
EXPLANATORY NOTE

(This note is not part of the Order)

Sections 58 and 58A of the Courts and Legal Services Act 1990 (c.41) (“the 1990 Act”) make provision as regards the regulation of conditional fee agreements (“CFAs”) and the recoverability of success fees payable under a CFA. Under these provisions, all proceedings may be the subject of an enforceable CFA, save for specified family proceedings and all criminal proceedings other than those under section 82 of the Environmental Protection Act 1990 (c.43).

Sections 58 and 58A of the 1990 Act were amended by section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) (“the 2012 Act”). The effect of the amendments is that a success fee payable under a CFA may no longer be recovered by a lawyer from a losing party, but, subject to additional conditions under section 58(4A) and (4B), will be recoverable by a lawyer from their successful client.

This Order makes provision as to how the success fee should be calculated. To that end, article 7 of this Order revokes the Conditional Fee Agreements Order 2000 (SI 2000/823), but its provisions are replicated in this Order, first, in article 2, which provides that all proceedings which may be the subject of a conditional fee agreement, except criminal proceedings under section 82 of the Environmental Protection Act 1990, may provide for a success fee, and, secondly, in article 3, which sets the maximum success fee percentage at 100% of the lawyer’s fee.

Section 58(4A) of the 1990 Act provides that CFAs which provide for a success fee and which relate to proceedings specified by the Lord Chancellor must comply with certain additional conditions (including conditions which may be specified by order made by the Lord Chancellor under section 58(4B)) in order to be enforceable. Article 4 specifies claims for personal injury for these purposes.

Notwithstanding the effect of article 3, section 58(4B) of the 1990 Act, enables the Lord Chancellor, in respect of proceedings specified by order under section 58(4A), to effectively cap the lawyer’s success fee at a percentage of specified damages awarded to the client. Article 5 provides that, in a claim for personal injuries, the success fee shall be limited to a maximum of 25% of the damages awarded for pain, suffering and loss of amenity and pecuniary loss, other than future pecuniary loss and net of any sums recoverable by the Compensation Recovery Unit, inclusive of VAT.

Article 5 further limits the effect of the 25% cap to proceedings at first instance. In respect of all other personal injury proceedings (i.e. appeals), the maximum success fee which may be recovered from damages awarded for pain, suffering and loss of amenity and pecuniary loss, other than future pecuniary loss and net of any sums recoverable by the Compensation Recovery Unit, shall be a maximum of 100% of those damages, inclusive of VAT.

Article 6 contains a transitional and saving provision. The effect of the transitional provision is to provide that articles 4 and 5 do not apply to a CFA entered into in respect of a claim for personal injuries, or to a collective CFA under which advocacy or litigation services are provided to a person in respect of that claim, before the day on which these regulations comes into force.

The effect of section 48 of the 2012 Act is that the amendments made by section 44 of that Act will not, for the time being, apply to a claim for damages in respect of diffuse mesothelioma proceedings. Additionally, section 44 will not be commenced, for the time being, in respect of publication and privacy proceedings (which are defined in this Order) and proceedings which are, or which relate to, insolvency proceedings. The effect of the saving provision in article 6 is to provide that articles 4 and 5 will not apply to these proceedings.