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The proposal for prepayment and forfeiture of High Court civil hearing fees. Will this shut the courtroom door on some litigants?

Gillian Coumbe, barrister, Auckland

A growing 'user-pay' approach to the funding of the courts has led to ever increasing court fees. The old adage that "justice is open to all, like the Ritz Hotel" should not be ignored. Embedded in the common law is a fundamental right of access to the courts to resolve bona fide civil disputes. That is a value also protected by s 127 of the New Zealand Bill of Rights Act 1990. However, the cost of litigation can be a significant impediment to access. Recently, in a 178 page judgment, the Supreme Court of British Columbia held daily court hearing fees to be unconstitutional: *Vilardell v Dunham* 2012 BCSC 748. The judgment, now under appeal, is in some respects controversial, but contains a timely and valuable discussion of the central importance of the courts' role as a "common good" not a mere provider of services to users.

Here in New Zealand the Ministry of Justice, in its recent consultation paper, *Civil Fees Review* (September 2012), proposes wide-ranging increases in court fees, designed to shift a greater percentage of costs from taxpayers to users. The New Zealand Bar Association and the New Zealand Law Society have both lodged detailed submissions opposing the changes. This article focuses on the High Court civil hearing fees for substantive hearings. Whilst the proposed increase for "general" proceedings – up from $1,570.90 to $1,600 per half-day or $3,200 per day – may, of itself, appear modest, these fees are already at a high level relative to other jurisdictions. The hearing fees for "concession rate" proceedings, such as judicial review, will be increased significantly, to 50% of the standard fees (up from 30-40%). Worse, a draconian new prepayment/forfeiture system is proposed. Litigants, both plaintiffs and counterclaimants, will be required to pay the full hearing fees upfront, within 10 working days of the fixture notice, and will risk forfeiting those fees if the case settles less than 21 working days prior to the hearing. After the hearing, if it proceeds, an intricate process of apportionment and refunds will apply as between the parties. These proposals, if adopted, will be implemented by amendment to the fees regulations.

The consultation paper was unaccompanied by an economic assessment of the likely impact on potential litigants.. The prepayment/forfeiture system may be financially oppressive for a significant segment of the public, and may also distort settlement incentives. For most litigants the decision to go to court is a practical compulsion not a mere choice. On its face, this fees structure risks infringing the right of access to the civil courts. The current fee waiver provisions, with their limited application, will not cure that. The proposal demands careful consideration and clear justification.

Prepayment of total hearing fees by plaintiff

Currently parties are not required to pay hearing fees until the beginning of each half day (reg 12(1), High Court Fees Regulations 2001), although they may elect to pay earlier. Only the setting down fee, representing the first day's fees, must be paid upfront: reg 11(1). The consultation paper proposes revocation of the setting down fee, and prepayment of all hearing fees -- including for the first day – in full in a lump sum, into the Court's trust account, "no later than 10 working days after the issuing of the notice of fixture" (para 179). This is intended to overcome the administrative difficulties of collecting fees on a daily basis,

and to "encourage early resolution". The fees will be based on the parties' estimate of hearing time required.

Administrative difficulties should be addressed, but the proposed solution seems extreme. There is often a lengthy delay from the date of the notice of fixture until the start of the hearing. This may be many months, and in larger cases may exceed a year. Plaintiffs will have to make large payments well in advance: $6,400 for a 2 day hearing, $9,600 for a 3 day hearing, $16,000 for a 5 day hearing, $32,000 for a 10 day hearing, $48,000 for a 15 day hearing, $64,000 for a 20 day hearing, and so on. Common sense suggests that many plaintiffs, particularly individuals and small businesses, will struggle financially with this. They may be forced to borrow money and pay interest during the (possibly lengthy) period before the hearing. Some may be deterred altogether from going to court. In concession rate proceedings such as judicial review, where a plaintiff is compelled to seek redress for abuse of power by the state, a requirement to prepay hearing fees (at 50% of the standard rate) seems especially inapt.

No costs justification for requiring payment of hearing fees at such an early stage has been put forward. Indeed, prepayment will lead to excess recovery, given the accompanying system under which a portion of the fees will be forfeited if a case settles less than a month before the hearing, discussed further below.

A requirement of full prepayment may also create a perverse incentive for plaintiffs to under-estimate the hearing time (so as to minimise the advance payment), or for defendants to over-estimate time (as a financial disincentive to the plaintiff). This added burden on the plaintiff may also create an uneven playing field and skew the settlement process. For example, a plaintiff with a meritorious claim who has been forced to litigate by the defendant's negligence, breach of contract, or other wrongdoing, may be unable to afford the necessary prepayment, and will have less leverage to negotiate a favourable settlement.

