

The Costs and Funding of Civil Litigation

A Comparative Perspective

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and
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FOREWORD

Dr Hodges, Professor Vogenauer and Dr Tulibacka have conducted an excellent and thorough comparative study of litigation costs and funding across a wide range of jurisdictions ('the Oxford study'). The Oxford study is important, because it provides both context and background for any critical examination of our own costs and funding rules.

The terms of reference set by the Master of the Rolls for the Review of Civil Litigation Costs last year included a requirement to compare the regime for England and Wales with the regimes operating in other jurisdictions. In the limited time available I looked at and wrote a summary of costs and funding regimes in ten jurisdictions only, namely Scotland, France, Germany, The Netherlands, Hong Kong (focusing on the HK Supplementary Legal Aid Scheme), Australia, New Zealand, the Eastern Caribbean, the USA and Canada.¹ Dr Hodges, Professor Vogenauer and Dr Tulibacka, working at the same time as myself, surveyed a much larger number of jurisdictions and made their findings available to my review. They also held a most informative two day seminar at Oxford in July 2009 on the subject, with speakers from both civil and common law jurisdictions. I took the findings of the Oxford study into account in reaching a number of my conclusions.²

The authors continued their work beyond 2009 and have now produced this excellent book, setting out the full findings of the Oxford study. I commend this book both for its breadth and detail and also for its percipient commentary. This work will make a valuable contribution to the debate which lies ahead about how the costs and funding rules of England and Wales should be reformed in order to promote access to justice.³

Rupert Jackson
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16th July 2010

¹ See chapters 18 and 54–62 of the Preliminary Report.

² See, for example, the Final Report at chapter 10 (re conditional fee agreements), paragraph 1.10; chapter 12 (re contingency fees), paragraph 1.4.

³ At the time of writing this foreword the Coalition Government has not announced its conclusions on these matters or the timetable for any further consultation.

PREFACE

This book examines the approach to costs and funding of civil litigation from a comparative perspective. Its first part sets out the results of a major study that was carried out by two of the research Centres of the Faculty of Law of the University of Oxford, namely the Centre for Socio-Legal Studies and the Institute of European and Comparative Law, in 2009. The study is based on a number of reports that were prepared by scholars and practitioners from all over the world. Some of these national reports are reproduced in the second part of the book.

The study was conducted against the background of, and designed to feed into, a recent fundamental review of civil litigation costs in England and Wales. This was initiated by the then Master of the Rolls, Sir Anthony Clarke, in 2008. He appointed Lord Justice Jackson to conduct an enquiry with a view to making recommendations in order to promote access to justice at proportionate cost. The massive Final Report of the Jackson Review was published in December 2009 (a summary is provided in Chapter 8 of this book). It drew on a wide variety of sources, *inter alia* the preliminary results of our study, which had been published on the Social Sciences Research Network (SSRN). The Jackson Review sets forth a large number of suggestions for wide-ranging reforms of the English costs rules, and their implementation is currently discussed. We hope that this book can help to inform these discussions.

We are extremely grateful to all those who helped us in conducting the study and producing this book. First of all, warm thanks are due to the many academics and practitioners who, within very tight schedules, provided information, data and written contributions for the initial study in 2009 and for this book. They are listed at pages xiii to xviii, below. We are equally indebted to Mr Francis Denning for processing the figures on the case studies and creating the charts and to Mr James Reardon for copy editing. We are also much obliged to international law firm CMS EEIG. They provided generous funding of the Oxford conference in July 2009 at which the preliminary findings of this study were discussed. Finally, we are most grateful to Richard Hart and his team at Hart Publishing who have assisted with their usual expertise and unflappable flexibility, not least in producing this book within a very short time frame.

Oxford, 18 June 2010
Chris Hodges,
Stefan Vogenauer,
Magdalena Tulibacka

GLOSSARY

ADR	alternative dispute resolution
ATE	after the event (insurance)
B2B	business to business
BTE	before the event (insurance)
CEPEJ	European Commission for the Efficiency of Justice
CFA	conditional fee agreement
CLAF	Contingency Legal Aid Fund
CPR 1999	Civil Procedure Rules 1999 (England and Wales)
LEI	legal expenses insurance
LF	litigation funding
OLAS	Ordinary Legal Aid Scheme
RTA	road traffic accident
SLAS	Supplementary Legal Aid Scheme
SME	small or medium sized enterprise
USD Intl	international dollar
VAT	value added tax

Further abbreviations used in Germany are explained in Chapter 11 of this book.

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⁴ National Reports are at www.cslls.ox.ac.uk/COSTOFLITIGATIONDOCUMENTSANDREPORTS.php

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Part I

The Oxford Study on Costs and Funding of Civil Litigation

CHRISTOPHER HODGES, STEFAN VOGENAUER AND
MAGDALENA TULIBACKA

Introduction

I. The Purpose and Scope of This Study

The focus of this study is on how different jurisdictions approach the two linked subjects of litigation funding and costs. We seek answers to the following questions. What are the options for claimants to fund litigation to vindicate their rights? What court costs, lawyers' fees and other costs will litigants have to pay? What are the rules on costs, both in relation to initial payments and any rules on subsequent reimbursement, particularly in relation to such sums as may be a liability for a loser to reimburse a winner through cost-shifting rules? Are such sums predictable in advance? Are they proportionate to the work done or to the issues at stake? Overall, which jurisdictions are comparatively more or less expensive?

An important preliminary point is that these subjects can be difficult to grasp without a level of understanding of the national context, and particularly of the national rules and practices on civil procedure. However, the primary concern of this study is not with general civil procedure, and we have consciously omitted almost all description of national rules and practices on procedural issues beyond the costs and funding of litigation. This is for three reasons. First, it is assumed that readers of a book such as this will have sufficient familiarity with at least the broad distinctions between the basic common law and civil law models of procedure that are represented here. Secondly, whilst there are considerable variations on such issues between jurisdictions, not only in relation to general principles and architecture of the systems, but also in matters of detail, useful reference works already exist on such matters.¹ Thirdly, the length of this study would be considerably extended if such detailed descriptions were to be included and, more importantly, its focus on the issues of funding and costs, on which only limited other comparative research exists to date, would be diminished.

¹ AAS Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford, Oxford University Press, 1999); A Layton and H Mercer (eds), *European Civil Practice* (2nd edn, London, Thomson, Sweet & Maxwell, 2004); N Trocker and V Varano (eds), *Civil Procedure Reform in Comparative Perspective* (Torino, Giappichelli, 2005); OG Chase, H Hershkoff, L Silberman, Y Taniguchi, V Varano and AAS Zuckerman, *Civil Litigation in Comparative Context* (St Paul/MN, Thomson West, 2007).