CHANCERY BAR

Court Fees Consultation

Chancery Bar Association Draft Further Response

Introduction

1. This is the response of the Chancery Bar Association ("the ChBA") to the Ministry of Justice's further consultation on Court Fees.

2. The ChBA is one of the longest established Specialist Bar Associations and represents the interests of some 1200 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.

3. The ChBA operates through a committee of some 17 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users' Committee and various Bar Council committees.

Question 1: Do you agree with the proposal to raise the maximum fee for starting proceedings for the recovery of money from £10,000? Please give reasons.

4. In our response to the Ministry of Justice's December 2013 consultation we explained in detail why we are opposed to an issue fee for money claims set at 5% of the value of the claim. At that time, only 18 months ago, the proposal was to cap the fee generally at £10,000, but with a higher cap of £20,000 for commercial proceedings. Nothing has happened since 2013 to cause us to change our views, which apply with even greater force to the general cap of £20,000 now proposed.

5. Given that the decision to impose a 5% fee has already been taken, we can see no justification for raising the cap which was introduced less than 6 months ago. If, as the December 2013 consultation paper suggested, £10,000 was the appropriate level for the cap then, there can be no rational justification for doubling it now.

6. The alternative suggestion of a removal of the cap altogether is wholly unjustifiable. In very high value claims, it would result in issue fees of potentially £ millions. Even wealthy parties are likely to feel aggrieved that they should be asked to pay substantially more than it will cost the court to resolve their case, and substantially more than they would have to pay in other countries. This is bound to drive many claimants towards other jurisdictions, to the detriment of the UK economy and the reputation of its legal system.

7. Our full response to the December 2013 consultation remains relevant, but we draw particular attention to the following matters:

(1) We do not agree with the premise that those who use the courts should be required to pay the full cost of the service they receive. In any case, however, the present consultation makes clear that, following the recent fee increases, the civil court system already pays for itself (para 48 and 53 of the consultation paper). We see no merit whatever in the notion that civil court users should pay more than the cost of dealing with their own claims in order to subsidise other courts. Subsidising other courts should be a matter for general taxation, not a penalty for civil court users.

(2) There is no logical basis for charging a fee based on the size of the claim. The amount of money claimed by a litigant does not bear any necessary correlation to the complexity of the issues or the extent of court resources necessary to resolve them. There are many simple debt claims which do not require much court time, regardless of their size.

(3) On the other hand, members of the Chancery Bar Association regularly deal with claims for £400,000 or more, brought by individuals and small-to-medium sized businesses with relatively limited resources. There is no sound basis for treating such claimants as if they were multi-national corporations or banks.

(4) An issue fee of £20,000 is so large in absolute terms that even relatively wealthy individuals and organisations will be discouraged from bringing claims. The payment of £20,000 "up front" is likely to appear an exceptionally high price to many potential litigants, given that they start out expecting the court to do relatively little before the claim is compromised. The difficulty is particularly acute where claims might otherwise be brought on the basis of a Conditional Fee Agreement (e.g. by liquidators who have limited funds and no possibility of any fee remission).

(5) Claimants whose resources are limited (but who do not qualify for fee remission) are less likely to instruct lawyers if they have to pay a fee of £20,000. This will have the effect of increasing the court's costs, because cases involving unrepresented parties always take up more time. Such claimants will also be put at a considerable disadvantage when the defendant has substantial resources. The defendant will be able to exploit the claimant's inability to afford a substantial issue fee in order to encourage the claimant to settle for less than is properly due.

(6) The proposals appear to draw an irrational and unfair distinction between money claims and non-money claims. Many non-money claims require as much, if not more, court time and expertise than money claims. The supervision of trusts, pension funds, companies and insolvencies are some obvious examples. Although claims in such cases often do not involve a claim for a sum of money, they regularly concern the administration of funds worth substantial sums. It is unfair that a claimant seeking payment of a simple debt of £400,000 should pay an issue fee of £20,000, whilst the trustees of a pension fund with assets of £200 million need only pay an issue fee of £528 (under the

current proposals).

(7) There is a danger that the wide discrepancy between the issue fee for money claims and non-money claims will lead to clients instructing lawyers to devise ways of avoiding issuing a money claim, by dressing it up as a non-money claim. For example, a claimant might seek a declaration that sums are due, rather than an order for payment. An incentive to obfuscate the nature of the claim is not conducive to the efficient administration of justice.

(8) In light of the preceding points, we believe that there is a serious risk that increasing the issue fee for non-money claims still further will discourage or prevent individuals and businesses alike (especially small-to-medium sized businesses) from accessing the courts, thereby breaching the duty in Section 92(3) of the Courts Act 2003.

