



**SOUTH EASTERN CIRCUIT RESPONSE TO
THE MINISTRY OF JUSTICE
A CONSULTATION ON COURT FEES
15 SEPTEMBER 2015**

Introduction

1. The South Eastern Circuit (SEC) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.
2. This is the response on behalf of the South Eastern Circuit ('SEC') to the further proposals of the Ministry of Justice in its current consultation on civil court fees¹.

SUMMARY

3. SEC opposed the increase in court fees which was introduced in March 2015. It also opposes the proposed further fee increases. We give reasons for this below.
4. Further, and in any event, SEC also believes that the fee remission arrangements are not broad enough to ensure protection of the weakest and vulnerable members of society, who are not in a position 'to afford to...contribute more'. In particular, SEC believes that any claim involving personal injury or wrongful death should be exempted from any requirement to pay enhanced fees. It is wrong in principle

¹ <https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation>

to demand that, for example, a widow or dependent children, or an injured person who is perhaps unable to work and may have significant care needs, to use their savings or assets to fund court fees to recover damages.

5. Similarly, the SEC is concerned that little or no consideration appears to have been given to alternative means of structuring fees. The effect of an upfront fee is that charging bears no relation to the actual use of court time or resource. It also makes the international court fees comparison carried out by MoJ meaningless, because there is no analysis of the number of cases which get to a hearing and therefore of the overall revenue raised in other jurisdictions. Increased court fees, in SEC view, will reduce the competitiveness of the courts of England and Wales and make this jurisdiction less attractive to those litigants whose claims enjoy a possible choice of forum.

NO JUSTIFICATION IN PRINCIPLE FOR FEE CHARGING

6. Any court fee which exceeds the cost of provision of the specific service provided to the court's user should be scrutinised carefully because it is, in effect, a tax. The MoJ is open in its latest consultation in its ambition to utilise the civil courts and tribunal service as a means of generating tax revenue. Indeed, this appears to be the sole justification for the measures.
7. The SEC believes that this is wrong in principle. An effective legal system underpins democracy and the rule of law, and is vital to the effective operation of commerce. The taxpayer should bear the costs providing the legal system more generally. This is all the more so in the case of those parts of the system such as the criminal justice and immigration and asylum systems, which exist for the benefit of society as a whole and would need to exist in order for the UK to fulfil its obligations under international law, including the ECHR².
8. There is no principled basis for the assertion that victims of civil injustice should be required to fund a broader range of services provided by the state, such as the prosecution of those under suspicion of crime, or the maintenance of an effective immigration and asylum tribunal process: why should the bereaved widow and

² European Convention on Human Rights

dependent children who have lost a husband and father in a workplace accident be the ones who are asked to fund state services such as magistrates' courts?

REQUIRES A GREATER LEVEL OF SCRUTINY

9. Even though such taxation through civil court fees is now permitted in principle, as a result of the power contained in section 180 of the Anti-Social Behaviour, Crime and Policing Act 2014, SEC would not expect a government which claims to have regard to both the needs of victims of injustice and also those of business and trade to use those powers in the way it already has and proposes to do. The contrast with other fundamental public services is stark: the government would never propose that education or health should be self-funding. The SEC believes that the proposals fail to take into account commercial considerations for litigants and have been made without proper consideration of the wider fiscal effects of the policies.
10. Use of 'enhanced fees' to raise tax is regressive. The value of a civil dispute is a poor indicator of litigant liquidity. Indeed, in our members' experience, the need to sue often coincides with weakened finances. The role of the courts is to compensate for losses sustained, so by definition, the court fees in civil claims are being borne by those whose financial capacity is reduced. For example, the victim whose professional career has been adversely affected by a libel, or a small business whose former employee is unlawfully competing; having taken confidential information and in breach of covenant, or which has been sold substandard machinery for use in its manufacturing process.
11. By contrast, both the current and former MoJ consultation documents wrongly assume a direct correlation between claim value and 'wealth' of the litigant. In our view this error significantly undermines the justification for either the existing 'enhanced fees' or the latest proposals to increase them yet further.
12. It is also odd that the justification for fees is stated to be that those with higher value claims can afford to contribute more, but that in fact those with the highest value claims have the benefit of the cap on fees. The effect is therefore that those with the lowest claims have the highest marginal rate of tax.

