Further written evidence from The Law Society

1. Introduction

1.1. This document provides the Members of the Justice Select Committee with the supplementary information requested by the Chair in a letter dated 22 February 2016. Law Society President Jonathan Smithers gave oral evidence to the Committee on 9 February 2016.

In the letter, the Chair requested the following:

- The Society's views on how high the fee remission threshold should be
- Further evidence on whether the value of a claim is an appropriate criterion for setting a court fee
- Further evidence of whether the new enhanced fees for money claims may provide larger firms with a competitive advantage
- Any additional evidence of whether there is increasing use of Singapore as a jurisdiction of choice for international contract disputes based on English law
- To provide a copy of The Society's recent paper on ACAS early conciliation
- Whether there has been any 'leakage' of cases from the Employment Tribunal to the County Court resulting from the rise in Employment Tribunal fees

2. Should the fee remission threshold be increased?

2.1 The Law Society recommends that the fee remission threshold should not be increased

2.2. In the 2013 consultation on the fee remission system¹, the then Government stated that its aim was "to reduce the taxpayer subsidy for the civil business by ensuring that fee income covers 100% of the cost of providing services, minus the income foregone to the remission system. In other words, we wish for the taxpayer contribution to be limited to those who can’t afford to pay fees with the user paying where it is possible for them to do so. For tribunals the aim is to maximise cost recovery and separate targets below full cost recovery have been agreed with Her Majesty's Treasury. The remission system ensures that access to justice is maintained for those individuals on lower incomes who would otherwise have difficulty paying a fee to use court or tribunal services."

2.3. The purpose of the system has been to enable access to the courts for those who could not afford even the relatively low fees prior to the increases in March 2015, rather than to function as a mechanism for making high fees more affordable.

2.4. Even before the most recent fees increases, the fee remission system was overly complicated and the eligibility cut off threshold set too low. Following the substantial fee increases in 2015, the fee remission arrangements have become still less fit for purpose.

2.5. Eligibility for fees remission is based on a complex matrix which includes the following interrelated factors:

- monthly disposable income of the applicant and any partner
- disposable capital
- level of the fee
- age of the applicant

• number of dependant children

2.6. If the applicant does not exceed the maximum income or capital thresholds, they will be eligible for either full or partial remission of fees dependant on their circumstances. Further details can be found on the application form EX160 and Guidance EX160A.

2.7. Historically, the income and capital thresholds were up-rated on a regular basis to take inflation into account. This has not happened for several years, and we recommend that, as a minimum measure, the thresholds should be reviewed to take account of inflation and a process for regular up-rating introduced.

2.8. We believe that that the Ministry of Justice (MoJ) should conduct a further review of civil court fees affordability and the remission system. With regard to the latter, we recommend that consideration is given to the scope for simplification, for example automatic fee remission for all basic rate tax payers.

3. Should fees be determined by the value of the claim?

3.1. Yes, for the reasons given below.

3.2. Although the value of the claim appears an objective and administratively straightforward criterion for setting fees, the main point is that fees should be set at affordable levels for litigants. Courts and tribunals should not be treated as a profit centre and fees must not constitute a barrier to justice.

3.3. It should be noted that, while the financial value of a claim can be indicative of the complexity of some cases and therefore the amount of court resources that will be required to resolve them, lower value claims, for example relating to serious personal injury or clinical negligence, may involve equally or more complex issues.

3.4. Therefore, while the value of the claim appears to be a convenient, clear and objective criterion on which to base fee levels, value may not always reflect complexity. Factors that directly impact on complexity include the number of legal issues, the volume of evidence, and the number of professional witnesses. Such factors will vary from case to case, and are more likely to be subjective and difficult to identify and quantify particularly at the beginning of the litigation process.

3.5. Although it would be possible, at least in theory, to develop a fee system that accounted for these and other criteria, it would almost certainly require an *ex post facto* assessment of fees in a similar manner to the assessment of legal costs at the end of a case. This would be administratively complicated, creating additional expense and uncertainty for both litigants and the courts. We do not regard this to be a viable alternative to fees based on the value of the claim.

4. Do the new enhanced fees provide a competitive advantage for larger firms?

4.1. The Law Society believes that, aside of the deterrent effect of the fees on those on lower incomes, higher fees have a disproportionately negative impact on smaller law firms.

