A matter of time: guideline hourly rates (Pt 2)

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In his second update, Julian Chamberlayne discusses national banding & the impact of enhancement factors on recommended rates

IN BRIEF

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In the first article in this series, I considered the background and methodology behind the Civil Justice Council (CJC) working party report on the Guideline Hourly Rates (GHR) of 8 January 2021 (see *NLJ,* 5 February 2021, p19). I now consider its analysis and recommendations for London, the national bandings and the enhancement factors that can be applied in cases of complexity, importance or high value.

London

The GHR previously divided London by firms located in the City, central London and outer London. The CJC's report recommends retaining three categories but rebrands them as London 1, 2 and 3.

London 1 is no longer based on firms being located in the City of London. Instead, it is intended to exclusively relate to very heavy commercial and corporate work undertaken anywhere in London. While at first blush that may sound like a big change, it is a limitation that was already established by case law dating back to the comments of Senior Costs Judge Hurst in *King v Telegraph Group Limited* [2005] EWHC 90015 (Costs) at [92]:

> 'City rates for City solicitors are recoverable where the City solicitor is undertaking City work, which is normally heavy commercial or corporate work. Defamation is not in that category, and, particularly given the reduction in damages awards for libel, is never likely to be. A City firm which undertakes work, which could be competently handled by a number of central London solicitors, is acting unreasonably and disproportionately if it seeks to charge City rates.'

Looking at the other side of the coin, the CJC's definition of London 1 is in principle helpful to London firms outside of the City who undertake heavyweight commercial work. This is an issue that arose recently in *Shulman v Kolomoisky* [2020] Lexis Citation 326, a $500m dispute where the receiving party's solicitor, Skaddens, had their office in Canary Wharf, which is beyond the City boundaries.

A related point on the choice of London solicitors features in the revised guide for judges undertaking summary assessments, which features as Appendix J in the CJC report. Affirming long-standing case law, it states:

> '[30] In a case which has no obvious connection with London and which does not require expertise only to be found there, a litigant who unreasonably instructs London solicitors should be allowed only the costs that would have been recoverable for work done in the location where the work should have been done: *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132 (CA). It follows that a party who instructs London solicitors to pursue in London a claim which concerns a dispute arising outside London and which was suitable to be heard in the appropriate regional specialist court should also be allowed only the costs that would have been recoverable for pursuing the claim in that regional court (and see Practice Direction 29 para 2.6A).'

The next para [31] of that guide confirms that where all or part of the work on a case is done in a different location, the appropriate hourly rate for that part should reflect the rates allowed for work in that other location. The CJC has a related suggestion for a change to form N260 to require a statement about the locality of individual solicitors. This addresses a concern that some London firms may insource aspects of the work to their regional offices, but still attempt to charge London rates. The CJC's report flags that changing work practices, including remote working, may require closer scrutiny the next time the GHR is subject to a full review.

The CJC received very little evidence relating to London 1 rates and was largely reliant on data relating to summary assessments gathered by judges from the Business and Property Courts (BPC) over just a few weeks. Only 25 BPC cases formed the basis of Table 6 in the analysis by Professors Fenn and Rickman, which the CJC working party adopted in its recommendations for London 1 rates ranging from £512 (grade A) to £186 (grade D), with a range of increases from the 2010 rates of 18% to 35%.

Those rates are a long way below the rates considered in *Shulman*, which at Grade A were allowed by Master Rowley at £750. I would endorse from experience the comment from Macfarlanes' submission to the CJC, that the hourly rates claimed in *Shulman* (ranging from approximately £250 to over £1,000) are closer to current market practice and more reflective of the overheads City law firms have to pay. It will be interesting to see whether City firms attempt to put in further data on London 1 rates in this consultation period and whether the CJC is prepared to consider any such new data at this late stage.

Fenn and Rickman also had very little data to work with for London 2. To formulate their Table 5c, they revised the data from some City law firm cases and Forum of Complex Injury Solicitors (FOCIS) cases from London 1 to London 2 because they did not meet the new definition of heavy commercial work. This resulted in the CJC's

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proposal for London 2 rates ranging from £373 (grade A) to £139 (grade D), which is an increase of 10-25% on the 2010 GHR.