WILL NOT ACHIEVE THE STATED AIM OF INCREASING GOVERNMENT INCOME

13. The SEC believes that both current 'enhanced fees'³ and the further proposed increases are highly unlikely to meet their stated aims of generating £120m more income⁴, as the consultation makes no concession of the substantial risk that case volumes will significantly decrease: a startling omission in light of the recent experience in increased employment tribunal fees⁵.
14. As a result, no consideration whatsoever appears to have been given to the wider economic consequences, including loss of revenue to HM Government as a result of reduced profit and turnover in the legal services industry. We think the economic analysis in both consultation documents is both complacent and flawed.
15. At worst, the basis upon which the consultation proceeds might even be said to be disingenuous. If, as stated, the scheme was intended to actually grow the courts' service as a viable business, it might have been expected that the consultation would reveal evidence of market research designed to establish the deterrent effect of different levels of court fee and at different stages of the civil litigation process. Further, it might have been expected that the comparison of fee charging with the courts of other jurisdictions would have been conducted in more depth, given that most of the comparators chosen appear to charge most heavily for actual hearing or court time and not as an upfront fee⁶.

BARRIER TO JUSTICE

³ Introduced by the Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015, passed pursuant to the power contained in section 180 Anti-Social Behaviour, Crime and Policing Act 2014.

⁴ Court and Tribunal Fees: The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals (August 2015) Cm 9124, Ministerial foreword.

⁵ Since July 2013, employees have had to pay up to £1,200 to bring a claim to tribunal. Applications have fallen by 70%, in sex discrimination the drop is over 90%. The proportion of claims won has remained constant, meaning that good claims are no longer being pursued.

⁶ Annex B to the consultation of January 2015

17. The enhanced fees are undoubtedly a barrier to justice. It is crucial that the scale of this barrier is seen in the context of litigated civil claims being a small minority of all disputes. One of the greatest benefits to society of a well-functioning accessible civil justice system is that it means that people do not have to go to court to vindicate their rights. It is crucial to the promotion of the rule of law that consumers, businesses and individuals know that their rights are easily and readily enforceable. People do not choose to litigate, but it is important that those who have to, can do so. If not, their substantive rights are worthless.
18. As has already been stated, the consultations do not even acknowledge that significant court fees could deter some litigants. The experience in the employment tribunals has shown that even if it were necessary or desirable to reduce the number of claims, perhaps because some were seen as 'a try on', increasing court fees across the board is not the correct tool for the job. It deters just as many, if not more meritorious claims, than bad ones.
19. Hefty court fees will encourage wealthier litigants to defend claims on the commercial risk of actually being sued, rather than the legal and factual merits of their defence. Similarly, those with valid counterclaims may not be able to bring them when faced with a well-resourced claimant. A real-life example of this was given to SEC by a member whose client, a company in Essex employing 25 people, was victim of a fraud by one of its employees on a credit card negligently issued by a bank on the company's account. The company was unable to raise the £3,500 fee to issue a counterclaim and as a result will have to pay back to the retailer the £70,000 spent by its criminal employee, as well as paying both sides' legal costs. The fact that the victim of a breach of contract may have to find up to £20,000 merely to issue a claim can accordingly be a significant bargaining chip in favour of the wrongdoer in negotiations. This undermines the Pre-Action Protocol process, which is a fundamental part of the civil court reforms introduced in 1999.
20. Another real-life example given anonymously by a barrister concerned an SME which was a small-scale road haulier. Its income-generating asset, a lorry, was put out of use due to damage sustained in a collision with another lorry owned by an

extremely well-known large UK commercial road haulage operator. A dispute as to fault for the accident ensued, leaving the SME without a means of generating income and with a significant repair bill. The SME cannot afford to repair the vehicle and pay the court fee. The practical reality for the SME is to negotiate a settlement as quickly as possible and without the need to pay the court fee. This will mean accepting less by way of settlement than the SME should recover, with a resulting adverse impact on the finances of the business.

