

## **Approval of Amendment to the Cab Rank Rule**

For approval by the Legal Services Board.

July 2015.

This application for a change to a regulatory arrangement is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications.

Any queries about this application should be addressed to:

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The Bar Standards Board (BSB) wishes to provide the information below in support of the application.

### **1. Details of proposed alteration**

**1.1** The purpose of this paper is to request that the Legal Services Board (LSB) approve the following amendment to the cab rank rule at Rule C30.7.b of the BSB Handbook:

**Rule C30** The cab rank rule does not apply if:

**.7** the *professional client*:

**.a** is not accepting liability for your fees; or

**.b** ~~is named on the List of Defaulting Solicitors~~ **represents, in your reasonable opinion, an unacceptable credit risk;** or

**.c** is instructing you as a lay *client* and not in their capacity as a *professional client*

It is proposed that the amendment to Rule C30.7.b will be supplemented by the following guidance:

Examples of when you might reasonably conclude (subject to the following paragraph) that a *professional client* represents an unacceptable credit risk include:

- .1 Where they are included on the *Bar Council's* List of Defaulting Solicitors;
- .2 Where to your knowledge a *barrister* has obtained a judgment against a *professional client*, which remains unpaid;
- .3 Where a firm or sole practitioner is subject to insolvency proceedings, an individual voluntary arrangement or partnership voluntary arrangement; or
- .4 Where there is evidence of other unsatisfied judgments that reasonably call into question the *professional client's* ability to pay your fees.

Even where you consider that there is a serious credit risk, you should not conclude that the *professional client* represents an unacceptable credit risk without first considering alternatives. This will include considering whether the credit risk could be mitigated in other ways, for example by seeking payment of the fee in advance or payment into a third party payment service as permitted by rC74, rC75 and associated guidance.

**1.2** The BSB has reviewed from first principles whether it is necessary to include the List of Defaulting Solicitors – maintained by the Bar Council in its representative capacity – within its regulatory arrangements. The list currently forms part of the BSB's regulatory arrangements in that it is included within the list of exemptions to the cab rank rule.

**1.3** The cab rank rule is Rule C29 of the BSB Handbook. The rule states that if a self-employed barrister receives instructions from a professional client such as a solicitor, and the instructions are appropriate taking into account the experience, seniority and/or field of practice of the barrister, they must accept the instructions. This applies irrespective of:

- The identity of the client;
- The nature of the case to which the instructions relate;
- Whether the client is paying privately or is publicly funded; and
- Any belief or opinion which the barrister may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

**1.4** As the List of Defaulting Solicitors is included within the list of exemptions to the cab rank rule, a barrister is entitled (but not obliged) to refuse instructions where a solicitor appears on the list.

**1.5** In order to assess whether it is necessary to retain the List of Defaulting Solicitors within its regulatory arrangements, the BSB sought views via consultation (Annex A) on the list not being included within the list of exemptions to the cab rank rule, but replaced by an exemption where it is reasonable to conclude that the professional client represents an unacceptable credit risk.

**1.6** The BSB considers that barristers should not be required to accept instructions under the cab rank rule if there is significant risk that they will not be paid. In reviewing the current provision its objectives are to allow an exemption from the rule when, and only when, there is such a risk which cannot be adequately mitigated and to do so in a way which does not undermine the rule itself. The BSB has concluded that in order to achieve this objective, it is not necessary to include the List of Defaulting Solicitors within its regulatory arrangements. It is instead proposing

amending the cab rank rule at Rule C30.7.b of the BSB Handbook to state that “the cab rank rule does not apply if the *professional client* represents, in your reasonable opinion, an unacceptable credit risk”. It is also proposed that the amendment to Rule C30.7.b will be supplemented by guidance, giving examples of when a barrister might reasonably conclude that a professional client represents an unacceptable credit risk.

## **2. Details of existing arrangements**

**2.1** As the List of Defaulting Solicitors is included within the list of exemptions to the cab rank rule, a barrister is entitled (but not obliged) to refuse instructions where a solicitor appears on the list. The list is maintained by the Bar Council as a service to its members and the BSB has no involvement in its administration. The summary of the BSB’s call for evidence on the cab rank rule (Annex E) also demonstrated that the vast majority of barristers have never had the rule invoked by professional clients. Among the respondents to the survey, close to three quarters had never had the rule expressly invoked (74.7%) with the remainder of respondents largely made up of those who had only rarely had the rule expressly invoked (22.1%), a combined percentage of 96.8%. It is therefore unlikely that many barristers have relied on the List of Defaulting Solicitors to refuse instructions under the rule.

