

Court and Tribunal Fees: Response to consultation on further fee proposals

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.

We strongly disagree with the above proposal for the following reasons:

- The consultation sets out a presumption that many claims brought for more than £200,000 are brought by multi-national organisations or wealthy individuals and that it is right to ask them to contribute more. It is certainly not our experience that many claims for above £200,000 involve those groups. Our experience is in fact the opposite:
 - We act for many public bodies that enter into large value contracts. When disputes arise, public bodies already have to make difficult decisions about whether to pursue those matters (if necessary in the Courts) with limited resources. The higher Court fees will mean that in many instances those bodies may decide not to issue proceedings (for example because there is a more immediate requirement for those resources elsewhere). This denies access for justice and ultimately the public purse is likely to suffer.
 - We also act for many SMEs and charities who simply cannot afford or would find it difficult to justify such a large expenditure on a court claim. Again this impacts on access to justice. We have already acted on cases involving SMEs who have decided not to issue court claims because of the court fee (post the increase that was introduced in April 2014).
 - Even for larger companies, our experience is that they do not undertake litigation lightly and the cost of litigation in the UK already acts as a deterrent. We consider that the higher court fees will lead to companies of all sizes deciding that to issue a claim may simply be unaffordable or unjustifiable denying them access to justice.
- Whilst we disagree with the proposal in general terms, we draw your attention in particular to the impact that the fee increase is already having on claims issued under the **Public Contracts Regulations 2006 / Public Contracts Regulations 2015 ("the Regulations")**. If the new MoJ proposals are implemented, these adverse effects will be amplified. Under the Regulations, economic operators who wish to challenge procurement decisions of "contracting authorities" have only a very short period of time to decide whether to do so. The relevant limitation periods are as follows:
 - Claims for damages (and any remedy other than ineffectiveness): 30 days from the date that the economic operator knew or ought to have known that grounds for starting the proceedings had arisen;
 - Claims for ineffectiveness: either six months after the public contract was entered into OR 30 days from the date that the contracting authority publishes a contract award notice confirming that the contract has been entered into.
- Claims under the Regulations are brought by economic operators who bid for (or would have wished to bid for) a public contract and who wish to challenge the way that a procurement process for a public contract has been run or the contract award decision. Public contracts are contracts that are awarded by contracting authorities (usually public bodies) for public services, to purchase goods or for public works. They include services purchased by NHS Trusts, local authorities and often relate to the most critical of public services (hospitals, education, waste disposal, social services to name but a few). Most often, public contracts are awarded to the "most economically advantageous tender" so there is a strong public interest in ensuring that contract award decisions are correctly made and that they can be challenged in the Courts. Many of the companies who bid for such contracts are in fact SMEs and often a large contract with a contracting authority is their bread and butter. We are aware of several instances where this is the case. We have direct experience of the already increased court fees deterring SMEs from bringing a claim for damages. This situation will be amplified if the Court fees are further increased.

- The effect of the very short limitation periods is that claimants regularly have no option but to issue proceedings on a **protective basis** before the expiry of the limitation period. It is very often necessary to do so for reasons including the following: (1) in such a short space of time, there is limited opportunity for fact finding and disclosure about why the contracting authority has reached the relevant purchasing decision – there is therefore limited opportunity for assessing the merits of the claim; (2) there is limited opportunity for ADR before the limitation period expires; (3) the issue of proceedings in a procurement claim puts an "automatic suspension" on the procurement – giving the claimant additional protection while the dispute is resolved in the Courts or otherwise.
- If the maximum Court fee is increased in the way proposed, this will mean that many claimants are unable to protect their rights simply because, at that early stage, it is simply not possible to carry out a well-informed cost/benefit analysis and to commit to that level of expenditure. Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts requires at Article 1(1) that member states must take the measures necessary to ensure that decisions taken by contracting authorities may be reviewed **effectively** and as rapidly as possible. In our submission, the proposed increase in court fees, combined with the very short limitation periods infringes the principle of effectiveness and is therefore **incompatible with EU law**. The recent European Commission consultation on remedies also included a specific question about whether Court fees had a dissuasive effect on applicants trying to protect their rights under procurement law. We responded that in the UK the Court fees were strongly dissuasive. The European Commission is therefore aware of this issue.
- **In summary**, whilst we disagree with the increase in the maximum court fee from £10,000 in general terms, our very strong view is that there must be an **exclusion or significant reduction in Court fees** for claims brought under the Public Contracts Regulations 2006, Public Contracts Regulations 2015, Utilities Contracts Regulations 2006 (and the new Utilities and Concessions Regulations which are anticipated to come into force in April 2016).

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 commencing a money claim

Please see our response to question 1. We strongly disagree with the proposal to increase the maximum fee for starting proceedings for the recovery of money from £10,000 for the reasons above. If the fees are increased, such increases should be kept to a minimum in order to minimise the adverse effects that will result.

We do not see how an unlimited maximum fee would be workable given that at the stage of issue, many claims have not been fully quantified. This is particularly so with procurement claims due to the very short limitation period.

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.

No comment.

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.

No comment.

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?

No comment.

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.

As a general point, we disagree because in our experience the higher court fees are already acting as a deterrent such that in some instances, access is denied. This particularly impacts on SMEs and public bodies with limited resources.

Question 7: Do you agree with the 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.

No comment.

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

No comment.

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.

No comment.

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

No comment.

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.

No comment.

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.

No comment.

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

No comment.

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.

No comment.

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

No comment.

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)?

No comment.

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

We consider that claims brought under the Public Contracts Regulations 2006, Public Contracts Regulations 2015, Utilities Contracts Regulations 2006 (and the new Utilities and Concessions Regulations which are anticipated to come into force in April 2016) should be exempt from the current proposals or have significantly reduced court fees for the reasons set out above.

We would also suggest a much lower cap on fees for public bodies / charities for the reasons set out above.

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.

As explained above, we consider that the proposal to increase the maximum fee for a money claim will have a disproportionate effect on public bodies, charities and those seeking to challenge public contracts. Taking the example of claims brought under the procurement regulations (referred to in our responses to questions 1 and 17 above), these are very often brought in relation to contracts with the object of protecting the more vulnerable groups in our society including those with protected characteristics under the Equality Act (for example: assisted living contracts (elderly and disabled), domestic violence contracts (women) to name but a few). We are therefore concerned that the increase in Court fees could have a particular adverse impact on those groups. If providers are deterred from challenging public body decision making in relation to those contracts, this would feed through directly to the service that people with protected characteristics receive.

Should the MoJ require any additional information or wish to discuss this further, please contact Laura Brealey, Senior Associate, Bevan Brittan LLP on 0370 194 3070 or laura.brealey@bevanbrittan.com.