it is held by them as a fund from which they can pay amounts owing to me. I will require You to refresh the Initial Retainer as it is applied to payment of those amounts.

9.4 You authorise and direct the Instructing Solicitor to deduct from any amount the Instructing Solicitor is holding for You (whether as the Initial Retainer, or not) any amount due, or that will become due, to the Instructing Solicitors or me as a result of any account issued by me or the Instructing Solicitors.

10 Client Comprising Multiple Parties

10.1 This section of these Terms of Engagement applies if You are a couple, partnership, unincorporated group, or a group or mixture of legal entities.

10.2 Each of You shall appoint one or more Nominated Representatives (up to a maximum of three) who shall, unless both I and my Instructing Solicitors are instructed to the contrary, each have authority to:

10.2.1 Give me and my Instructing Solicitors instructions on behalf of all or any of You;

10.2.2 Receive communications relating to the Brief (without me or my Instructing Solicitors being concerned to ensure that each communication is then received by any of You;

10.2.3 Make any decision relating to the Brief including decisions from time to time to instigate, continue, suspend, adjourn, discontinue, or settle proceedings or any dispute relating to the Brief:

- 10.3 Each of You is jointly and severally liable for payment in due time of all my fees and those of my Instructing Solicitors in accordance with these Terms of Engagement.
- 10.4 Any of You becomes a “Dormant Party” to these Terms of Engagement if:
- 10.4.1 That party gives me or my Instructing Solicitors notice in writing that they wish to become a dormant party;
 - 10.4.2 Is not (or will not, when the notice becomes operative, be) a party to any proceedings or otherwise requiring representation.
- 10.5 Without derogating from clause 10.3, if any of You become a Dormant Party, they:
- 10.5.1 Remain liable to pay their share of my fees and those of my Instructing Solicitors (both billed and unbilled) to that time but cease to be liable for any such fees incurred after that time except to the extent that the incurrence of such fees was not avoidable at the time the notice was given;
 - 10.5.2 Shall not be entitled to receive the proceeds of any settlement or proceeding, whenever those proceeds are recovered;
 - 10.5.3 Must maintain the confidentiality and privilege of all communications, documents and other information relating to the Brief and specifically must not disclose any such communications, documents or other information to any party with an adverse or opposing interest in the Brief.

11 **What if You Cannot Pay on Time?**

- 11.1 If you anticipate difficulty in the payment of any account, You must contact me and my Instructing Solicitors immediately and discuss arrangements for payment. The provisions of clause 6.3 may apply.
- 11.2 Both my Instructing Solicitors and I may charge interest on any amount unpaid to either of us on the due date for payment. In such a case interest will be charged in the manner and at the overdraft interest rate charged by the unpaid party’s bank to the unpaid party plus a margin of 4%. The interest will apply from the date payment was due until the date payment is actually received by the unpaid party.
- 11.3 If any liquidation or bankruptcy proceeding is issued, or any legal action is taken to recover any amount owed by You to me or my Instructing Solicitors You agree to pay, in addition to the amount outstanding, all service fees, filing fees and reasonable legal fees (on a solicitor-client basis) incurred in such action and in the enforcement of any such action.

12 **Guarantor**

- 12.1 Where the name of one or more guarantors is completed on the front page of this agreement, then each such person personally jointly and severally guarantees to the Instructing Solicitors and me full payment of all amounts due to:
- 12.1.1 the Instructing Solicitors (for amounts due to them or due to me from them) from You; and
 - 12.1.2 me, in terms of these Terms of Engagement.
- 12.2 Each Guarantor acknowledges that they will not be entitled to legally privileged or confidential information relating to You or the Brief without Your prior written consent.

13 **Lien**

13.1 Both my Instructing Solicitors and I have the right to retain the proceeds of any litigation and any original documents and correspondence on Your files until such time as all outstanding fees, disbursements and other expenses have been paid. This is known as a lien.

