MOJ Consultation Paper: CM8751 December 2013

Court Fees: Proposals for reform

RESPONSE OF THE LONDON SOLICITORS LITIGATION ASSOCIATION

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1. This document sets out the response of the London Solicitors Litigation Association ("LSLA") to the MOJ Consultation Paper CM8751, Court Fees: Proposals for reform. For the background to the LSLA, please see Schedule 1 attached.

Introductory notes

2. Before attempting to deal with the specifics set out in Questions 1 to 28 in the Consultation Paper, we think it appropriate to make certain fundamental and preliminary observations within which context our responses to Questions 1 to 28 should be considered.

3. The self-funding principle (that court fees cover the full cost of the service)

3.1 The LSLA notes from the Consultation Paper, and in particular from the Ministerial Foreword, that there is "*a principle that those who use the courts should pay the full cost of the service they receive*", and that there should be a system of apportioning costs which means that "*all who bring a case contribute towards the overall costs of the civil justice system*".

3.2 The LSLA is, and for many years has been, opposed to the policy that the cost of first instance civil litigation should be borne solely by the parties involved, through the payment of court fees. The LSLA's comments on a self-funding principle as regards appeals are set out at paragraph 6 below.

3.3 The benefit of an effective, efficient and predictable civil court system is felt by the whole community and not only by those who for whatever reason (many unwillingly) are active users of it. A clear and predictable body of case law is of particular benefit to trade and commerce, as is a properly managed civil justice system which allows litigants to bring and pursue legitimate claims as efficiently and effectively as possible. That principle was recognised by Lord Neuberger in his Harbour Litigation Inaugural Lecture on 8 May 2013, and is indeed recognised at paragraph 126 of the Consultation Paper: "*the courts fulfil an important role in ensuring the effective functioning of the economy. Ready access to the courts provides businesses and entrepreneurs with the confidence to enter into commercial agreements in the knowledge that, if a party defaults, there is an effective remedy to enforce their agreements*".

3.4 As part of the apparatus of any civilised state, the civil justice system should be provided by the state as part of the state infrastructure and be accessible to all, subject only to the requirement for fees at a level appropriate for deterring time-wasters and the frivolous use of the courts.

3.5 The LSLA notes that there is a deficit of £110-120 million in the civil and family courts, but HMCTS's annual report for 2012/13 shows that much of that deficit arises from the family courts. It therefore seems inconsistent to increase fees in the civil courts but to standardise, or even reduce, fees in the family courts: users of the civil courts are effectively being asked to subsidise the family courts.

3.6 Further, from paragraphs 33 and 34 of the Consultation Paper the Ministry of Justice's net budget is £8.3bn yet the total cost to the tax payer of civil court business is £120m, i.e. less than 1.5% of that net budget. Quite apart from the arguments on matters of principle, the LSLA believes that when the overall budget of the Ministry of Justice is over £8bn, tinkering with 1.5% of that budget seems wholly disproportionate, when balanced against the cost to individual court users.

4. The "sale" of civil court services to litigants

4.1 It is wrong to treat the provision of civil court services to litigants as a commercially-traded commodity for which a consumer must pay the price. If that were the justification for total fees, the consumer would be entitled to insist on a proper level of service and to seek redress when the service provided was inadequate or was delayed, cancelled, postponed, adjourned etc. Most litigants have almost no choice in the appropriate court, nor do they have control over the allocation of hearing and trial dates, postponements and delays which occur within the system, and other shortcomings in the civil court administration which can cause substantial loss to litigants. As set out at paragraph 9 of the Consultation Paper, 138 courts have been closed since 2010, and numbers of court staff have been reduced by 3,500: there must, therefore, be a significant risk with the proposed reforms not only that civil litigants will be expected to pay higher amounts to commence and progress proceedings, but also that they will be paying those higher amounts for a reduced-standard service.

4.2 The civil court service should be seen as part of the necessary infrastructure provided by the state, and not as the sale of a product to those who wish to pay for it.

5. Opposition to fee increases generally

5.1 The LSLA opposes fee increases as far as they are intended to provide an entirely self-funded civil court system for first instance litigation. The proportion of litigation cost already borne by litigants is high enough.