4.2. The maximum court fee of £10k applies to claims over £200k. This affects non commercial claims by individuals, in e.g. serious personal injury cases and clinical negligence claims. Except for birth injury cases, there is no legal aid for these claims and where the client cannot afford the fees, the firm advising the claimant will have to pay them up front to commence litigation. Although the fee is likely be recovered at the end of the
case, either from the defendant if the client is successful or from the client's insurance policy if not, such a mechanism creates major cash flow issues for smaller firms. One Senior Partner told us:

My firm is now regularly paying these eye watering fees and I estimate our overdraft has risen by around £200k as a result over the last 10 months. This is a real problem given that our bank has only increased our facility by £500k in 8 years despite turnover and WIP growing substantially in this period. Banks are not keen to lend to law businesses. I don't see how smaller firms will be able to afford to run bigger PI and clinical negligence cases. Clients are never asked to pay the fees and would never have the funds to do so and would always find a bigger firm to pay them.

4.3. The fee system also impacts on the ability of small businesses to engage in commercial litigation, as well as on individuals. The Head of Litigation in a regional firm told us:

At least in the field of commercial litigation, the real losers following the Court fee increases are the small- and medium-sized businesses. They are the 'squeezed middle' who can't afford the new fees but who don't qualify for remission.

I have probably had three or four cases since last March where my clients have been (effectively) deprived of the opportunity to bring good cases because they can't afford/can't afford to risk, the Court fees.

My firm, even as a relatively large regional firm, is not in the business of funding clients' litigation. I am not aware that firms generally are 'laying out' Court fees for commercial litigation, but it stands to reason that very big firms will be better-placed to do that than other firms.

4.4. It seems highly likely that smaller law firms are losing business because of the fee increases because larger law firms are more able to pay the fees up front. This is in addition to the impact arising out of the deterrent effect of the fees, whereby firms have lost business because the clients are not able to pursue litigation at all.

5. Is there any evidence of increasing use of Singapore as a jurisdiction of choice for international contract disputes based on English law?

5.1. We are aware of anecdotal evidence of an increasing tendency for commercial contracts to specify that the seat of arbitration should be Singapore. As yet, however, we are not aware of any data showing an increase in the selection of Singapore or other alternative jurisdictions to England and Wales and how many clients have chosen to resolve an international contract dispute in Singapore or are likely to do so, and why. However, we would suggest that this is likely to have been a factor in the decision of Singapore to establish a Commercial Court employing former English judges; court fees increases of the magnitude the Government has introduced would seem very likely to be a factor in that decision. There is also evidence of increased interest in the relative merits of Singapore, London and other jurisdictions\(^2\).

5.2. Our main concern is that given the growing reputation of other jurisdictions such as Singapore, the higher fees payable here are unlikely to assist London to maintain a competitive advantage.

5.3. Further to the written evidence submitted to the Committee in September 2015 we would reiterate that the government should undertake an assessment of the cumulative impact on the competitiveness of London as a centre for international dispute resolution and the extent to which fees have led to any move of international clients to cheaper jurisdictions.


6.1. As requested, a copy of The Society's paper *Making Employment Tribunals Work for All* has been emailed to the Clerk's office. It is also available online via the following link:

[Making employment tribunals work for all - The Law Society](http://www.lawsociety.org.uk/policy-campaigns/articles/making-employment-tribunals-work-for-all/)

7. Has there been 'leakage' from the Employment Tribunal to the County Court?

7.1. The majority of employment cases fall within the jurisdiction of the Employment Tribunal so there is no County Court option for these matters. For some cases, however, such as unpaid wages claims, there is a choice of jurisdiction. The Society's paper on Employment Tribunals referred to above has a good summary of the respective roles of the Tribunal and the County Court on page 9.

7.2. When Employment Tribunal fees were introduced in 2013 there was some evidence of claims shifting to the County Court. This was before the civil court fee increases which will have reduced the cost advantage of the County Court option for eligible claims. However we understand that some advisors are advising claimants with lower value breach of contract disputes to bring their claims in the County Court:

- If an employee is not entitled to a fee exemption, the combined issue and hearing fees for a money claim of up to £3000 in the court would be £285 (£275 if issued online). The claimant would be entitled to full refund of the fees if the claim is settled prior to the hearing.

- A similar claim (e.g. for wages/holiday pay) in the Employment Tribunal will cost £390 without any entitlement to a refund in the event of early settlement, and the recovery of the fees from the respondent is at the discretion of the tribunal. There are currently no published statistics for the number of County Court employment claims from March 2015.

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4 [The Law Society Gazette, June 2014](http://www.lawsociety.org.uk/policy-campaigns/articles/making-employment-tribunals-work-for-all/)