The London 3 rates ranging from £282 (grade A) to £129 (grade D) are closer to the rates for the National bands than they are to London 1 and 2. The CJC working group recognised that there are anomalies in the present London boundaries which should be considered in any future review. Meanwhile, they commented that costs judges will no doubt continue to take into account the nature and complexity of the work when assessing complex high-value work carried out by firms located in London 3.

National 1 and 2

The CJC observed that the data it gathered for rates allowed in National 1 and National 2/3 had substantially converged. They acknowledged that it was somewhat counterintuitive and wondered whether the results would be replicated on a future review. Therefore, while it did merge National 3 into National 2, it decided to hold off from creating a single national band even though the revised rates for National 1 and 2 are the same for Grades B (£218) and D (£126) and only a few pounds apart at Grades A (£261-255) and C (£178-£177). This represents a much more significant inflationary increase for National 2 (14%-27%) than National 1 (7%-20%). In the same ten-year period, the Services Producer Price Index legal services index rose by 34%, and even the Consumer Prices Index rose by 23.5%. That reinforces the impression that the CJC's methodology based on analysing the rates allowed, rather than rates claimed, is not a true reflection of the market rates clients pay for their legal services in 2021.

The CJC proposed rates are also a much lower increase than was allowed in *Cohen v Fine & Ors* [2020] EWHC 3278 (Ch). That was a decision of His Honour Judge Hodge QC, a member of the Foskett Sub-Committee of the CJC, which reported on the GHR in 2014. So, he knows the topic well. Purely for inflation, he added 35% to GHR in the North West. The claim was for about £35,000, and he clarified that he allowed this significant increase without the case having any complexity or other enhancement factors.

Complexity/value enhancement

This CJC report endorses, without changing, the long-standing practice of judges applying enhancements to GHR in complex and/or high-value cases, applying the factors listed at CPR 44.4(3), notably:

(a) the amount or value of any money or property involved;
(b) the importance of the matter to all the parties;
(c) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(d) the skill, effort, specialised knowledge and responsibility involved.

The revised guide for judges conducting summary assessments, at Appendix J of the CJC report includes:

> '[29] In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example, the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note (a) that these are only examples and (b) they are not restricted to high-level commercial work but may apply, for example, to large and complex personal injury work. Further, London 1 is defined in Appendix 2 as "very heavy commercial and corporate work by centrally based London firms". Within that pool of work, there will be degrees of complexity, and this paragraph will still be relevant.'

The issue of complexity enhancements featured in the thinking of Mrs Justice O'Farrell in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2504 (TCC), when she said:

> '[15] Solicitors providing such skill and expertise are entitled to charge the market hourly rate for their area of practice. The hourly rates charged cannot be considered in isolation when assessing the reasonableness of the costs incurred; it is but one factor that forms part of the skill, time and effort allocated to the application. It may be reasonable for a party to pay higher hourly rates to secure the necessary level of legal expertise, if that ensures appropriate direction in a case, including settlement strategy, with the effect of avoiding wasted costs and providing overall value.'

So, the enhancement factor is a way for judges to get from the GHR to what they consider a reasonable market rate for complex, high-value or otherwise important work.

Looking ahead

If the CJC agrees to publish the data for the rates claimed, as I proposed in my first article, it will be interesting to see whether that sheds further light on the real market rate for London 1 work, whether it shows the same convergence for National 1 and 2, and whether it shows market inflation notably at Grade D is closer to the inflationary indices than the judicially moderated rates allowed.

In the third and final part of this series, I will look at the questions posed by the CJC for this consultation and the future of the GHR. NLJ

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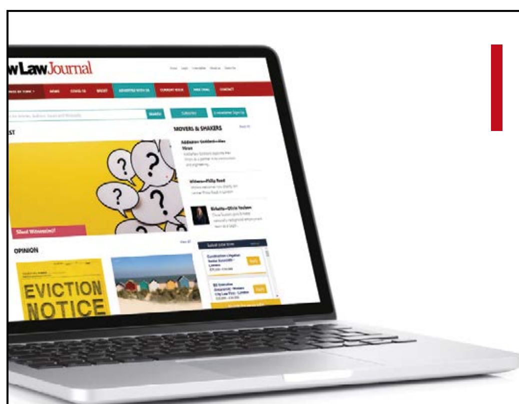

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