
DRAFT STATUTORY INSTRUMENTS

2002 No.

Access to Justice (Northern Ireland) Order 2002

PART III

OTHER FUNDING OF LEGAL SERVICES

Conditional fee and litigation funding agreements

Interpretation of Part III

38. In this Part—

“advocacy services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide;

“litigation services” means any services which it would be reasonable to expect a person who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide;

“proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated;

“a right of audience” means the right to appear before and address a court including the right to call and examine witnesses;

“a right to conduct litigation” means the right—

- (a) to issue proceedings before any court; and
- (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions).

Conditional fee agreements

39.—(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to paragraph (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this Article and Article 40—

- (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
- (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(3) The following conditions are applicable to every conditional fee agreement—

- (a) it must be in writing;

- (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
 - (c) it must comply with such requirements (if any) as may be prescribed.
- (4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—
- (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;
 - (b) it must state the percentage by which the amount of fees which would be payable if it were not a conditional fee agreement is to be increased; and
 - (c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.
- (5) If a conditional fee agreement is an agreement to which Article 71A of the Solicitors (Northern Ireland) Order 1976⁽¹⁾ (non-contentious business agreements between solicitor and client) applies, paragraph (1) shall not make it unenforceable.

Conditional fee agreements: supplementary

40.—(1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—

- (a) criminal proceedings; and
- (b) family proceedings.

(2) In paragraph (1) “family proceedings” means proceedings under any one or more of the following—

- (a) the Matrimonial Causes (Northern Ireland) Order 1978⁽²⁾;
- (b) the Domestic Proceedings (Northern Ireland) Order 1980⁽³⁾;
- (c) the Adoption (Northern Ireland) Order 1987⁽⁴⁾;
- (d) Part IV of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989⁽⁵⁾;
- (e) Parts II, III, V and XV of the Children (Northern Ireland) Order 1995⁽⁶⁾;
- (f) the Family Homes and Domestic Violence (Northern Ireland) Order 1998⁽⁷⁾,

and the inherent jurisdiction of the High Court in relation to children.

(3) The Lord Chancellor may by regulations amend paragraph (1) or (2) by adding proceedings or omitting or varying any proceedings; and regulations under this paragraph may, in particular, describe the proceedings which cannot be the subject of an enforceable conditional fee agreement by reference to the court or tribunal before which proceedings are to take place, or the issues involved.

- (4) The requirements which the Lord Chancellor may prescribe under Article 39(3)(c)—
- (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
 - (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

(1) 1976 N.I. 12
(2) 1978 N.I. 15
(3) 1980 N.I. 5
(4) 1987 N.I. 22
(5) 1989 N.I. 4
(6) 1995 N.I.2
(7) 1998 N.I. 6

- (5) Before making an order under Article 39(4), the Lord Chancellor—
- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
 - (b) may undertake such other consultation as appears to him to be appropriate.
- (6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of fees payable under a conditional fee agreement which provides for a success fee.
- (7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee).

Litigation funding agreements

41.—(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this Article shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) For the purposes of this Article and Article 42 a litigation funding agreement is an agreement under which—

- (a) a person (“the funder”) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (“the litigant”); and
 - (b) the litigant agrees to pay, in addition to any fee payable on the making of the agreement, a sum to the funder in specified circumstances.
- (3) The following conditions are applicable to a litigation funding agreement—
- (a) the funder must be a prescribed person or a person of a prescribed description;
 - (b) the agreement must be in writing;
 - (c) the agreement must not relate to proceedings which by virtue of Article 40(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed;
 - (d) the agreement must comply with such requirements (if any) as may be prescribed;
 - (e) any fee payable on the making of the agreement must not exceed such amount as may be prescribed;
 - (f) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates, together with an amount calculated—
 - (i) in prescribed circumstances, by reference to the funder’s anticipated expenditure in funding the provision of the services; and
 - (ii) in prescribed circumstances, by reference to any damages recovered by the litigant in the proceedings;
 - (g) the amount calculated in accordance with sub-paragraph (f)(i) or (ii) must not exceed such limit (whether expressed as a figure, as a percentage of the anticipated expenditure or damages mentioned in that sub-paragraph, or otherwise) as may be prescribed in relation to proceedings of the description to which the agreement relates.

