

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

A.

FUNDING OF LEGAL SERVICES (PARTS I & II, SECTIONS 1-34)

Background

Conditional fees

45. Section 58 of the Courts and Legal Services Act 1990 allowed the use of conditional fee agreements in such types of case as the Lord Chancellor specified by order (and subject to any requirements made by him in regulations). Section 58(10) excludes from the potential scope of conditional fees all criminal and family proceedings.
46. Conditional fee agreements allow clients to agree with their lawyers that the lawyer will not receive all or part of his or her usual fees or expenses if the case is lost; but that, if it is won, the client will pay an uplift to the solicitor in addition to the usual fee. In July 1995, conditional fee agreements were allowed for a limited range of cases (personal injury, insolvency and cases before the European Commission of Human Rights). The maximum uplift that could be charged if the lawyer was successful was set at 100% of the normal fee. In addition the Law Society recommended that lawyers should voluntarily limit the uplift to a maximum of 25% of the damages if that was lower than the 100% uplift of the fee. At the same time, insurance policies were developed which allowed the client to take out insurance to cover the costs of the other party, and the client's own costs other than the solicitor's fees, if the case should be lost. Generally the uplift and the premium are taken from any damages recovered by the client. In July 1998, the Government extended the availability of conditional fees to all civil cases (excluding family cases).
47. Since the introduction of conditional fees, the common law has been developed by two recent decisions of the courts (*Thai Trading Co. (A Firm) v Taylor*, [1998] 3 All ER 65 CA; and *Bevan Ashford v Geoff Yeandle (Contractors) Ltd*, [1998] 3 All ER 238 ChD). In the first of these cases the Court of Appeal held that there were no longer public policy grounds to prevent lawyers agreeing to work for less than their normal fees in the event that they were unsuccessful, provided they did not seek to recover more than their normal fees if they were successful. (The latter was only permissible in those proceedings in which conditional fee agreements were allowed). In *Bevan Ashford*, the Vice Chancellor held that it was also lawful for a conditional fee agreement to apply in a case which was to be resolved by arbitration (under the Arbitration Act 1950), even though these were not court proceedings, provided all the requirements specified by regulations as to the form and content of conditional fee agreements were complied with.
48. In addition, it is now possible for someone contemplating litigation to take out an insurance policy to cover, in the event that the case is lost, both the costs of the other party and his or her own legal costs (including the solicitor's fees if these are not subject to a conditional fee agreement). Some of these policies were developed to support the

*These notes refer to the Access to Justice Act 1999
(c.22) which received Royal Assent on 27th July 1999*

use of conditional fee agreements but others are used to meet lawyers' fees charged in the traditional way. The Act makes premiums paid for protective insurance recoverable in costs.

49. The principles behind the Government's desire to see an expansion in the use of conditional fee arrangements were set out in a consultation paper, *Access to Justice with Conditional Fees*, Lord Chancellor's Department, March 1998.