(9) We also believe that the enhanced fee proposals are likely to have a damaging effect on the attraction of the UK as a forum for dispute resolution. International litigators are normally cost conscious and well informed about the benefits of different jurisdictions. An issue fee of £20,000 far exceeds the fees charged in most (if not all) other jurisdictions. The amount likely to be generated by the proposed increased fees is likely to be considerably less than the sums which will be lost to the UK economy when a few high-value disputes, which would otherwise have been litigated in London, are issued abroad instead.

(10) No further research appears to have been undertaken as to the impact of increasing issue fees again. It is too early to reach any reliable conclusions as to the impact of the 5% fee (subject to the £10,000 cap) introduced in March 2015. Paragraph 71 of the consultation paper indicates that the MoJ will not be in a position to provide an update as to the impact of those increases until it replies to the responses to this consultation. This is putting the cart before the horse. It is necessary to understand what the effect the introduction of the 5% fee has had before making proposals to raise the cap.

8. For all the above reasons, we do not agree with the proposal to raise the maximum fee for starting proceedings.

Question 2: We would welcome views on whether the maximum fee for starting proceedings for the recovery of money should be increased:

- **to at least £20,000; or**
- **to a higher amount;**

Alternatively, do you believe that there should be no maximum fee for commending a money claim? Please give reasons.

9. For the reasons given in the answer to the previous question, we do not believe that the fee should be based on 5% of the value of the claim at all. Given that the decision has already been taken to introduce such a fee, the cap should be as low as possible.

The consultation paper fails to make out a case for increasing the cap only a few months after the previous proposals have been implemented. If £10,000 was an appropriate level to set the cap in March 2015, it remains an appropriate level in September 2015.

Question 3: Do you agree with the proposal to exempt personal injury claims from the higher cap and that the maximum fee of £10,000 should continue to apply in these cases? Please give reasons.

10. Members of the Chancery Bar Association are not often involved with personal injury claims. We agree with the principle that an onerous burden should not be placed on vulnerable claimants and that, therefore, a lower cap for personal injury claims is desirable. The proposal to exempt personal injury claims, however, demonstrates recognition by the MoJ that the size of a claim frequently has nothing to do with ability to pay.

11. We consider that this principle applies in a wider range of cases than personal injury claims. Members of the Association often represent claimants who are minors, or who are suffering from mental illness, or who are elderly. There does not seem to us to be any logical basis for limiting the proposed reduced cap to one class of vulnerable individual, whilst excluding others. If the increase in the cap is to be implemented, consideration must be given to enabling claimants in other vulnerable categories to apply for a lower cap in respect of their claims.

Question 4: Do you agree that if the maximum fee for money claim is increased as proposed, the disposable capital test for a fee remission should also be amended so that the disposable capital threshold for a fee of £10,000 is increased to £20,000 and to £25,000 for a fee of £20,000? Please give reasons.

12. The current disposable capital threshold is so low as to make it inapplicable in all but a few cases. We agree that it should be raised, but the proposed thresholds are still too low.

13. There is a vast difference between requiring a claimant with disposable capital of £26,000 to pay an issue fee of less than £1,000 (around 4% of the total), which was the position before the introduction of the 5% issue fee, and asking the same person to pay a fee of £20,000 (80%), which is now proposed. The latter fee is bound to be a substantial disincentive to commencing a claim. If the claim is issued, the claimant will be left with only £6,000 to fund the remainder of the case (let alone to provide for other needs). If lawyers cannot be found who are prepared to act entirely on a conditional fee, the claimant will have to be self-represented, with the consequent additional burden on the court system. The possibility for an unscrupulous defendant to run up costs in order to force the claimant to settle for little will be substantially increased. The argument that £20,000 represents only a small percentage of the ultimate recovery carries no weight if the claimant is unable to afford to bring the claim to trial in the first place. Such an outcome is a denial of justice.

Question 5: Are there any other benefits or payments that should be excluded from the assessment of a person's disposable capital for the purposes of a fee remission?

14. This question is based on a false premise, namely that small adjustments to the present fee remission system can solve any injustice arising from the proposed issue fees. The current system of fee remissions was not designed with issue fees of £20,000 in mind. Fees of that magnitude require a more sophisticated system, preferably giving a discretion to the court, to enable it to take all matters into account and reduce the fee to an appropriate level, where it is just to do so.

Question 6: Do you agree with the proposal to uplift all civil fees not affected by one of the other specific proposals by 10%? Please give reasons for your answer.

15. Most of the current fees under consideration are relatively modest, with the consequence that a 10% increase will result in new fees which are unexceptionable in absolute terms. It is not clear, however, why such an increase is required now, when it was not required in April 2014 as part of the wide range of increases then proposed. In the absence of any inflationary pressures, we do not agree with the current process of proposing incremental increases at short intervals, by which a series of small increases becomes a much larger increase over time.

16. We are particularly strongly opposed to the proposal in relation to Court of Appeal fees. The level of those fees was considered in the December 2013 consultation and the increases were announced in April 2014, even if they have not yet been implemented. There is no justification for increasing them further, just over a year later. The proposal that the principal fees under consideration should increase to over 2 ½ times their pre-April 2014 level is unjustified.