(4) Regulations under paragraph (3)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.

(5) The requirements which may be prescribed under paragraph (3)(d) include requirements for the funder to have provided prescribed information to the litigant before the agreement is made.

(6) Before making regulations under this Article, the Lord Chancellor—

- (a) shall consult the Lord Chief Justice, the Law Society and the General Council of the Bar of Northern Ireland, and
- (b) may undertake such other consultation as appears to him to be appropriate.

Litigation funding agreements: costs

42.—(1) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.

(2) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement.

(3) In any proceedings—

- (a) to which an individual, for whom advocacy or litigation services relating to the proceedings, or to a part of the proceedings, are funded under a litigation funding agreement, is a party (“the funded party”), and
- (b) which are finally decided in favour of a party for whom such services are not so funded (“the unfunded party”),

the court by which the proceedings were so decided may, subject to paragraph (4), make an order for the payment by the funder to the unfunded party of the whole or any part of the costs incurred by the unfunded party in the proceedings.

(4) An order under paragraph (3) in respect of any costs may only be made if an order for costs would be made in the proceedings apart from this Order.

(5) Without prejudice to any other provision restricting appeals from any court, no appeal shall lie against an order under paragraph (3), or against a refusal to make such an order, except on a point of law.

(6) In this Article “costs” means costs as between party and party, and includes the costs of applying for an order under paragraph (3).

(7) For the purposes of this Article proceedings shall be treated as finally decided in favour of the unfunded party—

- (a) if no appeal lies against the decision in his favour,
- (b) if an appeal lies against the decision with leave, and the time limited for applications for leave expires without leave being granted,
- (c) if leave to appeal against the decision is granted or is not required, and no appeal is brought within the time limited for appeal,

and where an appeal against the decision is brought out of time the court by which the appeal (or any further appeal in those proceedings) is determined may make an order for the repayment by the unfunded party to the funder of the whole or any part of any sum previously paid to the unfunded party under this Article in respect of those proceedings.

(8) Where a court decides any proceedings in favour of the unfunded party and an appeal lies (with or without leave) against that decision, the court may, if it thinks fit, make or refuse to make an order under paragraph (3) forthwith, but if an order is made forthwith it shall not take effect—

- (a) where leave to appeal is required, unless the time limited for applications for leave to appeal expires without leave being granted,
- (b) where leave to appeal is granted or is not required, unless the time limited for appeal expires without an appeal being brought.

(9) Where a party begins to receive advocacy or litigation services funded by the funder after the proceedings have been instituted, or ceases to receive advocacy or litigation services so funded

before they are finally decided, or otherwise receives advocacy or litigation services so funded in connection with part only of the proceedings, the reference in paragraph (3) to the costs incurred by the unfunded party in the proceedings shall be construed as a reference to so much of those costs as is attributable to that part.

(10) For the purposes of this Article “court” includes a tribunal.

Costs

Recovery of insurance premiums by way of costs

43. Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.

Recovery where body undertakes to meet cost liabilities

44.—(1) This Article applies where a body of a prescribed description undertakes to meet (in accordance with arrangements satisfying prescribed conditions) liabilities which members of the body or other persons who are parties to proceedings may incur to pay the costs of other parties to the proceedings.

(2) If in any of the proceedings a costs order is made in favour of any of the members or other persons, the costs payable to him may, subject to paragraph (3) and (in the case of court proceedings) to rules of court, include an additional amount in respect of any provision made by or on behalf of the body in connection with the proceedings against the risk of having to meet such liabilities.

(3) But the additional amount shall not exceed a sum determined in a prescribed manner; and there may, in particular, be prescribed as a manner of determination one which takes into account the likely cost to the member or other person of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

(4) Regulations under paragraph (1) may, in particular, prescribe as a description of body one which is for the time being approved by the Lord Chancellor or a prescribed person.