

Justice Committee

Oral evidence: [Courts and tribunals fees and charges, HC 396](#)

Tuesday 26 January 2016

Ordered by the House of Commons to be published on 26 January 2016.

Written evidence from witnesses:

[Rt Hon Lord Dyson, Master of the Rolls](#)

[Rt Hon Sir James Munby, President of the Family Division](#)

[Rt Hon Sir Ernest Ryder, Senior President of Tribunals](#)

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Members present: Robert Neill MP (Chair), Alex Chalk MP, Alberto Costa MP, Mr David Hanson MP, Dr Rupa Huq MP, Victoria Prentis, MP, and Marie Rimmer MP

Questions 266-329

Witnesses: **Rt Hon Lord Dyson**, Master of the Rolls, **Rt Hon Sir James Munby**, President of the Family Division, and **Rt Hon Sir Ernest Ryder**, Senior President of Tribunals, gave evidence.

Chair: Good morning. Thank you very much for coming to give evidence to the Select Committee. You have all appeared before the Committee at various times in the past, but this is the first time in the new Parliament. Welcome.

As you know, we must first declare our interests. If you do not mind, we will get that little bit of work out of the way. Members will know that I am a member of the Bar but not practising. I am sorry to say that I never practised in any of the jurisdictions that might have brought me before any of the witnesses.

Victoria Prentis: I am a barrister and a member of the Bar. I am not practising currently, but my husband, Sebastian, is in Sir James's former chambers.

Alex Chalk: I am a barrister. I still hold my practising certificate.

Alberto Costa: I am a practising Scottish and English solicitor.

Q266 Chair: Everybody else is silent on the point. You can work out the non-lawyers anyway. As I have already welcomed you, can I start with you, Lord Dyson, but addressing all three of you? First, we are grateful to you for coming and for the written evidence that we

have had, particularly from the divisions and from the Judicial Executive Board, which has been very useful to us. We want to try to amplify some of those issues and some of the related matters.

This is the first time that we have had senior members of the judiciary give evidence before the Committee in this Parliament. I am conscious of the constraints and conventions that apply to asking questions of you because of your and the judiciary's position. Rest assured that all members of the Committee have received a briefing on that and I shall make sure that it is adhered to, lest anybody forget. If anybody feels that it is not being adhered to, don't hesitate to say so, gentlemen.

As you know, this morning we are interested in the wide range of issues around courts and tribunals fees, particularly as they affect the divisions with which you yourselves have direct involvement. I would like to start with the principle. The JEB took a view on behalf of the judiciary that there was a problem with the principle of cost recovery—the idea that 100% cost recovery was not really an acceptable concept in principle. There is a separate issue around enhanced fees, which we will come to, but let us put that to one side. The Ministry's argument was that it had to pursue cost recovery “in order to ensure access to justice” and that it had an obligation to keep the system properly funded. In many parts of public life, such as local government, that would be regarded as fairly laudable. Why as a matter of principle—never mind the degree—is that a concern for the judiciary?

Lord Dyson: You are right that historically the judiciary has taken the position that there should not be an attempt to make cost recovery, that the provision of an effective court service is one of the most important functions of a civilised society and state, and that the state has to do it. Speaking for myself—but, I suspect, for many others, too—I fully recognise that the principle of having court fees to make a contribution, at any rate, to the cost of running the system is now pretty well established. It is no part of my function this morning—or, indeed, at all—to seek to argue against that principle.

To my mind, the real area for debate is the level, to make sure that whatever the level is, it does not in any way impair access to justice. Access to justice is the critical point. It should not be forgotten that not only is that a principle that most right-minded people would accept as absolutely essential to any civilised society and as a very important element of the rule of law, but it has been recognised as such by Parliament itself, because the principle is enshrined in the Courts Act. As you know, when setting the court fees, the Lord Chancellor is required by the statute to have regard to the necessity of maintaining access to justice. To my mind, that is the real area for debate, not some sort of high-level, almost philosophical principle of the kind you described.

Q267 Chair: That is helpful. The argument is that it could be pitched at such a level that, if access was impaired, that would be a matter of legitimate and proper concern for the judiciary and ought to be for us.

Sir Ernest Ryder: An example of a proper settlement would be the property chamber in the tribunals. From approximately 1997 onwards, they got used to fees set in such a way that the policy achieved its aim.

Q268 Chair: Yes. That is one of the points, isn't it? There are different parts of the system where it might be argued that the users, for want of a better word, are more vulnerable than in

others. In some cases, there is a greater degree of choice as to whether you litigate. Is that something that can properly be reflected in the way fees are pitched?

Lord Dyson: Yes.

Q269 Chair: Can I raise the issue of the enhanced fees, which go beyond that in some areas and where, in effect, you are making a profit, for want of a better word—more of an extra? The Ministry's argument has been that that is to offset the cost of the remissions in other areas. What is the judiciary's view on that? Is that an acceptable way of offsetting the remissions, or not?

Lord Dyson: Again, I speak for myself but, I suspect, for many others, too. I do not see any objection in principle to the idea. I have made the point already, but I am afraid that I will make it again and again, because it is critical. To my mind, the real point is the level at which you do it. We will come on to the way it has been done in this particular case, about which I have grave concerns. It is not a principle I like—that users of the civil courts are subsidising the family courts and, indeed, even the criminal courts. Personally, I think that is wrong in principle, but ultimately it is a policy decision for Government and Parliament whether to go down that route. They have chosen to do so, and I can see the reasons for it. As long as it does not impede access to justice, it is not the most terrible thing that has happened.

Q270 Chair: Do I get the sense that you fear that it is getting to a level where it might be unacceptable?

Lord Dyson: Yes.

Q271 Chair: Do you think that the current proposals have reached that level?

Lord Dyson: When you say the current proposals—

Chair: In terms of what we have at the moment and what is being consulted on.

Lord Dyson: Yes, I do. There is quite a lot of detail to talk about there.

Chair: Indeed.

Lord Dyson: I do not know whether you want to go into that now. As you know, the Government introduced these fee increases in stages. First, we had a very substantial increase, introduced in 2014. Then the so-called enhanced fees were introduced, in March or April 2015. Those have excited the most opposition, certainly from myself. I am afraid that the risk of denying access to justice to a lot of people is intense in those proposals. I am particularly concerned not about the people at the very bottom end—the people who are entitled to fee remission, although the level of fee remission is set so low that it captures only really poor people—but about ordinary people on modest incomes, who do not qualify. They are the sort of people who will inevitably be deterred from litigating.

I do not say that it will happen in all cases, of course. I am particularly concerned about small and medium-sized enterprises. I take the example of the builder who is seeking £50,000 from a client. He now has to pay £2,500 up front, as a condition of starting his claim. Previously the fee was £800-odd. That is a massive increase. Obviously it will not

deter really rich people, but it is bound to be severely deterring for small businesses. The Government say time and again that they want to encourage those sorts of businesses, because they will be the engine that provides the growth that this country so needs. Many of those people are the ones who are most at risk and are most likely to be put off. Litigation is a stressful and expensive business at the best of times. If you have to put £2,500 in cash up front—to take my example again—before you even get your foot in the door, it is bound to put you off. It is just a matter of common sense.