21. The large haulier gains a commercial advantage against the SME either way: if the claim is dropped, then the smaller business has had to bear the loss caused by its larger competitor. If the negotiations for a claim are pursued, then there is an incentive for the large company to apply pressure by dragging out negotiations until court proceedings are required, in the knowledge that the SME may not be able to wait that long and will most likely take a discount on its losses in the meantime. One SEC member reported that he had noticed that larger organisations were already adopting this approach in negotiations, which was already bearing fruit.
22. Substantial court fees are therefore likely to have a 'chilling effect' on the ability of small to medium sized enterprises and individuals, including consumers, to enforce their civil rights. These are the litigants who are highly unlikely to qualify for any remission of fees, regardless of the design of any remissions scheme. The fees have created an additional risk of under-settlement or withdrawal of claims for reasons related solely to the funding of proceedings. In trade or economic terms the court fees therefore have a market-distorting effect which could act not just as a barrier to justice, but to free market competition as well. It is of concern to SEC that no economic input appears to have been obtained by MoJ when formulating its measures or the new proposals.
23. Another example provided to SEC by a solicitor concerns the situation of a young couple with two small children. They purchased their family home with the benefit of a mortgage loan for the sum of £650,000. In paying that sum they acted in reliance on the professional expertise of a valuer. The expert valuer inspected the property and raised queries which he said required the benefit of further input

from an expert structural surveyor. A surveyor was engaged by the couple and reported that there were cracks in the property but did not identify any generalised subsidence. After receiving the surveyor's report, the valuer simply affirmed his original valuation. In fact, the property was built on unstable ground and is structurally unsound. It may need to be entirely demolished and rebuilt and the actual value could be as low as £350,000.

24. The family cannot raise any more capital secured on the property due to the problems. However, neither the valuer nor the surveyor will accept responsibility for the family's predicament. As a result they have had to spend their savings on reports from several experts, totalling some £20,000. Solicitors are acting on a conditional fee agreement, but it is highly likely that the family will not be able to proceed with their claim should they have to find £10,000 for court fees. They have already told their solicitors that they will end their claims if the fees are increased to £20,000 before the time comes at which the case is ready to be issued.
25. This family does not qualify for any fee remission. Both of the couple work and they and their children are having to live in the unsound property because they cannot afford both the mortgage and rental at the same time. Meanwhile the cracks are growing. It is hard to overstate the injustice of the state effectively removing any prospect of them recovering their life savings and rebuilding their family home through imposition of fees.
26. Another feature of this example is the fact that the solicitors' firm which is acting for the family, which has already taken on the risk of not being paid for its work in the event that the claim does not succeed, cannot afford to fund the court fee upfront. Only the largest litigation firms would be in a position to make this offer to clients, which of itself is likely to present a significant barrier for new and smaller firms wishing to compete in the litigation market.
27. The final point to make arising out this example is that it does not meet the point to state that court costs are recoverable against the unsuccessful defendant at the end of the case. The fact is that the upfront nature of the costs is already having a

deterrent effect. Secondly, this approach expects the litigant not only to take the risk of not securing and costs order and not being able to enforce it. Related to this is the concern that interest is not recoverable on pre-judgment costs and therefore successful claimants are put in the position of lender to the unsuccessful defendant and cannot recover the loss of use of their money.

28. These examples of injustice already being caused illustrate why SEC considers that the enhanced fees order should be repealed and the latest proposals not acted upon.

PERSONAL INJURY AND WRONGFUL DEATH CLAIMS SHOULD BE REMOVED FROM THE FEE SCHEME ALTOGETHER

28. In addition to the above points, SEC also believes that even in the event that the scheme is not repealed, there should be an exemption from enhanced fees for all claims for personal injury and wrongful death.