Other jurisdictions, such as the UK and some Australian states, now require similar prepayment. That does not mean New Zealand should follow suit. Furthermore, hearing fees in the UK and Australia are significantly lower than here, so the burden of prepayment is less. In the UK there is currently a standard fixed hearing fee for High Court hearings of £1090 ($2,127). It is proposed to introduce new fees based on bands of time and capped at a maximum of £10,900 ($21,282) for a hearing of 10 days or more: UK Ministry of Justice, "Fees in the High Court and Court of Appeal Civil Division", Consultation Paper CP 15/2011. This compares with the fee here of $32,000 for a 10 day hearing. The fee for a 20 day hearing in the UK would also be $21,282, compared with $64,000 here. In the Supreme Courts of some Australian states (for example Queensland and NSW), and in the Federal Court of Australia, differential hearing charges apply, based on both bands of time and the status of the plaintiff. Individuals and small businesses pay much less than corporates. In Canada only four of the provinces/territories charge hearing fees at all, and at much lower levels than in New Zealand: *Vilardell*, *supra*, para [95].

The impugned hearing fees in *Vilardell* started at CA$312 per day, escalating to CA$624 per day after 10 days, an amount considered by the Court to be prohibitive to people of modest means. A mere fraction of the New Zealand fees. The right of access to justice recognised in *Vilardell* was based in part on the Constitution Act,1867, but mirrors the common law right of access recognised in New Zealand, most recently in *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 at para [153].

If a change must be made it would be more appropriate to require payment of hearing fees no later than a specified number of working days *before the hearing*. Three working days – as proposed in the consultation paper for interlocutory hearings – seems a reasonable option that should be considered.

Prepayment of hearing fees by counterclaimants

Payment upfront by counterclaimants is also proposed. Currently a counterclaimant is not required to pay any hearing fees except in the limited circumstances prescribed in reg 12(3) of the 2001 Regulations. If the plaintiff's claim is "determined, settled or discontinued" and only a counterclaim remains to be heard, the counterclaimant is responsible for the fee from that time. Otherwise the plaintiff must pay all the fees, even where the hearing is likely to be dominated by evidence relevant to the counterclaim . There is no power of apportionment. This does seem anomalous, and some change is therefore needed.

Again, however, the proposed change goes too far. The consultation paper states (para 179) that both the plaintiff and counterclaimant "would prepay hearing fees for the total estimated hearing time, but would be refunded after the hearing for hearing time that did not relate to their claim or counterclaim." This appears to suggest that both parties would pay the full fees upfront – a double payment? Ministry personnel have subsequently confirmed that it is indeed intended that the plaintiff and every counterclaimant would each prepay the full amount of the hearing fees. Apportionment and refunds would then be determined by the Registrar after the hearing. A complex, potentially fraught, exercise.

Take a 5 day case with one defendant who makes a counterclaim. The Court would receive $32,000 ($16,000 from both parties) perhaps months in advance of the hearing. In a case with, say, two defendants and a third party who each make counterclaims or cross claims, and requiring a 20 day hearing, each party (four in total) would have to pay $64,000 in advance into the Court trust account, a sum of $256,000. Some cases, such as the leaky building litigation, can involve many more claimants. How can double or multiple prepayment be justified in cost recovery terms? And, importantly, how would the forfeiture system apply to sums prepaid by counterclaimants? That is still unclear.

In the other jurisdictions referred to above there is no requirement that the plaintiff and counterclaimant each prepay the full amount of the hearing fees. Rather, a discretion is conferred on the court, at the time of payment, to require another party to pay the fees, or to apportion the fees between the parties: see for example, cl 10(2)(b), Civil Procedure Regulation 2012 (NSW); reg 7, Federal Court of Australia Regulations. A more workable solution therefore would be to amend the 2001 Regulations to give the Court (or Registrar) a similar discretionary power to apportion the fee, at the time of payment, between the plaintiff and any counterclaimants.

Forfeiture of prepaid hearing fees

This aspect of the proposal is of particular concern. As stated above, currently hearing fees are not required to be paid until the beginning of each half-day. Under reg 12(2) the Registrar must refund the fee paid for any unused hearing time. The setting down fee, once paid, is not refunded (unless by waiver under reg 9).

The consultation paper proposes (para 179) a new system of refunds where a case is settled or discontinued one month or less before the hearing, as follows:

> 21 or more working days' notice: 100% refund (less the first days' hearing fee).
> 16-20 working days' notice: 75% refund.
> 6-15 working days' notice: 50% refund.
> 1-5 working days' notice: 25% refund.

This system is punitive, potentially draconian, in its operation, in that it will lead to forfeiture of significant sums. Again, no direct costs recovery justification has been demonstrated. The High Court has developed a sophisticated and effective model for managing standby

fixtures. Thus, if a case does not proceed to a hearing another fixture can usually be allocated.