We can talk about the evidence as to what has happened, but we have warned of the real dangers. We also warned that the research that was done by the Government before they embarked on this course was lamentable, frankly. The first time around, they made 18 telephone calls, of which about 12 were to big users of the court. That was the first stage. Then they supplemented it, and it got up to 31, but, of the 31, only a very small number were people who had experience of or were going to bring larger claims. When I say larger claims, I mean claims for more than £10,000. I am afraid that we warned that the research was hopeless. The impression I have is that there was a need to rush this thing through, because there was a great big gap in the Department's finances that had to be plugged. I got the sense that it was almost a desperate way of carrying on. I am sorry to use this very strong language.

Q272 Chair: It is very stark language to use in your position, Lord Dyson.

Lord Dyson: It is.

Q273 Chair: That is your conclusion. Do you think that the evidence base has improved at all since then?

Lord Dyson: We do not have a lot of evidence so far. There is very little in the public domain. There is more unvalidated evidence, which I have seen but cannot talk about. The evidence in the public domain is very limited. Such as it is, it is quite clear that there was a huge spike immediately before the introduction of the enhanced fees last year. One would have expected that. Then there was a big drop. We want to see where it all levels out. The signs are that it will level out lower than it was before, but it is too early to make any very definitive statements to that effect.

Q274 Chair: It is too early to say. Perhaps the only bit of good news is the decision not to increase the £10,000 cap on money claims.

Lord Dyson: Yes. That was good news. The Government listened and responded to the evidence, particularly from the commercial sector. That is another dimension you will no doubt want to touch on—the international competitiveness factor. There was some very powerful evidence, based on surveys that had been carried out, to which the Government listened, and I am very pleased about that. Nevertheless, they seem to be intent not only on sticking with the 5% enhanced fees but on upping them by 10%. That is just building on what I regard as an extremely unsatisfactory foundation and making it a little worse.

Chair: I am very grateful for that. I will now get my colleagues to move into some of the detail we have been talking about.

Q275 Victoria Prentis: I will move sideways, into help with fees—what we used to call fee remission. This is the new, supposedly user-friendly way of dealing with fee remission. Do you think the changes have been helpful?

Lord Dyson: The feedback I get is that the attempts to explain how fee remission works have been very useful. The trouble is that this world is a complete mystery to litigants in person. They do not understand the language, and the whole thing is terrifying and stressful. As judiciary, we are doing a great deal on a much wider front to cope with litigants in person and to help them to cope with the system. We are now looking at the possibility of an online course tailored to litigants in person. As judges, we are very sensitive to the particular concerns and needs of litigants in person. To come back to your particular question, the feedback I have had is that the explanations that are being provided to litigants in person about how the fee remission scheme works are good and are helping them to understand.

Q276 Victoria Prentis: We have heard evidence from Thompsons, in particular, that people do not know what they are entitled to. Could Sir James and Sir Ernest comment on their experience of what we can do to help people understand what they are entitled to in terms of fee remission?

Sir James Munby: My view is very much the same as Lord Dyson's. This is part of a much bigger problem, largely to do with litigants in person, and that of course is driven by other things. The average person in the street—even the average intelligent, educated person in the street—knows very little and understands even less about how the justice system operates. I suspect their vision of the justice system is the latest television drama on a Crown court.

The impression I get when people discover what I am and start asking the inevitable questions is that, when I say that I am to do with the family justice system, they say, "What's that?" The fact is that we have done shamefully little, despite recent attempts; I associate myself with what Lord Dyson said about the attempts of the judiciary to drive this forward. The general level of provision of information for litigants in person, whether in relation to the system or in relation to fee remission, is woefully inadequate. Those are things we have recognised for a long time. My perception, from the perspective of the family justice system, is that there is a need to provide information for litigants in person. That is something for which I have been pressing for quite some time, together with Sir David Norgrove, the chairman of the family justice review. Only very recently has there been any kind of indication from either Whitehall or Westminster that something effective is going to be done.

I am afraid that I am not adequately briefed to express a view on the specifics of fee remission in the family justice system. You mentioned Thompsons, who are PI solicitors, not family solicitors. Traditionally, we have had much more fee remission in the family justice system than elsewhere, for obvious reasons. I suspect that court staff are very familiar with dealing with the problems. Of course, there is the issue that court staff cannot give advice. What exactly that means will depend on the good sense of the particular person in the court office. I suspect on the ground, particularly in family cases, there has traditionally been a large amount of informal help and, as far as it is permissible, guidance and advice on how to apply and what you have to do.

My general assumption would be that the system, even as revised and revamped, is still of labyrinthine complexity. It is almost certainly couched in language that most people do not understand—why should they? A lot more needs to be done. Lawyers now appreciate that people do not understand Latin and they do not understand what I call lawyers' English. What lawyers do not understand is that the kind of language lawyers use, even if lawyers think it is ordinary English, is not ordinary English in the sense in which the man or woman in the street would recognise it. Therefore, the task of getting this material into a form that ordinary people understand is very difficult.

What we have done in the family justice system—not on fee remission—is to make use of Advicenow, which is an organisation that goes through documents to make sure that they are presented in a user-friendly way, in a way that is accessible to the ordinary man and woman in the street. That has paid enormous dividends. We need to do more of that. I would be interested to know—I simply do not, I am afraid—whether the revamped guidance on fee remission has gone through either the plain English people or the Advicenow people.

Q277 Victoria Prentis: It is much better. Sir Ernest, do you have anything to add specifically on fee remission?

Sir Ernest Ryder: I agree with what Sir James said. The complexity of language and process is still extraordinarily difficult for litigants in person, who comprise the majority of users of tribunals. We have to remember that this is not an access to justice question. Remission is an administrative act not controlled or administered by the judiciary, so we do not actually improve access to justice. It may, however, achieve its policy objective.

It does not work well in the tribunals. The best example is in employment. For example, say you are a pregnant woman who has been sacked or who has a redundancy payment, you have a small amount of money and a short limitation period within which that money may be dissipated, but you start off with savings. If you are a pregnant woman saving for your baby—for the toys, the bedding and so on—that money falls to be taken into account. All those small capital elements might prevent you from getting remission of fees in an employment tribunal case. It may not work pragmatically, as well as not being an answer philosophically. Recent research by Strathclyde University dwells on the issue of women and the potentially discriminatory nature of this type of system, which does not provide access to justice as its primary objective.

Q278 Victoria Prentis: That is very helpful. We will look that out. We are dotting around a great deal. We have a list of prepared questions. I am sorry to take you off to remission of fees and then back again. Is the value of a claim an appropriate criterion for setting the level of a fee? That is a very broad, general question.