29. Another real-life example illustrates the point: here a 60 year old man slipped and fell whilst in an hotel in Tunisia. He fractured his ankle so badly that his leg subsequently needed amputation below the knee. He is now unable to work as a result of his injuries and has substantial needs for prostheses, care and assistance as well as his loss of income. Following receipt of expert medical evidence, his solicitors, acting on a conditional fee agreement (no win no fee), have valued his claim for damages against the tour operator at potentially over £500,000. He does not qualify for fee remission, despite being on housing benefit and income-related benefits because he has some modest assets. However, he lives alone and cannot rely on family or friends for financial assistance to pay the court fees. It was only possible to give advice to the claimant as to whether his claim had reasonable prospect of success shortly before expiry of limitation. This has left the claimant with advice that his claim is viable, but only a very short period in which to attempt to raise the court issue fee of £10,000. There has been little or no consideration of the impact of limitation together with the upfront issue fees.

30. It is not acceptable to place victims under this stress in addition to the difficulties of coming to terms with their physical and psychological injuries and during a

period of financial constraint. These are not a category of people who are able to 'contribute more' and the value of their claim is typically inversely proportionate to the amount they can afford to spend on court fees.

31. As the Claimant has no means to pay and no means of borrowing the monies, this claim will only proceed if the solicitor's firm agrees to lend the Claimant the money, taking on the risk that the claim fails and the Claimant is left unable to pay. Therefore this Claimant will only be able to bring a claim if he instructs one of the few large personal injury specialist firms. At a time when the government is seeking to encourage alternative business structures in the legal services market, the requirement to be able to lend large amounts of capital to clients is a significant barrier to trade and reduces consumer choice and competition in the legal services market. The fees are therefore also a barrier to entry to the legal services market.

32. The SEC therefore believes that personal injury and wrongful death claimants should be totally exempt from enhanced fees.

FEE STRUCTURE IS CLUMSY AND INAPPROPRIATE

33. Even if one starts from the premise that the user should pay for the cost of providing the services, the fees bear little or no relation to those costs.

34. This is because the assumption is wrongly made that all claims go to trial⁷. The second wrongly made assumption is that the cost to the court of resolving the dispute is correlative to the amount in dispute. There is simply no data available from the Courts Service to support the second assumption.

35. Taking the Commercial Court as an example, there were 1,162 claims issued in 2014. In the same period there were 73 trials. That is to say that fewer than 10% of the claims issued were ultimately decided by a judge following a trial.

36. There is therefore a real problem in having a system which charges a substantial upfront fee: in many cases the only Court time needed is for the determination of

⁷ This flies in the face of the MoJ's own statistics: see <http://open.justice.gov.uk/courts/civil-cases> Accessed on 14 September 2015

a relatively short application, such as a freezing injunction to secure assets. In many others, no court time is needed at all. For those claimants who have the choice of jurisdiction, it must be a relevant consideration that there is no significant prospect of their case actually needing to come to trial. It is one thing to charge a litigant £10,000 or even £20,000 for a 6 week trial (although we should emphasise that, for reasons given elsewhere in this document, we would oppose the increase in court fees in any event, however structured); it is quite another to raise the same charge for a litigant whose application for injunctive relief is issued but resolved by consent without ever entering the door of the court.

37. It is of concern to SEC that no detailed research or consideration has been undertaken into the type and nature of involvement that the civil courts have in different types of proceedings. The one-size-fits-all approach of the current scheme pays insufficient regard to the factors set out by the 2014 Act. Where service users perceive that the charging for the service is unfair or disproportionate, they will, if other options are open to them, take their 'purchasing power' elsewhere.

38. It must be noted that there has been less than 6 months since the imposition of these changes and the long-tail effects will take months, if not years to emerge: unlike Employment Tribunal claims, for which the limitation period is typically three or six months, the limitation period for civil court claims is typically three or six years. SEC is concerned that the perception of England and Wales as a high-cost litigation system will become established and irreversible long before the impact on access to justice is measurable. It is not sufficient to simply ask for 'hard luck stories'. Policy ought to be based on a credible and durable assessment of the risks and using accurate and up-to-date evidence. This does not appear to be of interest to MoJ.

CONCLUSIONS

39. SEC is concerned that the court fees measures of March 2015 and the latest proposals are based on poor research, inadequate data and false assumptions. The changes which have been brought about pose significant risks to access to justice for both litigants and society as a whole. SEC is concerned that MoJ does not

appear willing or able to look either beyond its own departmental remit or to appreciate either the seriousness of the effects or that they might be irreversible later.

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