The forfeiture regime has the potential to operate unfairly. Where there is no counterclaim the burden will fall entirely on the plaintiff. Even if the plaintiff has a meritorious claim, an obdurate defendant may resist settlement until the eleventh hour. The plaintiff will then forfeit 75% of the fees. Thus, for example, if a case allocated a 15 day fixture settles between 1 and 5 days before the hearing the plaintiff will forfeit $36,000 (75% x $48,000) in hearing fees. A plaintiff will not necessarily succeed in negotiating reimbursement by the defendant as part of the settlement terms. Further, the inevitability of forfeiting an increasing portion of the hearing fees as the trial date approaches may, perversely, lessen settlement prospects. And what of the plaintiff who elects to discontinue before the hearing because he or she can no longer afford to continue, perhaps due to changed circumstances or a 'scorched earth' strategy adopted by a well-resourced defendant? Is it fair that that plaintiff should forfeit hearing fees?

There is a forfeiture/refund system in the UK and some Australian states. For example, in the UK High Court there is a 100% refund on 28 days' or more notice, 75% refund on 15 to 28 days' notice, and 50% refund on 7 to 14 days' notice: UK Consultation Paper , para 71. In the Queensland Supreme Court there is a 75% refund on 10 working days' notice: s 4C, Uniform Civil Procedure (Fees) Regulation 2009. However, as stated above, the hearing fees in these other jurisdictions tend to be lower than in New Zealand, so the impact of forfeiture will be less.

The forfeiture system will surely aggravate the impediment to access posed by the prepayment requirements. It also appears to be beyond the authority of the fees regulation making power in s 100A of the Judicature Act 1908.

A requirement that parties and their counsel give prompt notice to the Court when settlement has occurred is desirable. But that is entirely different from penalising the fact of 'late' settlement itself by forfeiting fees. The High Court already has, through control over its own process, an armoury of means to manage litigation, incentivise early resolution and promote the efficient use of court time.

If a fixture is vacated due to settlement or all prepaid hearing fees should be refundable, except the fees for the first day (or half-day), as is the case with the current setting down fee. Where a case settles part-heard, or takes less hearing time than estimated, there should also be a refund for remaining unused time, as at present.

The fee waiver provisions in regs 6 to 10 are not a complete answer

The consultation paper does not propose any change to the current fee waiver provisions in the 2001 Regulations. A fee exemption mechanism is essential where fees would otherwise impede access to the courts: *Re Wiseline Corporation Ltd* (2002) 16 PRNZ 347 (CA) at paras [18] and [19]. In *R v Lord Chancellor, ex p Witham* [1998] 2 WLR 849a Supreme Court Fees Amendment Order was held invalid as infringing the common law right of access, insofar as it revoked a fee waiver provision.

The fee exemptions in regs 6 to 10 are not, however, a complete answer to the above concerns, for two reasons. First, these provisions address only the affordability of the amount of the fees, not the added financial impact of prepayment and forfeiture. Secondly, the criteria for assessing financial means are restrictive. To qualify a litigant must be truly impecunious. The litigant may be legally aided (reg 6(3)(a)), dependent on a benefit, superannuation, or a veteran's pension (regs 6(3)(b)(i) &(ii)), or, in the case of a corporate, have no immediately available assets (reg 10). The residual standard of "undue financial

hardship" in reg 6(3)(b)(iii)) is high. Hardship per se is insufficient. The hardship must be "undue" – beyond the ordinary, beyond "what is just and right": *Appleton v Tauranga Law* [2012] NZHC 242, at para [17]. There is a large gap between the income levels of litigants who qualify for a fee waiver and the income levels of those who can reasonably afford $3,200-plus to access a courtroom, let alone those who could afford to forfeit such a sum. The Court in *Vilardell*, in holding that a fee exemption did not cure the "obvious impediment to access to justice" posed by the hearing fees in that case, stated (at para [416]):

> "the fact that 'indigency' and not some other form of "middle class" means test has long been the standard, is clearly implicit recognition that the fees that may fairly be charged for services…will always fall within a range that only the poor could not afford".

Civil court fee structures should not, on their face, be so onerous that people on modest incomes could not afford them. They should be "reasonably affordable by citizens in general": *Vilardell*, at para [288]. For many litigants who do not qualify for a fees exemption, the combination of upfront payment and potential forfeiture of hearing fees could well be "the straw that broke the camel's back".

Conclusion

It is not suggested that litigants should pay nothing towards the cost of their use of a courtroom to resolve civil disputes. The *Vilardell* decision may overreach, at least to the extent that it also suggests that a hearing fee (as distinct from a 'registry' fee) of any level is unconstitutional. All fees should, however, be both cost-based and reasonably within the reach of litigants of modest means. The proposed prepayment/forfeiture system takes 'user pays' too far, and adds a punitive element. It is a system more appropriate to a private market setting than the courts. It appears to be beyond the authority of the fee regulation making powers in the Judicature Act 1908.

The role of the courts as guardians of the rule of law is of central importance. Alternative means of private dispute resolution also ultimately rely, for their efficacy, on the backstop of the courts. Accordingly, any measures that risk impeding the right of access to the courts, or unfairly penalising litigants, require careful scrutiny. Whilst the consultation paper identifies inefficiencies that do need to be addressed, more measured solutions should be considered.