Lord Dyson: It is very crude and there are all sorts of difficulties with it, but has anyone come up with anything better? Unless you are going to have a flat fee applicable in all cases, and that would be ridiculous, you have to distinguish somehow between the more complicated cases and the very simple ones. I entirely agree that mere value is not a very good measure of the complexity and, therefore, the amount of court resources that will have to be devoted to the case. It is a very crude measure, but I am not aware that anybody has suggested an alternative, but maybe somebody around this table will.

Q279 Alex Chalk: It is not really an alternative, but some of those who have given evidence to us suggested that there is merit in having staged fees, as opposed to up-front fees. It is suggested that there ought to be a measure of fees when it appears that the bulk of the expenditure is likely to take place—at the trial listing stage—as opposed to their all being up front. Do you have a perspective on that?

Lord Dyson: I have read the transcript of the evidence that some witnesses gave you and I noticed that that proposal was put forward. It is not a proposal that has crossed my desk until now. I was interested in it, and I thought about it and, in the end, came to the conclusion that it does not work. It has a superficial attraction. It will not be relevant for the wealthy litigant, but for the litigant who does not qualify for fee remission, has some money but has cash-flow problems that may make it very difficult—to take my builder again—to find the £2,500 immediately, one can see that it might be, if he were told that he had to pay £1,000 at date of issue and then more down the line.

I accept that that might not have such a deterrent effect as the present system and that there might, therefore, be some cases where a litigant would not be denied access to justice under that kind of scheme. Many would realise that they still had to pay the £2,500, even if it was not all up front, so it is still there as a cost. More practically speaking, if you do it that way, the take from fees is bound to be a lot less, because most cases settle; 90-odd per cent of cases settle. I imagine that whatever instalment scheme you constructed would probably entail a chunk of the fee being payable very close to the date of trial, if not on that date. It seems to me inevitable that, under that sort of scheme, there would be less fee take than there is currently.

Q280 Alex Chalk: Might that not be a good thing? If individuals who have meritorious claims are able to make their claim, because they are not precluded or disincentivised from doing so, and then the parties see reason and reach a settlement, that is good for justice, isn't it?

Lord Dyson: It is wonderful, but where will the money come from? There is a big hole in the Department's finances. We were told that there was a £100 million shortfall in the last year, even with these fees. Yes, I agree with you that it would be better from a justice point of view, but if your fee take is reduced, how is the shortfall going to be made up? You cannot run away from that problem.

Sir James Munby: There is another aspect of the problem. The entire thrust of modern case management, in whichever division and whichever court, is to front-load the case and maximise the prospect that it will not go the full distance. Quite apart from the fact that, if you have to pay the full fee, paying it by instalments helps only those who have a cash-flow problem and not those who are deterred by the full fee, how do you structure the fee? I suspect the assumption underlying a lot of this is that you have a small amount at the beginning and a much bigger fee for the trial, because the trial is the big part of the case, but I am not sure that is right. In many cases, the effort of the court and its resources are deployed at an early stage and are never deployed at trial.

There are very real conceptual problems and practical problems in translating the seemingly rather attractive idea of staged payments into a system that reflects what you are trying to do. If you are attributing the fee notionally to what the court is doing, the fee may have to be front-loaded. On the other hand, if you are incentivising people to settle,

the last thing you want to do is to front-load the fee. This is something that has great superficial attractions, particularly for those who have a cash-flow problem, but once you get beyond the cash-flow problem, which is a very real problem for some people, I am sceptical.

Sir Ernest Ryder: The tribunals' view is slightly different, for the very significant reason that most of the litigants—most of the users—do have a cash-flow problem, so there is general acceptance that the graduated or sequential fee is better. Even in tribunals we face the significant problem that a hearing fee after an application fee provides the state and/or the other party with behaviours that they can use to manipulate the end product. I am afraid that it is not just anecdotal evidence that respondents in tribunal cases tend not to engage in conciliation processes in order to push the claimant into having to pay the next fee. That is a very significant adverse behaviour.

Chair: Those with deeper pockets—

Q281 Alex Chalk: Surely it comes down to the levels at which you set those potential rates. Take your example of the builder who is seeking to recover £50,000-odd. There may be plenty of builders for whom £2,500 is simply unconscionable, for the sake of cash flow, and they could not think of doing it; but if it were, say, £1,000, there might be a considerable number of builders who would say, "I will go ahead and issue." Lord Dyson, on your point in respect of fees, you might then have a whole load of people paying their £10,000 who might otherwise not have done so. Equally, to the extent that some pressure can be put on people to settle—the £1,500—it again comes down to what the fee is, doesn't it?

Sir Ernest Ryder: We have a relatively rational solution to that. If you adopted the Scottish civil justice model of a respondent's fee, in tandem with sequential fees, you would make the playing field more level and place a risk on both parties. My Scottish employment judges will tell you that it works perfectly well in Scotland.

Q282 Chair: Both are taking a risk, so both have a stake in it.

Lord Dyson: Could I mention one other issue? It may not be as significant as the point that I have already made to you. I do not know how many stages of fee there might be, but it is very easy to administer the present system. As a condition of the court issuing, you have to pay your money, so it is very simple. Just imagine if there were two or three different stages. The court would have to extract the money from the person. One imagines how difficult that might be. That is more administrative burden on the court staff and more administrative cost on the system. Although initially I was attracted by the idea and thought that it might be a solution, the more I thought about it, the more I came—

Alex Chalk: That is very helpful.

Q283 Victoria Prentis: I suppose that another way of doing it is to go back to the allocation and listing system, so that you pay a fee at various stages in the case.

Sir James Munby: It is not just an administrative problem. Supposing that one had this system, and supposing the court has been set up to deal with the next stage and the fee has not been paid, what do you do? The answer is that there will be a vast amount of satellite litigation as to whether or not it is oppressive to strike out the claim or whether you should

adjourn. Adjournment will have very serious knock-on effects, in terms of the proper administration of justice, and will simply generate delay.

Chair: That is very helpful. We need to move on a little. I will bring in Mr Hanson.

Q284 Mr Hanson: We have touched on civil court fees. Lord Dyson, you have been very clear in your view of the Ministry of Justice research and evidence on those issues. Is there anything in the Ministry of Justice case that you think stands up to scrutiny?

Lord Dyson: That is a very difficult question, and no doubt that is why you asked it. I am not sure that I am able to answer that question. I have sympathy with the Department's position, in that it has this great hole in its finances and it has to find the money from somewhere.

Q285 Mr Hanson: You have contested the evidential base that they put forward. Is there anything in that evidential base that has impressed you or is it all, from your perspective, not making the case?

