

## Amendment 24: Granting the Lord Chancellor the flexibility to alter the scope of Part 2 if access to justice is threatened

House of Lords Third Reading – Tuesday 27 March 2012

Part 2 changes the rules governing conditional fee agreements (CFAs). It provides that a losing party is not required to pay his/her opponent's success fee: instead this will be paid by the successful claimant, with maximum limits imposed. The effects of this provision will be twofold:

- **There will be a reduction in the practical availability of CFAs:** At present solicitors offset the risk taken in individual cases by charging an uplift on their fees in the case of success. This means that lawyers are able to take on complex and time-consuming cases, as overall they can cover their costs. Under the Bill's reforms firms will not be able to run the risk of these type of complex and controversial cases.
- **Claimants will be forced to pay the success fee from their own damages:** Under the Bill's proposals claimants will be forced to pay their lawyer's success fee from their own damages, subject to a cap specified by the Lord Chancellor. As Lord Avebury said at Report, claimants seeking damages, such as victims of industrial negligence, will 'effectively be fined 25 percent of the general damages he has been awarded' (HL, Col. 314, 14 March 2012).

At earlier stages many Peers argued that certain areas of law should be exempt from these rules, so as to maintain practical access to justice. For example, Peers argued for the following exemptions:

- **International human rights cases:** Cases where overseas victims of human rights abuses by British multinationals seek compensation are highly complex and therefore expensive. If practical access to justice is prohibited because of prohibitive costs, the Government may find it is in breach of UN rules on business and human rights, a situation it will wish to resolve.
- **Industrial disease cases:** Seriously or terminally ill victims of negligent employers – such as asbestos victims – will lose 25 percent of their damages. Furthermore, the complexity of such cases is likely to deter firms from taking on such cases given the limited success fee.
- **Insolvency cases:** Under the Government's proposals a proportion of the funds recovered in insolvency proceedings will have to be paid out in order to fund the success fee. In most cases the HM Revenue and Customs is a major creditor, meaning that the state will be paying out funds legitimately owed to the state as success fees.

There is a clear risk that practical access to justice will be inhibited in these, and possibly other areas, of law. It is therefore surprising that the Government have not granted themselves sufficient flexibility to exempt certain types of cases via regulations from the non-recoverability rules in the future. Should evidence arise to suggest that access to justice is being prohibited, such flexibility may be necessary.

The Government has conceded that this kind of flexibility is desirable for the legal aid section of the Bill and has said that it will amend Clause 9(2) at Third Reading so that the Lord Chancellor would have power to widen the scope of legal aid should the need arise. The Minister has described this as a 'safety net'. It would make sense to have a similar provision for Part 2.

The amendment to Clause 46 in the name of Lords Pannick and Alton rectifies this oversight by granting the Lord Chancellor the power – if he sees fit, on the basis of available evidence – to exempt areas of law from the non-recoverability rules in the future and so maintain access to justice.

### For more information please contact:

Richard Messingham (Public Affairs Adviser)  
T: 020 7320 5858  
M: 07870 889 330  
E: [richard.messingham@lawsociety.org.uk](mailto:richard.messingham@lawsociety.org.uk)