6. Appeals

6.1 The LSLA's approach to court fees at the appeal stage is, however, different. While it is right that the State should provide a system of dispute resolution accessible to all subject to modest fees to deter time wasting and frivolous proceedings at first instance, different considerations apply to appeals. Once a party has had, with assistance from the tax payer, his day in court,

with a decision against him, the dissatisfied litigant should not thereafter expect the taxpayer to subsidise his appeals.

7. Time-related hearing fees

7.1 The LSLA has particular concerns regarding the proposals that litigants be required to pay hearing fees measured by the predicted or actual length of the hearing or trial. For good reasons and bad, the difference between predicted length and actual length can be enormous. Responsibility for erroneous estimates and/or for trials overrunning, having to be adjourned or postponed etc is notoriously difficult to establish. Whereas the other fees already involved (and the proposed increases in those fees) are unlikely in almost all cases to have a significant impact on the overall costs of a party to the litigation, the addition of a time-related hearing fee will in all but the biggest cases add a significant burden to the parties' costs.

7.2 The LSLA has concerns about the mechanics of estimating the length of trials for the purposes of time-related hearing fees, and considers that the process could well be open to manipulation and result in satellite litigation.

8. Enhanced fees

8.1 The LSLA has concerns that the proposed increase in issue fees for "high value" money claims from the current upper limit (£1,670 or £1,870) to either £20,000 or £10,000, with daily hearing fees potentially payable on top of those issue fees, may encourage international and domestic court users to question whether other jurisdictions can provide a suitable alternative service and, if so, whether to make their contracts governed by that jurisdiction's law rather than English law. New York law is the main competitor to English law as the governing law of choice for international business and finance contracts, and the LSLA understands that fees in the New York Courts are nominal.

8.2 Further, it is not clear whether any research has been carried out into the way the proposed enhanced fees are likely to be regarded overseas: given that they are intended to raise revenue rather than cover cost they are likely to be seen, and portrayed abroad, as a tax which could be raised further in the future, effectively introducing political risk into the question of whether to litigate in the UK. The LSLA considers that there is a real risk that enhanced fees will deter commercial parties from choosing to litigate their disputes in London either by drafting non-UK jurisdiction clauses and/or agreeing non-English governing law. This would damage the broader market for English legal services, as advice from non-UK jurisdictions would be required in relation to the drafting of commercial contracts and other business and finance transactions, and could also have a detrimental effect on the wider UK legal market, and well as the City of London as a whole as a financial centre.

8.3 Insofar as litigation moves away from the UK as a result of enhanced fees, then there is likely to be a very significant loss of tax revenues. International litigation in the UK, particularly in large commercial cases, creates significant UK based fee income and as a result significant tax revenue (income tax, corporation tax, VAT etc). There is a real risk that movement of litigation away

from the UK may result in a reduction in revenues from general taxation which would more than offset any revenues raised by enhanced Court fees, and as a whole the Treasury would be out of pocket.

8.4 Further, any move away from litigation in the UK commercial courts would also damage the reputation of the Courts: it would reduce the number, range and scope of commercial decisions being reported in the UK courts, which in turn would damage the reputation of English law as a choice of law.

8.5 As has been commented on in the recent Opinion from the Regulatory Policy Committee, the Impact Assessment regarding enhanced court fees published on 2 December 2013 (Impact Assessment Number MoJ222) has failed to make clear whether the proposal for enhanced fees for commercial cases will result in the court system raising more funds than is necessary to cover costs. The Impact Assessment says that the proposal for enhanced fees will increase net fee income to HMCTS by £190 million: it should therefore explain why £190 million is required and, if HMCTS is to be generating a surplus, what that additional revenue will be used for. The Impact Assessment is, as the Regulatory Policy Committee advises, not fit for purpose.

8.6 The Impact Assessment does not contain sufficient discussion of the risks that fees above cost will move demand below the economically efficient level and there appears to have been no proper surveys or research carried out to assess the risks identified at paragraphs 8.1 to 8.4 above. As set out in the Opinion from the Regulatory Policy Committee, the Impact Assessment should discuss any risks associated with a reduction in the demand for court services: in the absence of any such discussion, or indeed any research into the likely effects of higher fees on domestic and international demand for the UK courts' services, the LSLA has serious concerns about the current proposals.

