

EXPLANATORY MEMORANDUM TO
THE CONDITIONAL FEE AGREEMENTS ORDER 2013

2013 No. 689

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order prescribes the requirements (additional to those provided in sections 58 and 58A of the Courts and Legal Services Act 1990 (c.41 –“the 1990 Act”) which a conditional fee agreement (“CFA”) which provides for a success fee must comply with if it is to be enforceable.

2.2 It specifies both the CFAs which may provide for a success fee (article 2) and the maximum amount that may be charged by way of a success fee (article 3). In particular, it caps the success fee that may be paid in claims for personal injury (article 5). It also makes transitional and saving provisions (article 6). Further, the Order revokes the Conditional Fee Agreements Order 2000 (SI 2000/823) (“the 2000 Order”), but replicates its provisions in articles 2 and 3 of this Order.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act) contains reforms to the funding and costs of civil litigation following the Government’s acceptance of recommendations made by Lord Justice Jackson see – *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response*, March 2011 (CM8041). The cap on success fees forms part of these reforms, and allows a prescribed amount of claimants’ damages to be protected.

4.2 Sections 58 and 58A of the 1990 Act make provision for the regulation of CFAs and the recoverability of success fees payable under a CFA. Section 44 of the LASPO Act amends these sections so that the success fee payable under a CFA is no longer recoverable from the losing party, but will be payable by the successful client subject to a prescribed cap. The amendments made by the LASPO Act enable the Lord Chancellor, by Order, to set a cap on the damages which a lawyer can take as a success fee in specified proceedings.

4.3 Further, section 48 of the LASPO Act provides that the amendments made by section 44 of the LASPO Act shall not apply to proceedings in respect of diffuse mesothelioma (so that a success fee in these cases will still be recoverable from a losing party) until a review of the likely impact of the reforms on these cases has been

carried out and a report published on the findings. Accordingly, those provisions in this Order which cap the success fee payable in respect of claims for personal injury will not apply to these proceedings. Moreover, these provisions shall not, for the time being, be commenced in respect of privacy and defamation proceedings and proceedings in respect of, and in relation to, insolvency proceedings.

5. Territorial Extent and Application

5.1 This Order applies to England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State for Justice, Helen Grant, has made the following statement regarding Human Rights:

In my view the provisions of the Conditional Fee Agreements Order 2013 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 CFAs (also known as “no win no fee agreements”) are a means of funding litigation, usually entered into by claimants, where the lawyer agrees not to take a fee if the claim fails. If the claim is successful, the lawyer may charge an uplift (known as a success fee) in addition to their fee. The success fee that might be charged is capped at a maximum of 100% of this fee. Under the existing regime, both the lawyer’s basic fee and the success fee is recovered from the losing defendant.

7.2 Lord Justice Jackson argued that the current regime had led to excessive costs in civil litigation, with risk free litigation for claimants and additional costs being paid by defendants. He therefore recommended that recoverability from the losing side should be abolished in all cases. Lord Justice Jackson further recommended that the success fees in personal injury cases should be limited to 25% of damages (excluding damages awarded for future care and loss). The Government accepted his recommendation and agreed that claimants should have their damages protected from excessive legal fees.

7.3 The 25% cap is intended to protect claimants’ damages, specifically those relating to future care and loss, which can run into many millions of pounds in the most catastrophic injury cases. A similar, although not identical, approach has been taken in respect of damages-based agreements (in proposed regulations made under section 58AA of the 1990 Act) for the same reasons.

7.4 Under sections 58 and 58A of the 1990 Act, all proceedings may be the subject of an enforceable conditional fee agreement except specified family proceedings and criminal proceedings other than those under section 82 of the Environmental Protection Act 1990. Article 2 provides that all proceedings which are the subject of an enforceable CFA, other than those under section 82 of the Environmental Protection Act 1990, may provide for the payment of a success fee (c.43). This replicates article 3 of the 2000 Order.

7.5 In order to be enforceable, article 3 provides that a CFA which provides for a success fee must not provide for a success fee which is greater than 100% of the lawyer's fee. This replicates article 4 in the 2000 Order.