**2.2** The cab rank rule is an unusual feature of the Bar’s regulatory arrangements, given that it can be professional misconduct for a barrister to refuse to represent a lay client for personal reasons (which separates the Bar from other professionals). The effect of the rule is that barristers cannot choose their clients. On the contrary, all clients have equal access to the Bar, each having a full range of choice of any advocate who is suitably experienced, not conflicted and available for the work, whatever the nature of their case. In effect, the cab rank rule is a public interest restriction on barristers’ normal freedom to contract (and hence to compete on an equal footing with other legal professionals in the marketplace).

**2.3** However, the BSB has not thought it reasonable to require barristers to have to rely for payment on solicitors who are in default in paying other fees, and are a possible credit risk. The rationale for the List of Defaulting Solicitors being included within the BSB’s regulatory rules is therefore as an indicator to a barrister that a particular solicitor may be an increased credit risk. The exemption to the cab rank rule simply removes the obligation to act for such solicitors. Barristers are still free to do so if they wish, but it is unfair to oblige a barrister to accept an unreasonable credit risk by the operation of the rule that they would otherwise have the commercial freedom to avoid. However, the List of Defaulting Solicitors is only one potential source of evidence of high credit risk.

**2.4** The BSB therefore sought views via consultation (Annex A) on whether it is necessary, in light of the regulatory objectives, for the cab rank rule to continue to refer specifically to the List of Defaulting Solicitors, or whether the regulatory objectives would be better met by moving to a more outcomes focused exemption where there was an unreasonable credit risk. The BSB also sought views via consultation on whether an exemption for unacceptable credit risk would, by adding to the grounds on which instructions could be refused, risk undermining the cab rank rule.

### 3. Rationale for the alteration

**3.1** The BSB notes that the existing arrangements involve the List of Defaulting Solicitors being administered by the Bar Council in its representative capacity, but having a direct impact of the BSB's regulatory arrangements. It has therefore been necessary to assess from first principles whether it is essential on public interest grounds for the list to be included within the BSB's regulatory arrangements.

**3.2** The BSB's overriding objective is that barristers should not be compelled to work in situations which would be unfair or cause hardship, as this could undermine the regulatory objective of encouraging an independent, strong, diverse and effective legal profession. The existing arrangements are intended to further that objective by allowing barristers to identify, via the List of Defaulting Solicitors, those who represent an unreasonable credit risk. Work from those who are not on the list may not currently be rejected on the basis that they represent an unacceptable credit risk (however, barristers do have the option of requiring fees to be paid up front. If they are then not paid up front, the cab rank rule does not apply. Rule C30.9.b of the BSB Handbook states that "the cab rank rule does not apply if: having required your fees to be paid before you accept the instructions, those fees have not been paid").

**3.3** Nonetheless, the List of Defaulting Solicitors is only one potential source of evidence of high credit risk. The existing arrangements therefore do not address other situations in which it may be unfair to require barristers to work and in doing so, risk undermining the regulatory objective of encouraging an independent, strong, diverse and effective legal profession. This has led the BSB to conclude that it is not necessary on public interest grounds for the List of Defaulting Solicitors to be included within its regulatory arrangements.

### 4. Nature and effect of proposed change

**4.1** It is proposed that the following amendment to the cab rank rule is made at Rule C30.7.b of the BSB Handbook:

**Rule C30** The cab rank rule does not apply if:

*.7 the professional client.*

*.a is not accepting liability for your fees; or*

***.b is named on the List of Defaulting Solicitors represents, in your reasonable opinion, an unacceptable credit risk; or***

*.c is instructing you as a lay client and not in their capacity as a professional client*

It is also proposed that the amendment to Rule C30.7.b will be supplemented by the following guidance:

Examples of when you might reasonably conclude (subject to the following paragraph) that a *professional client* represents an unacceptable credit risk include:

- .1 Where they are included on the *Bar Council's* List of Defaulting Solicitors;
- .2 Where to your knowledge a *barrister* has obtained a judgment against a *professional client*, which remains unpaid;
- .3 Where a firm or sole practitioner is subject to insolvency proceedings, an individual voluntary arrangement or partnership voluntary arrangement; or
- .4 Where there is evidence of other unsatisfied judgments that reasonably call into question the *professional client's* ability to pay your fees.

Even where you consider that there is a serious credit risk, you should not conclude that the *professional client* represents an unacceptable credit risk without first considering alternatives. This will include considering whether the credit risk could be mitigated in other ways, for example by seeking payment of the fee in advance or payment into a third party payment service as permitted by rC74, rC75 and associated guidance.

**4.2** The amendment moves to a more outcomes focused exemption from the cab rank rule where the professional client represents an unreasonable credit risk. Compared to the existing arrangements, it therefore better meets the overriding objective that barristers should not be compelled to work in situations which would be unfair or cause hardship.