9. Questions on which the LSLA is unable to comment

8.1 The LSLA considers that it should not respond on questions relating to private family law fees, magistrates courts' fees, fees in the Court of Protection, or non-contentious probate fees. The LSLA as a body does not have the requisite experience to comment on each of those aspects.

Summary of Questions

Question 1: What do you consider to be the equality impacts of the proposed fee increases (when supported by a remissions system) on court users who have protected characteristics? Could you provide any evidence or sources of information that will help us to understand and assess those impacts?

Answer

The LSLA cannot see any circumstances in which the proposed fee increases would have any inequality impacts when supported by the fees remissions system.

Question 2: Do you agree with the premise of a single issue fee of £270 for non-money cases? Please give reasons for your answer.

Answer:
The LSLA agrees on the basis that such a fee is proportionate and it is unlikely in most cases to affect access to justice and a single uniform fee for non-monetary claims is simpler to administer and to understand.

Question 3: Do you agree with the proposed fee levels for money claims? In particular, do you agree with the proposal to charge the same fee for claims issued through the Claims Production Centre that would be charged for applications lodged online? Please give reasons for your answer.

Answer:
The LSLA does not agree with the proposed levels for money claims as set out at Annex A of the Consultation Paper: the relative increases seem haphazard, disproportionate and inconsistent, and there are a many percentage increases which are unexplained.

The LSLA agrees with the proposal that the same fee be charged for claims issued through the Claims Production Centre as would be charged for applications lodged online.

Question 4: Do you agree with the removal of the allocation and listing fee in all cases? Please give reasons for your answer.

Answer:
The LSLA agrees with the proposal to remove all allocation and listing fees on the basis that doing so will reduce administrative costs both for the court and for practitioners, and therefore the overall costs for court users. However, the LSLA notes that the removal of the allocation and listing fees links into the imposition of hearing fees.

Question 5: Do you agree that small claims track hearing fees should be maintained at their current levels, which are below cost? Please give reasons for your answer.

Answer:
The LSLA does not oppose small claims track hearing fees being maintained at current levels. However, given that a fee remission scheme exists for those who have real financial difficulties bringing claims, it is unclear why the MOJ considers that small claims track hearing fees should be charged at below cost.

Question 6: Do you agree that fast track and multi-track hearing fees should be maintained at their current levels, which are above cost? Please give reasons for your answer.

Answer:
The LSLA agrees that fast track and multi-track hearing fees should be kept at the current levels: they are a sufficient deterrent for most frivolous and vexatious claims, and there is no evidence that they adversely affect access to justice.

Question 7: Do you agree with proposals to abolish the refund of hearing fees when early notice is given that a hearing is not required? Please give reasons for your answer.

Answer:
The LSLA agrees with the proposals to abolish the refund of hearing fees: there is no justification for that refund, and abolishing it will reduce the administrative costs of the court.

Question 8: Do you agree with proposals to retain the current fee levels for private law family proceedings and divorce, and the proposal to no longer charge a fee for non-molestation and occupation orders? Please comment on all or any of these processes.

Answer:
The LSLA believes that its members do not have sufficient experience in connection with private law family proceedings to be able to answer this question responsibly and is therefore unable to comment.

Question 9: Do you agree with the standardisation of the fee for Children Act cases, and with the proposal that there should only be one up-front fee for public law family cases? Please give reasons for your answer.

Answer:
The LSLA believes that its members do not have sufficient experience in connection with Children Act cases to be able to answer this question responsibly and is therefore unable to comment and is therefore unable to comment.

Question 10: Do you agree with the standardisation of general application fees and fees for applications within family proceedings? Please give reasons for your answer.

Answer:
The LSLA believes that its members do not have sufficient experience in connection with applications within family proceedings to be able to answer those questions responsibly and is therefore unable to comment.

Question 11: Do you agree with the proposed fee levels for judicial review cases? Please give reasons for your answer.

Answer:
The LSLA agrees with the proposed fee levels on the basis that they are unlikely to affect access to justice.

Question 12: Do you agree with proposals to increase the fee for an application for grant of probate to full-cost levels? Please give reasons for your answer.

