

ACCESS TO JUSTICE ACT 1999

EXPLANATORY NOTES

A.

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

Commentary

Part II: Other funding of legal services

Conditional fee and litigation funding agreements

132. **Section 27: Conditional fee agreements.** This section replaces the existing section 58 of the Courts and Legal Services Act 1990 with two new sections: section 58 and 58A. New section 58 takes into statute law the decisions in the *Thai Trading* and *Bevan Ashford* cases described in paragraph 47 above. It does this by making all agreements which provide that legal fees should be payable only in certain circumstances subject to the provisions of the new sections. Section 58(5) excepts from this principle agreements between solicitors and their clients in relation to services (such as conveyancing) that do not relate to litigation or prospective litigation.
133. New section 58 also draws a distinction between agreements which do, and do not, provide for an additional success fee to be paid. It empowers the Lord Chancellor to define the proceedings in which such fees are to be permitted, and to prescribe their maximum size. New section 58A(6) allows for success fees can be recovered in costs from the losing party in the case. Paragraph 32 above sets out the reasons for this change
134. New section 58A replicates the existing bar on conditional fees in family and criminal proceedings, but makes an exception for proceedings under section 82 of the Environmental Protection Act 1990. These cases, which are technically criminal proceedings, concern orders requiring people to put right a statutory nuisance (e.g. the failure of a landlord to maintain rented housing in a habitable condition). The *Thai Trading* case permitted conditional fees without an uplift in these cases, and the exception in section 58A(1)(a) is necessary to preserve that position. Section 58A also clarifies the existing law in several respects. Subsection (3)(a) makes clear that requirements to provide information to a client apply before a conditional fee agreement is actually made. Subsection (4) ensures that the legislation covers tribunal cases, cases that are settled before court proceedings are issued, and cases that go to arbitration.
135. **Section 28: Litigation funding agreements.** This section provides for a new type of agreement called a litigation funding agreement. Like conditional fee agreements, litigation funding agreements would allow litigants to pursue cases on the basis that they would not be liable for their legal costs if the case was unsuccessful. The difference between the two types of agreement is that a litigation funding agreement would be with a third party funder, not the lawyer taking the case. The funder would pay the lawyer in the normal way and, in successful cases, would be able to recover those costs and a success fee from the other side. The success fee would be paid into the fund to help meet the cost of lawyers' fees in unsuccessful cases.

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

136. [Section 28](#) provides for the Lord Chancellor to prescribe in regulations who may fund services in this way, and impose similar requirements as apply to conditional fee agreements on the amount of the success fee.