Question 7: Do you agree with Government's proposal to increase the fees charged for proceedings in the First-tier Tribunal (Immigration and Asylum Chamber) as set out in Table 1 above? Please give reasons.

Question 8: Do you agree with the proposal to introduce a 10% discount for applications lodged online? Please give reasons.

Question 9: Do you agree with the Government's proposal to revise the scheme of exemptions for the Immigration and Asylum Chamber, including the proposal to exempt from fees those individuals appealing against a decision to revoke their refugee and humanitarian protection status? Please give reasons.

Question 10: Do you agree that it is right to increase fees for immigration judicial review applications in the Upper Tribunal?

17. We have no comments on questions 7 to 10, which fall outside the experience of the members of the Chancery Bar Association.

Question 11: Do you agree with the Government's proposal to introduce a simple fee structure for most proceedings in the Property Chamber of £100 to start proceedings and £200 for a hearing? Please give reasons.

18. We agree that there is no reason in principle not to charge fees in the Property Chamber and the amounts currently proposed appear reasonable. We are concerned, however, that the introduction of such fees at a reasonable level should not be used as a stepping stone to make substantial increases in a few months' time.

Question 12: Do you agree with the proposal to charge higher fees for leasehold enfranchisement and valuation cases, and specifically £400 to start proceedings and £2,000 for a hearing? Please give reasons.

19. No.

20. The premise on which this proposal is based is that there are large amounts in dispute in these kinds of cases. The evidence relied upon in the consultation paper is the data obtained from the Leasehold Advisory Service, showing that the average value determined by the tribunal was around £142,000. This figure is simply an average. An average is a crude indicator of the sums that are in issue. A cursory glance at the data on the web page referred to[1] shows that a significant proportion of the values determined were substantially less than £142,000.

21. This evidence provides no sound basis for an inference that the claimants in the majority (let alone all) of the enfranchisement and valuation cases are able to afford significantly higher fees than those in other kinds of case.

22. The alternative suggestion in paragraph 123 of the consultation paper is that fees should be set at a percentage of the value at stake. We do not agree with this suggestion for two reasons.

23. First, the issues in enfranchisement and valuation cases are often similar whether the amount at stake is £1,000 or £1,000,000. Charging a percentage of the value at stake potentially results in very large fees being charged for cases which do not cost the tribunal significantly more to resolve than cases involving smaller sums. At the very least, a cap would have to be set on the fees so that the cost does not become out of all proportion to the value of the service being provided.

24. Secondly, the there is a practical difficulty in that the tenant is likely to be contending that the value at stake is significantly less than the figure contended for by the landlord. The tribunal may conclude that the value is somewhere in between the two; but that value will not be known until the conclusion of the case. Which figure should be used to set the issue or hearing fees? If the tenant's figure is used, unscrupulous tenants will simply allege as low a value as they can. If the landlord's figure is used,

[1] http://www.lease-advice.org/lvtdecisions/tables.asp?table=3

there is an incentive for unscrupulous landlords to contend for as high a value as possible, knowing that it will cost even more for the tenant to challenge it.

25. In our view, the fees should be the same for all kinds of case in the Property Chamber.

Question 13: Are there any other types of application in this Chamber which you feel should be exempt from fees?

26. If the fees are set at the relatively modest level of £100 to issue proceedings and £200 to list the matter for hearing, we do not consider that there are any types of application which should be exempt (subject to the availability of fee remissions in the same was as in any other case).

Question 14: Do you agree with the proposed fees for all proceedings in the General Regulatory Chamber: specifically £100 to start proceedings with a determination on the papers; and a further fee of £500 for a hearing? Please give reasons.

27. We agree that there is no reason in principle not to charge fees in the General Regulatory Chamber and the amounts currently proposed appear reasonable. We are concerned, however, that the introduction of such fees at a reasonable level should not be used as a stepping stone to make substantial increases in a few months' time.

Question 15: Are there any proceedings in the General Regulatory Chamber that should be exempt from fees? Please give reasons.

28. We are not currently aware of any proceedings which require special treatment.

Question 16: Do you agree with the proposed fee structures we are proposing in the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery)?

29. We agree that there is no reason in principle not to charge fees in the Tax Chamber and the Upper Tribunal and the amounts currently proposed appear reasonable. We are concerned, however, that the introduction of such fees at a reasonable level should not be used as a stepping stone to make substantial increases in a few months' time.

Question 17: Are there any types of applications or cases which you feel should be exempt from the fees?

30. We are not currently aware of any proceedings which require special treatment.

Question 18: We would welcome views on our assessment of the impacts of the proposals for further fee increases set out in chapters 3 and 4 on those with protected characteristics. We would in particular welcome any data or evidence which would help to support these views.

31. We have no comment on this question.

Andrew Twigger QC
6th August 2015