Answer:
The LSLA believes that its members do not have sufficient experience in connection with non-contentious probate to be able to answer this question responsibly and is therefore unable to comment.

Question 13: Do you agree with the proposed fee levels for cases taken to the Court of Appeal? Please give reasons for your answer.

Answer:
The LSLA agrees with the proposed fee levels on the basis that they are unlikely to affect access to justice.

Question 14: Do you agree with the government's proposed changes to the fees charged in the Court of Protection? Please give reasons for your answer.

Answer:
The LSLA believes that its members do not have sufficient experience in connection with Court of Protection work to be able to answer this question responsibly and is therefore unable to comment.

Question 15: Do you have any further comments to make on the government's cost recovery plans?

Answer:
The LSLA does not agree with a policy of full costs recovery at first instance, but approves of it in all appeal processes. Further comments are set out in the introductory notes to this response paper.

Question 16: Do you agree that the fee for issuing a specified money claim should be 5% of the value of the claim?

Answer:
The LSLA considers that the proposed 5% issue fee will mean that fees will not necessarily be a 'very modest' part of the costs to date.

The proposed increases will probably deter small and medium size enterprises from issuing proceedings to recover debts of between, for example, £200,000 and £600,000. Under the current proposals, the issue fee on a claim valued at £400,000 would be £20,000: for many such claims, the cost of issue could therefore be greater than the legal fees for preparing the proceedings and will add to the already onerous pre-action costs which claimants are obliged to incur. In circumstances where the ability of the defendant to pay may be in doubt, such high fees will make litigation at this level considerably more risky.

In cases where the lawyers are acting under a CFA type arrangement, the court fees may be the entirety of the costs incurred, and claimants would very probably struggle to afford the entirety of the proposed 5% issue fee up front.

Question 17: Do you agree that there should be a maximum fee for issuing specified money claims, and that it should be £10,000?

Answer:
The LSLA agrees that there should be a maximum fee for issuing specified money claims, and agrees with the proposed level of maximum fee on the basis that it will not inhibit access to justice, and it is proportionate.

Question 18: Do you believe that unspecified claims should be subject the same fee regime as specified money claims? Or do you believe that they should have a lower maximum fee of £5,000? Please give reasons for your answer.

Answer:
The LSLA agrees that unspecified claims should be the subject of the same fee regime as specified money claims, but that such claims should not have a lower maximum fee: if there is an effective fees remission system in place (which the LSLA supports), there should be no need for a reduced maximum fee for unspecified money claims. The LSLA believes that a lower maximum fee would encourage problems and, potentially, manipulation.

Question 19: Is there a risk that applying a different maximum fee could have unintended consequences? Please provide details.

Answer:
Please see the answer to Question 18 above.

Question 20: Do you agree that it is reasonable to charge higher court fees for high value commercial proceedings than would apply to standard money claims?

Answer:
The LSLA disagrees with the suggestion of higher fees for all claims issued in the Rolls Building jurisdictions and equivalent district registries (save for the Mercantile Court). The implication is that all proceedings issued in the Rolls Building, with the exception of those issued in the Mercantile Court are high value: many are not.

As set out in the answer to Question 16 above, for many such claims the cost of issue could be greater than the legal fees for preparing the proceedings and will add to the already onerous pre-action costs which claimants are obliged to incur. The proposal to apply higher court fees for Rolls Building claims will probably disproportionately affect small and medium sized enterprises, and could very well deter them from pursuing claims through the courts: there should be proper research into how the proposed fee levels will affect such enterprises, and discussion had on how the impact of the increase in fees on those entities will be mitigated.

Further comments are set out in the introductory notes to this response paper.

Question 21: We would welcome views on the alternative proposals for charging higher fees for money claims in commercial proceedings. Do you think it would be preferable to charge higher fees for hearings in commercial proceedings? Please give reasons for your answer.

Answer:
Please see the LSLA's answers to Question 20 above and Question 22 below, and the introductory notes to this response paper.

Question 22: Could the introduction of a hearing fee have unintended consequences? What measures might we put in place to ensure that the parties provided accurate time estimates for hearings, rather than minimise the cost? Please provide further details.