7.6 The effect of article 4 in this Order is to provide that success fees payable under CFAs in personal injury claims are subject to a cap. Article 5 provides that, in order to be enforceable, a CFA must not provide for a success fee which, including VAT, is greater than 25% of the damages awarded to the claimant for pain, suffering and loss of amenity and damages for pecuniary loss (save for future pecuniary loss), net of any deductions made by the Compensation Recovery Unit ("the CRU" - the Department for Work and Pensions' agency with responsibility for recovering benefits paid out to a claimant who subsequently recovers damages which include loss of income).

7.7 By way of example, a claimant ("C") is awarded £10,000 in damages in a personal injury claim, in respect of which £6000 is awarded for pain, suffering and loss of amenity and (past) pecuniary loss. £1000 is recovered by the CRU, leaving a net sum of £5,000. C's lawyer's fee is £2000 and this, as is typically the case, is recovered from the losing defendant. It was agreed between the parties that the success fee would be calculated as 100% of the lawyer's fee. On that basis, in a non-personal injury case, the lawyer would be entitled to recover £2,000 from C as a success fee. However, because C's case concerns a personal injury claim, the most that the lawyer can recover by way of a success fee, irrespective of the agreed 100% uplift, is 25% of £5,000 (being the net sum in respect of pain suffering and loss of amenity and past pecuniary loss), i.e. £1,250. If the lawyer's fee had been significantly less, say, £500 (again recovered from the losing defendant) and the agreed uplift was, again, 100%, then the most that the lawyer could claim as a success fee would be £500 – i.e. the lawyer is only entitled to claim the full 25% of the relevant damages if the success fee is equal to or exceeds that sum.

7.8 Including VAT on the lawyer's success fee within the cap will provide further protection for the claimant's damages and added certainty for the claimant as to the likely deductions from their damages. This approach is also consistent with the current cap of 35%, inclusive of VAT, on payments to be made from damages in respect of damages-based agreements ("DBAs") in employment matters and which will be applied to DBAs which relate to personal injury claims (to be provided for by the Damages-Based Agreement Regulations 2013).

7.9 The cap will not apply to appeal proceedings in respect of personal injury claims, where the parties will be free to negotiate a success fee up to 100% of any damages that are awarded, which reflect the additional risks which can be incurred by a lawyer in representing a client in appeal proceedings.

7.10 Article 6 contains both a transitional and a saving provision, the effect of which is to provide that this Order will not apply to any CFA entered into before section 44 of the LASPO Act comes into force (i.e. 1 April 2013, the same proposed date as this Order). Similarly, the amendments will not apply to collective conditional fee agreements (an agreement where a body, for example a trade union, enters into a CFA with a law firm on their members' behalf for certain classes of proceedings

rather than one specific claim) where advocacy or litigation services are provided to a claimant under the agreement before this Order comes into force. This transitional provision replicates that contained in section 44 of the LASPO Act in respect of the amendments made by that section. The saving provision takes account of the fact that, for the time being, the amendments made by section 44 of the LASPO Act to sections 58 and 58A of the 1990 Act, and, accordingly, articles 4 and 5, do not apply to personal injury claims in respect of diffuse mesothelioma, privacy and defamation proceedings and proceedings in respect of, and relating to, insolvency.

- ***Consolidation***

7.11 This Order revokes the Conditional Fee Agreements Order 2000 and replicates the following two provisions:

- All proceedings under a CFA, except criminal proceedings under section 82 of the Environmental Protection Act 1990, may provide for a success fee; and
- The maximum success fee is set at 100% of the lawyer's fee.

8. Consultation outcome

8.1 The public consultation paper *Proposals for reform of civil litigation funding and costs in England and Wales* contained initial proposals relating to the recoverability of success fees and after the event (ATE) insurance premiums and the introduction of a cap on the amount of damages that a lawyer can take as a success fee. That consultation was published on 15 November 2010 and closed on 14 February 2011. The overall consultation received a total of 625 responses. The responses were generally evenly split between those representing claimant interests, who disagreed with the proposal that success fees should no longer be recoverable from the losing party across all categories of civil litigation, and those representing defendant interests, who agreed with this proposal. Defendants were concerned about the substantial costs burden on them. Claimants, on the other hand, stated that recoverable success fees had ensured access to justice for a large number of people.