**4.3** However, the amendment is also supplemented by guidance, which gives examples of when a barrister might reasonably conclude that a professional client represents an unacceptable credit risk. The guidance is worded fairly strictly, and broadly replicates the types of situations which are already covered by the List of Defaulting Solicitors. This is intended to mitigate the risk that the amendment, by adding to the grounds on which instructions can be refused, undermines the cab rank rule.

**4.4** The guidance still refers to the List of Defaulting Solicitors as an example of when a barrister might reasonably conclude that a professional client represents an unreasonable credit risk. This retains any benefits of the list, but avoids relying on a representative function within the BSB's regulatory rules, and also enables barristers to draw on other evidence to the same effect.

## **5. Risk/statement in respect of the LSA regulatory objectives**

**5.1** The effect of the cab rank rule is that barristers cannot choose their clients – all clients have equal access to the Bar, each having a full range of choice of any advocate who is not conflicted and available for the work, whatever the nature of their case. However, the BSB has not thought it reasonable to require barristers to have to rely for payment on solicitors who are in default in paying other fees, and are a possible credit risk. The BSB has therefore particularly sought to balance the risks to the regulatory objectives of, on the one hand, encouraging an independent, strong, diverse and effective legal profession, and on the other, improving access to justice and protecting and promoting the interests of consumers.

**5.2** By better meeting the objective that barristers should not be compelled to work in situations which would be unfair or cause hardship, the amendment would further the regulatory objective of encouraging an independent, strong, diverse and effective legal profession more so than the existing arrangements. It is also undesirable for the List of Defaulting Solicitors – maintained by the Bar Council in its representative capacity – to continue to be included within the BSB’s regulatory rules unless there are good reasons otherwise.

**5.3** However, respondents to the consultation (Annex B) did raise concerns that an exemption for unreasonable credit risk would, by adding to the grounds on which instructions could be refused, risk undermining the cab rank rule. The proposal is to amend Rule C30.7.b of the BSB Handbook to state that “the cab rank rule does not apply if the *professional client*: represents, in your reasonable opinion, an unacceptable credit risk”. Including the words “reasonable” and “unacceptable” within the rule, which are open to interpretation and challenge, could risk barristers inappropriately determining that professional clients represent unreasonable credit risks and refusing work from them. This would affect the ability of lay clients to access the services of barristers, and negatively impact the regulatory objectives of improving access to justice and protecting and promoting the interests of consumers.

**5.4** The BSB has sought to mitigate these risks to the regulatory objectives by proposing to supplement the amended Rule C30.7.b with guidance. This is worded fairly strictly, and broadly replicates the types of situations which are already covered by the List of Defaulting Solicitors (and indeed, still cites the list as an example of when a barrister might reasonably conclude that a professional client represents an unacceptable credit risk). It also clarifies that a barrister should not conclude a professional client represents an unreasonable credit risk without first considering alternatives, e.g. the use of a third party payment service, or requiring fees to be paid up front as per Rule C30.9.b of the BSB Handbook. In this way, barristers should be prevented from inappropriately determining that professional clients represent unacceptable credit risks and refusing work from them.

**5.5** The BSB therefore considers that it has struck an appropriate balance between the risks to the regulatory objectives of the one hand, encouraging an independent, strong, diverse and effective legal profession, and on the other, improving access to justice and protecting and promoting the interests of consumers. In turn, it has mitigated the risk of the cab rank rule being undermined.

**5.6** A full consideration of how the amendment would impact each of the regulatory objectives is available at Annex C.

## **6. Statement in respect of the Better Regulation Principles**

**6.1** The BSB considers that the proposed amendment fulfils its obligation to have regard to the Better Regulation Principles. The following section summarises how the proposed amendment meets these principles.

· *Transparent*: a consultation (Annex A) was issued and a report will be published on the BSB’s website. A log of responses to the consultation is also available at Annex B.

· *Accountable*: the proposed amendment has been consulted on extensively and debated by the Bar Standards Board in public session. The BSB will keep the impact of the amendment under review. In particular, it has committed to review the standard contractual terms (which also form part of the cab rank rule) within the next two to three years. It will look at this rule again within the same timescales.

· *Proportionate*: the proposed exemption to the cab rank rule leaves it to the discretion of the barrister to decide whether the credit risk is acceptable but provides a framework for making that decision. The List of Defaulting Solicitors is only one potential source of evidence of high credit risk. The existing arrangements therefore do not address other situations in which it may be unfair to require barristers to work. Conversely, the proposed amendment would allow barristers, where there is other evidence of potentially high credit risk, to make a proportionate judgment not to accept work under the cab rank rule. Moving the reference to the List of Defaulting Solicitors to guidance will also enable a more flexible approach to be taken over time, i.e. if the Bar Council, in its representative capacity, changes the procedure for professional clients being placed on the list in the future.

· *Consistent*: as the List of Defaulting Solicitors is only one potential source of evidence of high credit risk, the existing arrangements do not address other situations in which it may be unfair to require barristers to work. Moving to a more outcomes-focused approach would therefore promote consistency within the BSB's regulatory arrangements.