Lord Dyson: I cannot really chop it up in that way. They made an assumption, in effect—they said so; the word “assumption” appears more than once in their documents—that demand would not be affected by these increases. That is the assumption that they made. They based that assumption on a very limited evidential base. As an ordinary human being, I was extremely sceptical about that assumption, never mind the research on which it was based, because I know how people behave. I know how the small builder with cash-flow problems is likely to react if he is told, “You’ve got to pay £2,500 up front.”

Q286 Mr Hanson: Is there a time in the future when you think that we will be able to assess whether that assumption on demand has been met? When will the Committee or Parliament be able to determine whether the Justice Department assumptions have been met?

Lord Dyson: It would be only by conducting much more thorough research and survey. Frankly, I would be surprised if the results of that survey did not say that the assumption was false. I do not see how I can say what the Department and the Government need to do in order to prove the validity of their assumption, because I think the assumption is most unlikely to be capable of being proved. If they want to try to prove it, they have to conduct a great deal more in-depth research than they have done. They did it in such a rush, as I said. I hope that I am answering your question. They have to do a lot more research.

Q287 Mr Hanson: We have had contesting evidence, in both written and oral form, from witnesses to the Committee regarding the impact of insurance or conditional fee arrangements. The Ministry of Justice has been very strong in its view that those safeguards are there to ensure access to justice, yet we have also heard from people such as the Police Action Lawyers Group who are not convinced that conditional agreements or insurance are of help. Have you formed a view on either side of that argument?

Lord Dyson: The question is whether the fees can be funded by other means. One suggestion is that solicitors—or, possibly, insurance—could bear the costs in the first instance and fund them. There is not much evidence that that would be available on a wide basis.

Q288 Mr Hanson: In its evidence, the Ministry of Justice says that there are a “number of other safeguards to ensure access to justice.”

Lord Dyson: I know they say that, but what is the research upon which that assertion is based? I have not seen any. They would have to conduct a very detailed survey of solicitors and insurers to make that good. It is no good coming out with these statements unless they are backed up with hard evidence.

Sir Ernest Ryder: For example, CFAs do not apply in tribunals. If you are looking for an evidential base for union funding of claims, for example, having taken over the fee element, there is no research base that indicates that. Likewise, there is no research base to indicate whether household insurance that provides legal assistance has been taken up by any significant group of people. In the absence of the sort of research the Master of the Rolls is talking about, we are left simply with a policy objective that has not been achieved this year, with a hole in HMCTS finance as a consequence. That is a very sad position to be in.

Sir James Munby: Your very practical question was: how long will we have to wait until we know? I would hazard the same answer that I gave this Committee when asked a similar question in relation to the effects of LASPO: at best, two years after implementation and, more realistically, probably three years after implementation. The reasons for that are that, when something goes up or is taken away, there is an immediate spike in cases before it happens; there is then a dip afterwards and it is very difficult to ascertain whether the dip is simply the reaction to the spike or whether it is the reaction to the policy.

In family cases, there was quite a lot of material to suggest that issuing of process was affected by the time of year. There is the lag in getting the basic statistics. My view in relation to that and my view in relation to fees would be the same: until one has had two years, one has not reached a point where one can see whether the graph has settled down. What has happened since I expressed that view to the Committee in relation to LASPO has done nothing to make me change my view and think that we will get there more quickly.

Q289 Mr Hanson: The other potential unintended consequence—I give the Government the benefit of the doubt; it might be an intended consequence, but it could be an unintended consequence—is that defendants may be hanging on in there, waiting to see whether the fees disincentivise people from taking claims forward. We have heard from the Law Society and the Police Action Lawyers Group that there is emerging evidence that people are hanging back, waiting to see whether a claim progresses before settling.

Sir Ernest Ryder: That is a well-known issue in employment tribunals in England and Wales. There is more than anecdotal material. The Council of Employment Judges and the leadership judges would all say that there is clear behavioural material as to the way in which respondents are behaving. They are avoiding engagement in conciliation processes and waiting for the next fee to be paid, which means that settlement opportunities are lost.

Q290 Mr Hanson: You would give evidence to the Committee that that is quantifiable as a change.

Sir Ernest Ryder: No, I did not say that. That is the view of the employment judges and their leadership judges. You have that in writing. I concur with that. They are saying to me very clearly that public sector employers, for example, will not engage because there is another fee to be paid and the Treasury will not give instructions to allow such proper engagement as there could be.

Q291 Chair: Would that include local authorities? Probably not, as they do not need to go to the Treasury, but does the same principle apply?

Sir Ernest Ryder: You tend to find that local authorities are involved in the equal pay cases. The attitude is rather similar. Most of those cases go to a contested hearing on a point of principle.

Q292 Marie Rimmer: With regard to the 10% uplift in civil fees recently confirmed by the Ministry, you stated in your response to the August Command Paper that the uplift would be “keenly felt by some parties for each stage of their case.” Are there any specific fees within that general uplift that you think warrant reconsideration?

Lord Dyson: I am not really in a position to answer that question. My objection to it is a rather broad one. As I said earlier, you have a bad situation and you are just making it a bit worse.

Q293 Marie Rimmer: Do you believe that the 10% increase in fees for judicial review is likely to have an effect on demand?

Lord Dyson: Again, it is the same issue. Ten per cent does not sound a lot, and it is not a lot, but if the figure to which you are adding your 10% is itself too high, you are just making it that much worse. I would not become too fixated on the 10%. It is the total package, really.

Marie Rimmer: I understand.

Sir James Munby: If the concept that appears to underlie the Government’s policy on this is that justice is a commodity that is being bought by customers, in principle surely the elasticity of demand must apply. The bald assertion that underpins the current approach, that it does not apply—full stop—and therefore there will be no reduction, is not intuitively compelling. How and to what extent it operates, of course, depends on the figures. There will be some people for whom an x% reduction or increase is neither here nor there. If the increase or reduction—after all, when I talk about a reduction, I am not talking about sales of hardware—is two times x, it may affect those same people. It all comes back to the figures.

In a sense, if one does salami-slicing—if one eases up the price a bit and then eases it up again and again—people become familiar with it, and that may mask the effects of elasticity of demand. The assertion or assumption that in principle the elasticity of demand is not there, and therefore an x% increase will not affect the figures, is not one that I would have thought was founded in common sense, economic theory or intuition. I may be completely wrong—I hope that I am shown to be wrong—but I strongly suspect that when we have the statistics over the next two or three years we will see that there is some correlation on the face of it between the fees going up and the volume of cases going down.

Q294 Alex Chalk: Underlying your response, Lord Dyson, are you saying that the fee for permission to apply for judicial review, currently £140, is too high?

Lord Dyson: No, I don't think I am saying that. Judicial review is a very sensitive subject. We could spend half an hour talking about judicial review. It is very different from ordinary private litigation. It is an essential part of our rule of law. As you know, it is one of the ways of holding Executive bodies to account. I know that it is extremely irritating for the Executive, for the Government, to be faced with judicial review challenges and many of them, I am afraid, are weak and unfounded, but a lot of them are not.