8.2 The Government's response, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, may be found at: <http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf>

8.3 As the response sets out, the majority of respondents supported a cap on the amount of damages which may be charged as a success fees in personal injury cases. Respondents felt that such a cap would strike a balance between maintaining access to justice and protecting a meaningful award for claimants. However, some respondents were concerned that it was not clear whether the cap would be inclusive or exclusive of VAT, whether it was to be shared between counsel and solicitors, whether it would apply gross or net of recovery by the Compensation Recovery Unit of the Department for Work and Pensions, or whether it would apply to appeals.

8.4. The Ministry of Justice has undertaken extensive stakeholder engagement on the details of the cap, and the final policy details have now been reflected in the Order.

8.5 In its Response to consultation, the Government said (at paragraph 8):

*“The Government believes that claimants who have been compensated for personal injury should have their damages protected from having too much deducted by their lawyer as a success fee. **In personal injury cases, there will be a cap on the amount of damages that may be taken as a success fee.** The cap will be set at 25% of the damages other than those for future care and loss. This will help protect claimant’s damages generally, and will specifically protect those relating to future care and loss. Special damages for future care and loss, which can run into many millions of pounds in the most catastrophic injury cases will be protected.”*

8.6 As required by Section 58AA of the Courts and Legal Services Act 1990, the Lord Chancellor consulted the designated judges, the General Council of the Bar, the Law Society and such other bodies that he considered to have an interest in the draft Order during October 2012. A total of 20 responses were received, some of which were from individual practitioners. Along with some drafting points, which have been reflected in the Order, some respondents argued that the 25% cap should apply to all heads of damages, and not be limited to damages for pain, suffering and loss of amenity and past loss. It was felt that protecting future loss would reduce the pool of funds to pay for lawyers, which might mean that otherwise good cases are not pursued because it would be uneconomic for lawyers to take on those claims. It was also argued that the cap should be exclusive of VAT as the inclusion could further reduce the pool of success fee available to be shared between solicitor and counsel, which in turn would mean that many good cases that are currently pursued would become uneconomic (these are points which have been considered at paragraphs 7.2, 7.3, 7.8 and 7.9 above).

9. Guidance

9.1 The Ministry of Justice will work with representative bodies, such as the Law Society, to consider whether any guidance is necessary to support effective implementation of the Order.

10. Impact

10.1 There will be some impact on business, but no direct impact on charities or voluntary bodies. Any sectors that derive an income from civil litigation may be affected. This may include for example, lawyers, after the event (ATE) insurers, claims management companies and experts. Claimant lawyers could see a reduction in profits as a result of the cap on the level of success fee that they are able to charge in personal injury matters. This reduction in profit may come through either a reduction in the costs lawyers are willing and able to incur in a case, or due to the fact that some cases are no longer profitable and would not be taken on under a CFA as a result of the cap.

10.2 There will be no direct impact on the public sector.

10.3 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the LASPO Act receiving Royal Assent in May 2012. This is available at <http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information>. An Impact Assessment has not been prepared specifically for this instrument.

11. Regulating small business

11.1 The Order applies to small business. The cap would have an impact on small legal firms which rely heavily on personal injury cases conducted under CFAs as part of their business model. These firms could face a reduced income if they are no longer able to charge 100% success fees in successful cases.

12. Monitoring & review

12.1 It is intended to review the policy between three to five years after the implementation date. The review will form part of a wider review of the entire package of reform policies implemented following the passing of the LASPO Act. Further details are attached in Annex A of the Impact Assessment.

13. Contact

Vilopa Patel at the Ministry of Justice (telephone: 020 3334 3118, or email: vilopa.patel@justice.gsi.gov.uk) can answer any queries regarding the Order.