· *Targeted*: by moving to a more outcomes focused exemption from the cab rank rule, the proposed amendment would address situations in which it may be unfair to require barristers to work, but are not adequately covered by the existing arrangements. However, the BSB is proposing a targeted regulatory response in which the supplemental guidance is worded fairly strictly, and broadly replicates the types of situations which are already covered by the List of Defaulting Solicitors. This should prevent barristers from inappropriately determining that professional clients represent unacceptable credit risks, and thereby prevent the cab rank rule from being undermined.

## **7. Statement in relation to desired outcomes**

**7.1** The desired outcome is that barristers should be required to accept cab rank rule cases unless there is a genuine risk of non-payment which cannot be adequately mitigated. The proposed amendment and related guidance widen the grounds on which a barrister can determine that the risk is unacceptable while seeking to ensure that the exemption cannot be used as a way of avoiding the requirements of the rule.

## **8. Consultation process undertaken**

**8.1** The BSB issued a call for evidence on the cab rank rule (Annex D), in part to gather information about the frequency with which the rule is being invoked. The summary of the BSB's call for evidence on the cab rank rule is available at Annex E, and the analysis of the accompanying survey on the cab rank rule and standard contractual terms is available at Annex F. The BSB then sought views via consultation (Annex A) on whether it is necessary, in light of the regulatory

objectives, for the rule to continue to refer specifically to the List of Defaulting Solicitors, or whether the regulatory objectives would be better met by moving to a more outcomes focused exemption where there was an unreasonable credit risk. The BSB also sought views via consultation on whether an exemption for unacceptable credit risk would, by adding to the grounds on which instructions could be refused, risk undermining the cab rank rule.

**8.2** The Bar Council objected to the proposed amendment on the grounds that permitting greater flexibility might risk barristers avoiding their obligations under the cab rank rule by claiming that a solicitor or firm represented an unreasonable credit risk. It and others also felt that a change was unnecessary because of the option to require fees to be paid up front as per Rule C30.9.b of the BSB Handbook. Furthermore, there was a concern that if the List of Defaulting Solicitors was no longer the basis of an exception to the cab rank rule, it could become obsolete (although it should be noted that as the list is maintained by the Bar Council in its representative capacity, this would not be a regulatory concern).

**8.3** However, others generally agreed that the proposed amendment would not cause any detriment to the cab rank rule. The Family Law Bar Association noted that the value of the rule as a principle was deeply embedded in the profession and that in any event, the competitive nature of the market means barristers are not seeking grounds on which to refuse instructions.

**8.4** The proposed amendment was also welcomed by some, as a recognition that the List of Defaulting Solicitors was a blunt tool which may not be of practical use to the profession in circumstances where there was evidence (e.g. through a track record of dealing with a particular solicitor or firm) that there was a genuine risk of non-payment, despite the solicitor or firm not appearing on the list.

**8.5** That notwithstanding, many were of the view that if the reference to the List of Defaulting Solicitors was removed from the list of exemptions to the cab rank rule, the BSB should publish guidance as to what a barrister might reasonably regard as representing an “unacceptable” credit risk. The BSB therefore proposes to publish such guidance to supplement the proposed amendment to Rule C30.7.b. The guidance still refers to the List of Defaulting Solicitors as an example of when a barrister might reasonably conclude that a professional client represents an unreasonable credit risk.

**8.6** There was also a concern that the proposed amendment would allow barristers to refuse instructions on the basis that the professional client represents an unacceptable credit risk, despite the fact that they or the lay client are willing and able to pay fees up front. The guidance therefore clarifies that “You should not conclude that the *professional client* represents an unacceptable credit risk without first considering alternatives. This will include considering whether the credit risk could be mitigated in other ways, for example by seeking payment of the fee in advance or payment into a third party payment service as permitted by rC74, rC75 and associated guidance”.

**8.7** A log of responses to the consultation is available at Annex B.

## **9. Implementation timetable and operational readiness**

**9.1** The amendment will be made as part of the next round of updates to the BSB Handbook. The new position will be also communicated to the profession via the BSB's monthly Regulatory Update e-mail.

### **Annexes**

Annex A – Consultation on the Cab Rank Rule, Standard Contractual Terms and List of Defaulting Solicitors.

Annex B – Log of Responses to the Consultation on the Cab Rank Rule, Standard Contractual Terms and List of Defaulting Solicitors.

Annex C – Consideration of Regulatory Objectives (List of Defaulting Solicitors).

Annex D – Call for Evidence: Review of Standard Contractual Terms and the Cab Rank Rule.

Annex E – Summary of Responses to Call for Evidence.

Annex F – Cab Rank Rule and Standard Contractual Terms Survey Analysis.