Somewhere in the papers—it may have been in the evidence—I saw that somebody said, “Won't this increase in fees be effective in rooting out frivolous and weak judicial review claims?” There is no doubt that there are quite a lot of those, but a lot of judicial review claims are well founded. When the Government produce figures showing that only 10% or 12%, or whatever it is, of judicial review claims succeed, that omits the very important fact that a large percentage—I don't have figures, I am afraid—of the claims that are started are compromised. Judicial review is very important, so we have to be very careful not to set the fee too high.

Q295 Alex Chalk: If £140 is not too high, why do you say that a 10% increase, up to £154, is too high? I do not understand.

Lord Dyson: I really do not want to get into details about particular fees. I agree with you. If £140 is not too high, £154 is not too high. I am not saying that it is.

Alex Chalk: I will leave it there. Thank you.

Chair: We can always return to some of that at a future date. There is a broader spectrum to deal with. I will bring in Mr Costa, who will look at some of the broader impacts.

Q296 Alberto Costa: Good morning. I would like to turn to the question of competitiveness within the domestic legal services market, as well as the international market. I declare an interest here, Chair. I am a consultant for a small Chancery Lane-based law firm.

Can we look first at the domestic market and the effect of the court fee regime on the domestic competitiveness of the legal services market? It has been put to us by the south-eastern circuit that the increased cost of disbursements potentially gives larger law firms a competitive edge, as they are better placed initially to pay disbursements on behalf of their clients. Gentlemen, I wonder whether you have any comments to make about that, given the overriding objective of the Legal Services Act, which is to foster greater competition within the legal services market in England and Wales.

Lord Dyson: The legal profession is better equipped to answer that sort of question than I am. Clearly it is the case that large firms are better equipped to finance these fees than small firms are. The real question is whether they will be willing to do it. I suspect that the answer is that it does not really arise. On the whole, the very large firms, which are very expensive, are not the sort of firms to which your ordinary person or small businessman will go, because they cannot afford their fees. The normal clients of those very large firms tend to be large corporations, for which sums of this sort are not very significant.

I do not know the answer to your question. It is really a question of working out what the behaviour is actually going to be. I do not know whether firms of solicitors are willing to fund these fees. In the big cases they probably are, because they represent a relatively small percentage of what they will get out of it at the end of the day. To my mind, the real problem of these reforms lies at the smaller end—the claims of up to £200,000.

Q297 Alberto Costa: Could I interrupt and drill down? The example given by the south-eastern circuit to the Committee is this. If you have a personal injury claim valued at over £500,000, the fee payable is £10,000. It is argued that somebody who might be a potential claimant, who might have some modest assets and, therefore, is not eligible for fee remission, might not have choice in the legal market, as it would be likely that the larger firms, and only the larger firms, would be willing to take on a case of that nature. What would your comments on that be?

Lord Dyson: I am sure that if that premise is true the consequence is also true. I just do not know enough about how solicitors would behave, and do behave, in this situation. It is more a matter for the legal profession. I do not feel qualified to comment, I am afraid.

Q298 Alberto Costa: That is fine. Could I turn to international competitiveness? You might have some experience of seeing the effect of this regime on international competitiveness. The Ministry of Justice has recently announced that it will not increase the cap on money claims “for the time being”, but it may revisit the proposal in the future. Looking at the current regime, do you think that the introduction of the 5% fee, with a cap of £10,000, has had a significant effect on international competitiveness? Do you have any comments on that?

Lord Dyson: As we said earlier, it is too early to say what the effect of these changes will be. Those in the City and in the commercial world feel very strongly that even increasing the cap from £10,000 to £20,000 might jeopardise UK plc, as they like to call it. Again, I do not feel able to venture a view about how people would behave. This is mainly concerned with large commercial work, where there are real choices internationally—Singapore is always the place that is brought up, for the obvious reason that it is now trying very ambitiously to compete with this country and, in particular, with London—so at the very least, one could say that anything that makes Singapore more attractive and London less attractive is something to be very concerned about.

Q299 Alberto Costa: Do you have any knowledge of an increase in arbitral claims as a direct result of the fee regime? Are claimants choosing where possible, if the contract permits, to arbitrate matters, rather than going through the English and Welsh state litigious process?

Lord Dyson: Again, it is too early to say. I am not privy to data on this. If we are talking, as I think you are, about the very big international cases, where the sums involved are huge—many millions—and the legal costs are also huge, often running into seven figures, the Department would say that, compared with figures of that sort, whether it is £10,000 or £20,000 is neither here nor there. That is the argument they run. Indeed, when I have challenged Ministers over the enhanced fees more generally, that is the answer I have always had. It is no answer at all to my builder with his £50,000 claim, but on the international front it is something of an answer. Only time and the response of the market will tell. Frankly, I would not like to predict how the market will respond to it. All I can

say is that the British Institute of International and Comparative Law has put in evidence, which you may have seen, that two thirds of the people it approached said that a rise in the cap from £10,000 to £20,000 would influence their behaviour. I can only assume that the Government were sufficiently impressed by that evidence to defer, at any rate for the time being, raising the cap from £10,000 to £20,000.

To some extent, this is all speculation, but one is playing with fire. I would make this further important point. The amount of revenue that would be generated by raising the cap from £10,000 to £20,000 is minute in the big scheme of things, because we are talking about a very small number of cases. That is not where the big source of revenue from these fees will come from. Therefore, raising the cap from £10,000 to £20,000 will make precious little difference to the Exchequer in any event. It may be—I do not know—that that was a further factor in the Department's thinking. It is a very important factor. If you are not going to make much money out of it and there is even a modest risk that you will send people to arbitrate in Singapore, why take the risk?

Q300 Chair: The answer to this may be obvious, but has the careful monitoring and analysis the JEB asked for in its written submission been met or anywhere near met?

Lord Dyson: We have seen nothing.

Q301 Chair: Can I turn specifically to Sir James? There are some issues that relate to family fees. We have seen the division's written evidence in relation to this. I get the sense that the key issue of particular concern was the increase in divorce issuing fees.

Sir James Munby: Yes.

Q302 Chair: The other fees were not such a concern in the overall scheme of things, but the divorce fees were.

Sir James Munby: Some of them were actually reduced.

Q303 Chair: Indeed. That was the trade-off. There was a particularly strongly held view about divorce. They backed off from £750 down to £550, as I understand it—

Sir James Munby: For the time being.

Q304 Chair: You still have concerns. Would you like to indicate why you fear that it is for the time being and why you think that the £550 is still unreasonable in the circumstances?

Sir James Munby: The figures strongly suggest—you have heard evidence to this effect from other witnesses—that even the original fee of £400 and whatever involved a significant profit element, because the cost of administering the divorce system was something of the order of £200 a case, not £400. There was a substantial profit element. That profit element is simply enhanced by putting up the fee further, and it was significantly enhanced when the fee went up to £550. In fact, we have an enhanced fee. That raises the question: to what extent is that appropriate? Many family judges would say that it is wrong in principle, as well as being wrong for the various reasons set out in the written evidence.