13.2 The existence of a lien will be particularly important in circumstances where You decide for whatever reason to instruct another law firm or barrister. In that case You must pay all outstanding fees, disbursements and other expenses outstanding to me and my Instructing Solicitors before I (or the Instructing Solicitors) must release the lien. Alternately my Instructing Solicitors or the new law firm may be obliged to give an undertaking to me to pay all outstanding fees and disbursements.

14 **Collection, Retention and Correction of Records and Information**

14.1 You and each Guarantor acknowledges that both the Instructing Solicitors and I may wish to collect and retain personal information about you and them for the purposes of deciding whether to extend, further extend, cancel, or suspend credit, carrying out the Brief, or recovering any amounts owing to me or them.

14.2 You and each Guarantor authorises my Instructing Solicitors and I from time to time to collect, retain and use such personal information. That information may be collected from any source we consider appropriate.

14.3 You and each Guarantor has a right of access to, and may request correction of any, personal information held by my Instructing Solicitors or me about them.

14.4 Upon completion of the Brief I will usually return all files and documents that You or my Instructing Solicitors have provided me, to my Instructing Solicitors. I will leave it to them to return to You such of those documents of which You wish to have custody. I retain all files and documents created by me for the purpose of conducting the Brief.

14.5 To the extent I retain any files and documents (whether mine or Yours), those will be stored either in my chambers or in a professional file storage facility. You accept the risk of loss, damage or destruction of the files while in either of those locations or in transit. Those files and documents will be retained by me for the period required by law after which they may be destroyed.

14.6 Subject to the lien in paragraph 13.1, if You wish to inspect these files and documents, a charge may apply for recovery of the files or documents from storage and for any copying, or scanning required.

15 **Confidentiality**

15.1 I will hold all information concerning Your business and affairs in strict confidence, and will not divulge such information except where required or permitted to do so by law, or You expressly or impliedly authorise me to make such disclosure.

16. **Instructing Solicitors Work:**

16.1 Unless the Instructing Solicitors and I agree, or have agreed, to the contrary previously, the Instructing Solicitors will carry out any tasks in or related to the Brief which in normal litigation practice in the relevant Court or forum would be performed by a solicitor.

16.2 Without limiting that understanding, the Instructing Solicitors will:

- Draft all notices and correspondence to the other parties, both before and after proceedings commence, and will then settle the same with me before delivery.
- Prosecute and diligently and carefully prepare any pleadings in the Brief, settle the same with me before delivery, and take all procedural steps in time;
- Instruct any experts or investigators that I, in consultation with You and them, consider

necessary or desirable for the proper conduct of the Brief;

- Ensure all experts are advised of and comply with the terms of any code of conduct that will apply to them and the evidence they give in the relevant Court or forum;
- Provide me, or make available to me, copies of all documents relevant to the Brief as soon as possible after they become available to You or them;
- Inform me of all material developments and information relevant to the Brief as soon as possible after they become known to You or them;
- Acquire and provide me with any other documents or information relevant to the Brief which I reasonably request and which are available to or known to You or them;
- Compile and list all relevant documents in accordance with the rules or orders of the relevant Court or forum so as to complete Your discovery and disclosure obligations. In doing so the Instructing Solicitors will consult with me as to the format, timing and contents of the list.
- Consider with me the need for me to advise on evidence, merits, and quantum or to perform any other tasks and the need for any further procedural steps which I might consider necessary, at least, upon service of the initial pleadings, upon completion of disclosure and inspection of documents, upon preparation of witness statements, affidavits, instructions to experts and/or experts reports; upon exchange or service of expert's reports or affidavits of opposition witnesses;
- Communicate to You my advice on all important aspects of the Brief including liability, merits, quantum, terms of settlement, security for costs, economics of the Brief, the need or desirability of more senior or specialised counsel or experts
- Confer on hearing dates in good time;
- Communicate to You and me promptly any settlement proposals and seek my advice as to whether to accept, reject or counter-offer in response;
- Carry out any work defined as "Excluded Work" in any addendum relating to these Terms of Engagement if it is a Conditional Fee Agreement.

