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# TECBAR response to the Ministry of Justice’s consultation paper entitled “Court Fees: Proposals for reform”

1. TECBAR (the Technology & Construction Bar Association) does not support the proposals for enhanced fee charging and does not support the proposals for claimants in ‘commercial’ cases to subsidise claimants in ‘non-commercial’ cases. TECBAR believes that this will have a detrimental impact on access to justice and will undermine the UK’s position as the leading centre for commercial dispute resolution.
2. The past 15 years have seen a concerted effort by successive governments to reduce and control the cost of litigation to members of the public. This has been at the heart of the Woolf Reforms and, more recently, the Jackson Reforms. The central thrust of these reforms was justified on the basis that lower costs meant better access to justice. The increased front loading of costs will have the opposite effect.
3. Rather than produce a stand-alone response, TECBAR respectfully adopts the responses set out in detail by the Bar Council and by COMBAR. This Note confines itself to highlighting a particular and significant detrimental impact on construction cases which has been entirely overlooked by the proposals and is of very real concern to the construction industry. In short, the new fee proposals threaten to undermine the success of the construction adjudication procedure.
4. The Housing Grants, Construction and Regeneration Act 1996 (“the Act”) introduced a statutory adjudication scheme available as a statutory right to all parties to a non-residential construction contract. The jurisdiction of the Act was extended further by amendments introduced by the Local Democracy, Economic Development and Construction Act 2009.
5. Any party to a non-residential construction contract is entitled to refer a dispute to an adjudicator at any time. Unless the parties agree otherwise, the adjudicator must make a decision within 28 days. That decision is binding and enforceable unless or until the parties seek to litigate the substantive dispute. This allows for an extremely quick resolution of a dispute, with no adverse cost risk within the adjudication.
6. Whilst initially envisaged as being mainly used to police interim payment certificates during construction works so as to allow the works to be completed, adjudication has in fact blossomed into the first jurisdiction of choice of the construction industry. It is very widely utilised. A recent study by Strathclyde University estimated that over 60% of all adjudications concerned sums of over £50,000 and that over 40% concerned sums of over £100,000, with over 20% relating to sums over £250,000.
7. Crucially, for the purpose of the consultation paper, the effect of this is to significantly reduce the number of cases litigated through the courts, resulting in a very substantial saving to the tax payer and a freeing up of court time for other members of the public.
8. The key feature and attraction of adjudication, other than its speed, is that the adjudicator’s decision is binding and, if necessary, will be enforced by the Court as a matter of course. The Court has made it plain that unless the adjudicator’s decision was made without jurisdiction or breached the rules of natural justice, it will be enforced by the Court and the paying party will have to ‘pay now, argue later’ even if the decision was wrong.
9. The Court has recognised the benefit of this system and the TCC introduced a bespoke streamlined procedure which allowed for ‘enforcement proceedings’ to be dealt with very promptly by way of a summary judgment application, typically within a matter of weeks of the application (See section 9 of the TCC Court Guide – Appended). This is in keeping with the rationale that a party should be able to obtain the cash to which the adjudicator has found they are entitled in a quick and (critically) a low cost manner.
10. However, the streamlined TCC procedure, whilst referred to as ‘enforcement proceedings’ is still initiated by a standard claim form being issued. Until now, the fact that this issue fee was the same as would be an issue fee in relation to a substantive dispute, was of relatively little concern due to the level of the fee. That is not the case under the proposed new fee regime.
11. It cannot be fair or appropriate for such enforcement claims – which are upon issue intended to be dealt with by a streamlined summary judgment application within weeks – to attract the same court fee as would a case intended to be resolved by a full trial in the normal course of events.
12. This has the prospect of acting as a serious disincentive to parties utilising the adjudication process (undermining the purpose of the Act) and, more troublingly, will act as a positive incentive to losing parties in an adjudication not to pay and to ignore the adjudicator’s decision in the hope that the ‘winner’ will not want to forward fund the £10,000 or more required to initiate a claim. That was clearly not the intention of the new fee proposals and should not be undertaken without obtaining feedback from the construction industry.
13. For example, in relation to a dispute worth £200,000, at present a party can obtain a decision from an adjudicator within 28 days of referring a dispute and seek enforcement at court quickly and at low cost. There is no real prospect that the cost of such enforcement proceedings will be anything like the £10,000 being suggested. As set out above, a large proportion of adjudication cases involve sums at or above this kind of level.
14. To put this concern into context, the most recent TCC Annual Report recorded that 18% of all claims issued in the TCC were adjudication enforcement claims (Appended).
15. The position is akin to the enforcement of an Arbitration award pursuant to section 66 of the Arbitration Act 1996 and CPR Part 62.18. Such applications attract a lower court issue fee of £60 and, under the new proposals, are intended to remain at that lower fee.
16. Consequently, if the new court fee proposals are adopted, it is essential that adjudication enforcement claims are treated as genuine ‘enforcement’ claims and/or are otherwise not subject to the proposed fee increases.

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For and on behalf of TECBAR

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