The written evidence sets out the concern that if and in so far as there is elasticity of demand—I will come back to that in a moment—this impacts disproportionately and in a

discriminatory fashion against women. I think that I am right in saying that a very significant majority of divorce petitions are brought by women, and even in the world of 2016 women are significantly disadvantaged economically compared with men. Whether it is £500, £400 or £700, it is a significant amount of money for a woman.

Q305 Chair: Was that an issue at £410, never mind any further increase?

Sir James Munby: In a sense, any fee—

Q306 Chair: Almost any fee will have some impact.

Sir James Munby: Some impact. The argument against the £400 is more that it is already an enhanced fee.

Q307 Chair: I understand the point.

Sir James Munby: The difficulty with the position on divorce fees is this. There are only two things that the justice system does where you have no choice but to use the system. One is divorce; the other is probate. Only a judge—only that system—can give you a divorce or a grant of probate. Therefore, we have a captive market. I simply do not know, and it is too early to say—I will be fascinated to see the divorce statistics as they come out over the next year or two—whether those two competing analyses, that there is no elasticity of demand and, therefore, people will pay until they simply cannot pay, will triumph over the concerns expressed by the judiciary. I have to say that there is something rather unattractive—particularly if one is selling justice, which one should not be doing—in battenning on to the fact that there is a captive market and that, because there is no elasticity of demand, one can simply go on putting up the fees until it becomes another poll tax on wheels.

Again, it is early days. My suspicion is that the increase to £500-odd will not have a significant impact on the numbers. If people are in a position where they need and want to divorce, I suspect that they will divorce, whether it is £400 or £500, not least because divorce is the gateway, if you are an economically disadvantaged woman looking after children, to getting from the person you hope will be your former spouse the money to keep you and the children later on.

In a sense, there is not much choice. Around the edges, there may be. It is conventional wisdom in the family courts, and has certainly been my experience, that sometimes it is not very obvious why a woman or man who has had a succession of partners chooses to marry one and does not choose to marry the next. Things are much more fluid than they were once upon a time in terms of the need to marry to be seen to be respectable and, therefore, the need to get a divorce. I suspect that it will have some impact on the figures, but only at the margins. I suspect that those who feel they need to divorce for whatever reason will, through gritted teeth, pay the increased fee at the present level. That does not mean that one should go on endlessly putting it up.

Q308 Chair: You are concerned about the ratchet.

Sir James Munby: There is a very telling point, which I have made myself on previous occasions. When you get married, what do you pay the registrar of births, deaths and marriages? I do not know the answer to that question, but I think that it is less than £100.

There will come a point where people start to say to themselves, “Why does it cost six, seven or eight times as much to get divorced as it did to get married in the first place?”

Q309 Chair: I am not asking anyone to give more up-to-date evidence on the levels of fees, but I take your point. Part of your point, Sir James, is echoed by Resolution, who quoted a solicitor they had been involved with saying, “Yes, it is a captive market, in effect, and it is not as if we are getting an enhanced service. We are not getting a Rolls-Royce service for this additional cost.” Would it make any difference if, for example, some of the enhanced fee income were to be used specifically for the courts modernisation process that has been talked about, either in the context of family or other jurisdictions?

Sir James Munby: On a pragmatic basis, within limits, one can see that there is advantage in putting up fees to an appropriate extent if—but only if—that is going to feed back into an enhanced system. One of the problems, however, is this. One of the very first parts of the digital court that is likely to emerge is online divorce. I am promoting that very vigorously. It will not take people long to work out that the cost of administering an online system is but a fraction of the cost of organising the present paper-based system. People will start saying, “We were paying twice as much as the cost to have an old-fashioned divorce. Why should we now pay 100 times as much as the cost to get a digital divorce?” On one level, the response to that will be that the digital divorce process will be simpler and, critically, quicker than the present paper system, but there are tensions. Once one has written off the initial cost of the IT, which will reduce ongoing costs dramatically—in all likelihood, we will see that, for example, in a reduction in the number and size of court buildings and the number of people employed in the Courts Service—people will start to ask, “What are we paying this money for?”

Q310 Chair: I understand. Are you satisfied with the progress of the digital work and the capacity of the Ministry of Justice to deliver it, as far as your division is concerned?

Lord Dyson: That applies across the board.

Q311 Chair: Indeed. I mentioned it to Sir James only because we were talking about the digital court.

Lord Dyson: I am sorry, but it does apply. As you know, £700 million has been made available. We have four years in which to do it, which is incredibly tight. The Government’s track record on IT projects is not exactly shining. We just have to hope. It has to happen, because without it we are just managing decline, and it is getting worse.

Sir James Munby: If you press me to answer that question—

Q312 Chair: I will not press you if you are uncomfortable, Sir James.

Sir James Munby: No. I am not going to say anything to you that I have not already said to others and to officials. As Lord Dyson says, court modernisation will work only if there is an IT revolution, leading to the online or digital court—however one describes it. That is fundamental. Online divorce—I am not propounding this merely because I am in charge of family justice; it would be my view whatever system I was in—is an obvious front-runner for that, because from the legal and administrative point of view divorce is a fairly straightforward process that can be very easily digitised. If the MOJ is able to produce an

effective online divorce system, that will give enormous credibility to the wider vision of an online court. Conversely, if it cannot, we are in very great trouble.

I have been discussing online divorce—the need for it and the form of it—with officials for several months, and I am becoming increasingly concerned. My current position is that the ability to deliver is a question on which the jury is still out. The word I would use is disappointed. I am disappointed by where we have got to after many months of work. I still have no clear answer to such basic questions as what is the overall timeline, being realistic, and what are the stages in the process. It causes me very real concern, not just, or even primarily, because of its effect on online divorce, but in terms of its potential impact on the entire modernisation system.

Q313 Chair: That is very troubling. The fear for us is that, if this is not successful as a process, back comes the demand for more fees to offset costs that might otherwise be saved. Courts rationalisation was mentioned by respondents in that context as well. Again, the point was that we are a captive market and are not getting any enhancement. In your experience, are you satisfied that the Ministry of Justice deploys the appropriate resource, either internally or externally, to make sure that the estates issues that arise from courts rationalisation are adequately dealt with, so as to remove the cost pressures that have been driving some of the policy we have been talking about?

Sir Ernest Ryder: I declare an interest, because I sit on the main HMCTS board, as the senior president. One has to be very careful to separate business as usual cost recovery and the implications for running a proper estates system from the modernisation proposals. The present courts rationalisation programme, which is yet to be decided upon by the relevant Minister, falls into the business as usual category, rather than that of strategic change within the modernisation programme.