Answer:
The introduction of a daily hearing fee as proposed will almost undoubtedly have unintended consequences. If, as with most (if not all) civil court fees, the hearing fee is to be payable in advance of the hearing itself, then the LSLA queries what, if any, measures will be put in place should the time estimate prove inadequate. Paragraph 167 of the Consultation Paper says, "*if the actual trial or*

hearing takes longer than estimated, an additional fee would become payable at the same rate". However, given the general proposal in the Consultation Paper to abolish the refund of hearing fees, if there was an over-estimation of the length of trial there would be no plan to refund part of the hearing fee.

There will probably be disputes between the parties as to time estimates, either in advance of the hearing or in retrospect. Further, it is unclear whether the hearing fees proposed would include time spent by the trial judge in writing his or her judgment before handing it down: strictly speaking that is part of the trial process, but the parties would have no way of estimating the length of time it would take to prepare a judgment.

Without proposals for the mechanics of time related hearing fees, it is difficult to comment further: however, attention is drawn to the introductory notes to this response paper in so far as they relate to time related hearing fees.

Question 23: If you prefer Option 2 (a higher maximum fee to issue proceedings), do you think the maximum fee should be £15,000 or £20,000? Please give reasons for your answer.

Answer:
Please see the comments set out in the introductory notes to this response paper as to the proposal of enhanced court fees for commercial proceedings.

Question 24: Do you agree that the proposals for commercial proceedings are unlikely to damage the UK's position as the leading centre for commercial dispute resolution? Are there other factors we should take into account in assessing the competitiveness of the UK's legal services?

Answer:
Many cases are dealt with using alternative methods of dispute resolution, such as arbitration, which would not necessarily be affected by the proposed reforms to court fees.

However, the assertion in the Consultation Paper that the proposals to introduce enhanced fees would not have any material impact on the attractiveness of the Commercial Court as compared to competitor appears to be based on very limited research. The LSLA has a real concern that enhanced fees would damage the Commercial Court's competitiveness against its main competitors, particularly in New York and Singapore. There is a further concern that the proposals will risk the UK's courts losing out to international (and domestic) arbitration in the event that enhanced fees are introduced.

Further comments are set out in the introductory notes to this response paper.

Question 25: Do you agree that the same fee structure should be applied to all money claims in the Rolls Building and at District Registries? Please give reasons for your answer.

Answer:
The LSLA agrees with this proposal, save that it should exclude the Mercantile Court, which typically deals with lower value (if not necessarily less complex) claims. There is no justification for a distinction in fees between the Rolls Building and District Registries.

Question 26: What other measures should we consider (for example, using the Civil Procedure Rules) to target fees more effectively to high-value commercial proceedings while minimising the risk that the appropriate fee could be avoided?

Answer:
The LSLA is unsure what is meant by "*to target fees more effectively to high-value commercial proceedings*". If the intention of this question is to query what can be done to increase fees for high-value commercial proceedings while minimising the risk of manipulation by parties of, for example, time estimates and claim values, to avoid paying the correct fees, it seems that there is no alternative but to leave it, as we think it should be left, to the appropriate judge's discretion on costs generally.

Question 27: Should the fee regime for commercial proceedings also apply to proceedings in the Mercantile Court? Please give reasons for your answer.

Answer:
The LSLA does not consider that the proposed fee regime for commercial proceedings should apply to proceedings in the Mercantile Court: the Mercantile Court traditionally deals with lower value (if not necessarily less complex claims. The Mercantile Court's fees should be the same as those in other courts generally; if the fees in the Mercantile Court were the same as those proposed for commercial proceedings there would be no point to the Mercantile Court.

Question 28: Do you agree that the fee for a divorce petition should be set at £750? Please give reasons for your answer.

Answer:
The LSLA believes that its members do not have sufficient experience in connection with such proceedings to be able to answer this question responsibly and is therefore unable to comment.

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SCHEDULE 1

The LSLA was formed in 1952 and currently represents the interests of a wide range of civil litigators in London. It has over 1,400 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms.

Members of the LSLA Committee sit on the Civil Justice Council, the Civil Rule Committee, The Law Society Civil Litigation Committee, the Commercial Court Users Committee and the Supreme Court Costs Group, to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change. Representatives from the City of London Law Society and the City of Westminster and Holborn Law Society also sit on the LSLA Committee.

See website: www.lsla.co.uk