As to whether adequate resources are allocated to business as usual, I have no difficulty, as the senior president, in responding, with the Lord Chief Justice, to the board's recommendations in respect of courts rationalisation that there is a policy that can be implemented and can protect access to justice. I express reservations, which the Lord Chief Justice would also express, as to the specialist capacity within the Department to deliver central services now, for business as usual, and in the future, for the modernisation programme.

Sir James Munby: It is very important in the context both of the estates and of IT to distinguish between the Ministry of Justice and HMCTS. For the future of court reform, my feeling is that it is very important that responsibility for those matters, and to a very considerable extent their operational handling, becomes a matter for HMCTS and not for the MOJ.

Lord Dyson: I endorse that. To answer your question about resources, it is very striking that the Government have announced that they are proposing a massive reduction in the number of MOJ officials. The logic of that, which I would endorse, is that more of the work should be done by HMCTS and that responsibility for all the day-to-day running and policy decisions is with HMCTS and the Lord Chief Justice. Of course, the Secretary of State has a role to play there, but the question of the working out of that relationship has not been fully addressed.

Chair: That is helpful. It may be something we want to return to on some future occasion. I want to move on to another aspect of the specifics on the employment side.

Q314 Alberto Costa: I turn specifically to you, Sir Ernest, as senior president of tribunals. First, can we look at type A and type B claims? This is the way in which employment tribunal cases are sorted, with a different fee structure. Type B claims command a higher fee, on the grounds that they are generally more complex and, therefore, more time-consuming of judicial resources. Do the classifications properly reflect their relative costs?

Sir Ernest Ryder: No, they do not. The classification into type A and type B is too simplistic. It does not match the three-part classification that the employment tribunals use, which is short, standard and open. You might note that the Government's original proposals in relation to employment tribunal fees used the classification that the tribunal judges use. That was superseded by the type A and B, rather more simplistic, formulation.

To give you an example of why it is difficult, type B will range from a simple one to two-day unfair dismissal case, which may have had a couple of hours of case management at a separate hearing, through to a multi-party, complex equal pay or discrimination case that can last days, and sometimes weeks if it is a test case. That may itself have had one to two days' worth of case management hearings preparing for the main issue to be heard. If fees are going to be levied in the way that they are and as they are proposed, it is right to say that employment tribunal judges would prefer them to match the classifications used in the tribunal, which are there for a good reason—they actually match the work that the judges recognise.

Q315 Alberto Costa: May I turn to the question of the percentage of successful cases in the employment tribunal? It has been put to this Committee that simply looking at the percentage of cases that ended with their being "successful at hearing" or with "default judgment," as the Ministry does in its court statistics, is a poor indicator of the actual number of successful claims. For instance, it does not include cases that were settled in favour of the claimant without a hearing. How do you think successful claims should be measured?

Sir Ernest Ryder: You will find that proposition across all the datasets for courts and tribunals. I have spent 12 years looking at the datasets, and I am afraid that a lack of professional analysis of the same besets all of us. If you do not have a system that breaks down the point of settlement by reference to the type of case within the jurisdiction—here I speak for Scotland as well as for England and Wales—you are unable to have any proper empirical study of what are the behavioural influences that get one to a successful resolution, preferably sooner rather than later. I am afraid that is the position we are in, whether it be in employment or in the courts services generally.

There is an aspect of your question that relates to unmeritorious cases.

Alberto Costa: We will come to that in just a moment, Sir Ernest.

Q316 Chair: I am very happy if you want to flow on and deal with it now. I am sure that Ms Prentis will come back.

Sir Ernest Ryder: I will do so, if I may, because it is part and parcel of the same thing. If the policy was to seek to address a percentage of allegedly unmeritorious claims by

making the fee a proper—that is a proportionate—policy deterrent to unmeritorious claims, one would expect to have seen a difference in the success rate or the appeal rate at the end of the claims. In so far as there is any material at the moment, because we are too soon after the changes and without any research to validate what they mean, what little indications we have are to the contrary. Not only has the success rate and the appeal rate not changed with any significance, the position is, if anything, marginally better than it was, which would suggest that we have not changed the cohort of meritorious or unmeritorious claims at all.

Chair: Ms Prentis, are you happy with that?

Victoria Prentis: I am very happy with that.

Chair: That is very helpful and clear.

Q317 Dr Huq: We have had evidence from both the TUC and Thompsons that fees have decreased employer engagement with early conciliation. In your submission, you mentioned changes to employment law as having an impact on cases brought to tribunals. The Ministry also referred to that as another factor, in addition to fees. Could you expand on that?

Sir Ernest Ryder: It certainly is a factor. The changes in terms of qualifying period and salary-capping were bound to have some influence on claims made to the tribunal, just as the introduction of ACAS early conciliation was bound to be a factor. If you look at the various factors and the chronology of potential impact, as a researcher might, there is a cliff edge—to use a phrase that has been used already this morning—in relation to the workload of the employment tribunals in England and Wales and in Scotland, reflected also in the Employment Appeal Tribunal.

On a prima facie basis, it is not for me to answer the question of what is the cause and what is the effect—with respect, that is a matter for this Committee—but there is a prima facie case to explain, which why has there been such a significant decline in the number of claimants and the number of claims. There were approximately 70% fewer claimants in 2013-14 to 2014-15 and just over 50% fewer claims. The difference reflects the multi-party nature of some of the actions. That is an extraordinary position that demands an explanation. It is not for me to comment extrajudicially, in the light of an application to the Supreme Court about what is the cause and effect, but there is something to be explained.

Q318 Dr Huq: It has also been put to us in evidence that employment tribunal fees discourage defendants from seeking conciliation earlier, as they prefer to wait and see whether the claimant can afford to pay the fees. Is there evidence that fees discourage defendants from engaging with early conciliation?

Sir Ernest Ryder: I do not think that at the moment there is anything more than the ACAS material, to which the Committee has access, and the opinion of the employment judges and their leadership judges, which is to that effect. Again, we are in the hinterland of no evaluated material. It is a seriously important question. The early conciliation opportunity is there to prevent the imbalance of power between defendants and applicants. If we are in a position where we have introduced something behaviourally that is increasingly

producing a greater imbalance of power, that is much to be regretted in a tribunal of that kind, as well as generally.

Q319 Chair: Mediation is one of the schemes that has been running, both in England and Wales and in Scotland. It can be advantageous and save costs. Your Scottish colleagues had some concerns that the respondent's fee, which has the levelling playing field effect you talked about, might have discouraged some people from going to mediation. Can you comment on that, Sir Ernest?

Sir Ernest Ryder: The hypothetical possibility is absolutely as they describe. It is interesting to look at the statistics for judicial mediation in England and Wales and in Scotland. It is statistically insignificant—again, we are in the same position—but there has been a slight decline.

Q320 Chair: Should we generally—Parliament, the judicial system and society as a whole—be more open-minded and more encouraging of mediation as a means of resolving employment law disputes, or are not all disputes susceptible to it?

Sir Ernest Ryder: The introduction of the early conciliation scheme was a classic example of following through a good policy objective. Within the courts and tribunals modernisation programme, you will see the same question asked in respect of all jurisdictions. Without imbalancing the playing field for litigants, is there an opportunity for early neutral evaluation or other forms of ADR that ought to be taken and built into the programme? I would never set my face against any opportunity that might work in that way.

Sir James Munby: In principle, it seems to me very important that across the entire justice system we make as much use as possible of what is now called NCDR—non-court dispute resolution. For some reason, mediation is the current favourite, but there are many other forms of NCDR. In the family justice system, we very much encourage use of all forms of NCDR, even in family cases. Mediation is now compulsory in certain family cases. Arbitration is becoming a feature of the family jurisdiction, which it was not until very recently, and is very much to be desired.

Q321 Marie Rimmer: In evidence to the Committee, the Scotland employment tribunal judiciary stated that “several representatives” have told the president of the Scotland employment tribunals that there has been greater displacement of claims from the employment tribunal to the sheriff court for “money claims” under breach of contract, when that is possible. They further suggest that the displacement is greater in Scotland due to the relevant civil court fees being lower there, compared with the courts in England and Wales. Have you seen much displacement from the employment tribunal to the civil court; for example, where claimants are seeking to bring their claim under breach of contract in the county court? Is there any difference in the displacement rates for Scotland compared with England and Wales? I have seen a breach of contract case in the county court in my own constituency. Is there much of that?

Sir Ernest Ryder: The evidence from the presidents of the two employment tribunals is slightly different. First, I have to caveat: their experience is not recorded in figures, because neither Her Majesty's Courts and Tribunals Service nor the Scottish Courts and Tribunals Service measures the type of claim in such a way as to be able to evidence what

is coming in that is different by type from what existed before. It is another evidence of the data insufficiency we all have to live with.

The impression in Scotland, in particular, is that which you describe. The fee for Scottish civil proceedings is sufficiently low that there is experience among the Scottish tribunals judiciary of a leaching of cases from the Scottish employment tribunal into the sheriff court. We have not experienced that with any marked significance in England and Wales. We deduce that it is likely to have happened, but not to the same extent, in England and Wales. Again, I am afraid that we are missing the data to be able to evaluate it.

Q322 Marie Rimmer: Have there been any other noticeable differences in the impact of employment tribunal fees in Scotland compared with England and Wales?

Sir Ernest Ryder: Yes. You will see the largest decline of all in the Scottish employment tribunal in relation to sex discrimination cases. That is independently validated by researchers in Scotland, but in any event it can be taken from the discrimination statistics that are published by the employment tribunals service.

Q323 Alberto Costa: Can you cite the researchers you are referring to?

Sir Ernest Ryder: No, not reliably.

Q324 Alberto Costa: Could you inform the Committee post this hearing?

Sir Ernest Ryder: Certainly. I will get my office to do that. In fact, you can take all the material you need from the published statistics, but I have a memory that there is a research commentary on that as well.

Chair: I am conscious that we need to finish before the House sits at 11.30 am—particularly as it is Justice questions, by happenstance. Can I move to another specific area where there has been a good deal of commentary, if I can put it that way: immigration and asylum? I am sorry, but it is you again, Sir Ernest. Ms Rimmer, do you want to deal with some of the issues around that to start with?

Q325 Marie Rimmer: In the Ministry of Justice impact assessment of the initial introduction of fees for the immigration and asylum chamber of the first-tier tribunal, the Ministry stated that the first-tier tribunal was over-consumed by weak claims and that helped to justify fees. We also had comments from the Immigration Law Practitioners' Association that such an argument "had not been made out at all." What is your comment on what is happening?

Sir Ernest Ryder: One has to be careful about phrases that are culled by others. "Over-consumed" is an interesting concept for any litigation. If one tracks it back, you will find that it comes from a 2011 Government commentary on the introduction of fees in immigration and asylum tribunals. Since then, Parliament has enacted the 2014 Act. There is an Immigration Bill before Parliament at the moment. Speaking as a senior president responsible for this jurisdiction, one would have hoped that Parliament had taken the opportunity to remove whatever over-consumption there might be in the system by appropriate regulation of what is and is not a meritorious claim. In any event, I have to comment that if that was the policy objective, given the necessary extent of fee remission—for example, for those subject to removal and those making asylum claims—

what, in fact, is the likely recovery of fees in this arena? I do not find it an attractive argument, I have to say.

Q326 Marie Rimmer: The Ministry has stated that the reason for the intended increases in fees in the immigration and asylum chamber is to increase cost recovery to 25%, from 9%. Do you think that the proposed fee increases are likely greatly to increase the level of cost recovery?

Sir Ernest Ryder: The policy is for variable percentage recovery from each tribunal that is subject to fees. That in itself is a difficult proposition, because it leads to internal and external disparities and inconsistencies in the fee levels. We have inconsistencies both internally, within the tribunal, as to fees that are plainly recoverable and proportionate and others that are plainly not, and as between tribunals. The obvious example is that the general regulatory chamber has a £200 hearing fee, but the property chamber has a £400 fee, which is a much greater fee for very similar litigation. You can take the disproportionality of what a fee might produce. For example, it will cost you £500 to challenge your £60 wheelie bin penalty before the general regulatory chamber. I would not suggest that that was a sensible policy objective.

Q327 Marie Rimmer: Looking at the immigration and asylum chamber, how navigable is the current fee remission system for both unrepresented claimants and legal practitioners?

Sir Ernest Ryder: I go back to what we said earlier. It is better, but complex, and the language is complex. No matter what we put in place to assist litigants in person—and we do—I echo what the president of the family division has said. There are some huge incentives in play with the Civil Justice Council to try to improve access to justice for litigants in person: the remission system and its explanation is not a way of guaranteeing access to justice. It is a pragmatic enhancement, but no more than that.

I can give an answer, if I may, to Mr Costa's question. It is the Equality and Human Rights Commission article on discrimination claims in employment tribunals from the Scottish perspective. My apologies for not being able to remember it.

Alberto Costa: I am very impressed.

Q328 Marie Rimmer: I have one final question. It has been put to us that the fee remission system used across HMCTS could be extended to cover the immigration and asylum chamber, albeit with some modifications. Do you believe that that would be practicable?

Sir Ernest Ryder: That would bring the immigration and asylum chamber into line with other tribunals. In general terms, yes, I would be in favour of one set of principles and one procedure, not just for all tribunals but—moving slightly outside my arena, into the modernisation programme—for all courts and tribunals. After all, if you have a digital system, it ought to be one that is explicable to all, with one set of terms and conditions.

Q329 Chair: Lord Dyson, Sir James and Sir Ernest, thank you very much. I am very grateful to you for the length of time that you have spent with us. I hope that the questioning observed all the appropriate proprieties.

Lord Dyson: Impeccably.

Chair: You are very kind. We are genuinely grateful to you for your time and for the evidence you have given us. Thank you very much for coming.