Response to

The Civil Justice Council Working Group's Consultation on Guideline Hourly Rates

March 2021

About Us

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients;

2. Share knowledge and information among members of the Forum;

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury;

4. Use members' expertise to promote improvements to the legal process and to inform debate;

5. Develop fellowship among members.

See further www.focis.org.uk

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	JMW
Ashtons Legal	Irwin Mitchell
Balfour + Manson	Leigh Day
Bolt Burdon Kemp	Moore Barlow
Dean Wilson	Osbornes
Digby Brown	Potter Rees Dolan
Fieldfisher	Serious Law
Fletchers	Slater and Gordon
Freeths	Stewarts
Hodge Jones & Allen	Thompsons NI
Hudgell Solicitors	

In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

Introduction

FOCIS welcomes the opportunity to respond to the CJC Working Group's consultation on Guideline Hourly Rates. We whole-heartedly support the plan to implement a new GHR in 2021. We understand that regular updates to GHR's are currently impracticable and we therefore welcome the concept of annual indexation of the GHR. It would avoid a repetition of the unfairness that has been faced during the last 10 years, to the cost of litigants who have proved they suffered a civil wrong.

We commend the CJC working group and Professors Fenn and Rickman for successfully gathering a credible body of data on rates claimed and assessed, and then reviewing reporting on the assessed claim data. However, FOCIS would have liked to see an analysis of the rates claimed from the same data set. That would have given valuable insight into what the market rate is. In addition, a potential issue with the current data analysis is that it unclear that it allows for the impact of reductions in rates allowed due to London solicitors working on cases in regional courts.

Following receipt of tables 8a-c from the CJC, and the further data analysis that we conducted with Harmans, we contend that the revised GHRs should be based on the average claimed rates, not the average of rates allowed, from this dataset. This reduces the impact of the historic GHR on the setting of the new GHR, is a closer match to inflation in the legal sector and is the best proxy for market rates.

The working group's report appropriately endorses the long standing principle of judges applying enhancements to GHR in complex and/or high-value cases with reference to CPR 44.4(3). The enhancement factors are crucial for judges to get from the GHR to what they consider a reasonable market rate for complex and high value work. This is of particular importance for much of the work undertaken by FOCIS members, for clients with life changing disabilities, requiring evidence from in excess of 10 expert fields. We contend that this aspect of the guidance to Judges ought to be extended to also encompass Grade D.

We accept the reasoning behind the recommended changes to London 1 and London 2 and to National 1 and 2 (including the merging of what was National 3).

Responding to the CJC working group consultation on GHR

The working group invites comments on the contents of their draft report, in particular:

(i) The methodology used by the working group.

(ii) The recommended changes to areas London 1 and London 2.

(iii) The recommended GHRs set out in paragraph 4.18 of this report.

(iv) Specifically, whether the rate of £186 for London 1 Grade D is too high; if so, at what rate it should be set and why?

(v) The recommended changes to the geographical areas in section 5 of this report and the recommendation to have two national bands.

(vi) Should the working group recommend that the Civil Procedure Rule Committee be requested to consider amending the summary assessment form N260 and the information

provided on the detailed assessment bill - the amendment would be to require the signatory to specify the location of the fee earners carrying out the work.

(i) methodology

This is by far and away the most important question.

In the introduction to the working group's report, it is stated that "*The intention of the rates is to provide a simplified scheme and the guidelines are intended to be broad approximations of actual rates in the market*." FOCIS agrees.

The previous CJC review in 2014 had valiantly tried to gather evidence of expense of time, but few firms submitted such data (the accurate compilation of which can be a time-consuming exercise). Therefore, this working group understandably discounted that approach as likely to be doomed to failure. Instead, it decided to set itself an achievable data-gathering exercise. That was for the rates claimed and allowed for cases that were subject to assessment or an express agreement on hourly rates, in two periods: April 2019 to August 2020 and September to November 2020.

On receipt of Mr Justice Stewart's letter requesting this data, FOCIS responded to express concern that this exercise involves a significant element of circularity. That is because virtually all rates allowed or agreed in recent times will have been dragged down by the legacy of the now aged and flawed GHR. In every costs dispute our members have faced, the defendants have sought reductions in hourly rates with reference to GHR. Even when the matter proceeds to assessment and even if the costs judge departs from the GHR, there are few, if any, judgments that suggest the costs judge wholly excised them from their decision-making.

This point is illustrated by the comments of Master Rowley in *Shulman -v- Kolomoisky [2020] EWHC B29 (Costs)* that "*there is rarely any other starting point offered by the parties to the court when considering the appropriate level of hourly rates*".

FOCIS's overarching point was, and still is, that a party to a multi-track claim who makes a reasonable choice of solicitor for the type and scale of the claim in question ought to be able to recover at up to market rate for that work. If they prevail in their litigation, then under the loser pays principle, why should they be left with a shortfall in costs attributable to the GHR being artificially set at any lower rate? In making this point, FOCIS invited the CJC not to lose sight of the raft of other cost control mechanisms (eg fixed costs, proportionality, budgeting, etc.) that the GHR need not duplicate.

The working group responded to these points in this report, saying:

"*It was understood that the information being sought might be influenced by the existing GHR. Any such input from the existing GHR will, however, be very substantially diminished by the expertise of specialised costs judges, together with the fact that the existing GHR are 10 years out of date. However,* ***the possible influence of the outdated GHR****, together with a desire to obtain other sources of evidence,* ***led the working group to seek information of rates claimed****, rates suggested by the paying party and rates agreed by legal professionals*." (Emphasis added)

The CJC commissioned Professors Fenn and Rickman to analyse the data they had gathered from the professions and the judiciary. The combined data pool was 754 cases with costs assessed or hourly rates agreed in the two date ranges. Their findings, limited to the rates assessed as opposed to those claimed, are set out in Appendix H to the CJC report. They concluded for grades A, B and C outside London 1, the mean assessed hourly rates are significantly higher, with at least 95% confidence. For grade D, the mean assessed/agreed rates are quite close to the current GHR in all bands.

We were pleased to see that the FOCIS data set of 51 cases materially assisted and added to the pooled data set, in particular assisting to plug the deficiency of data for London 2. As in (ii) below we accept the methodology behind that adjustment to the data, as the cases in question do not meet the heavy weight commercial litigation criteria of the new London 1 banding.

Data submitted by DWF was rightly excluded as it was presented in a different format from that sought in the Appendix F and there were numerous other anomalies. In particular the note on the DWF tables 3 and 4 in Appendix H is a very important qualification in that 96% of the data resulted from agreement rather than from assessment. This is in stark contrast to the data in tables 1 and 2 where the majority is from assessment rather than agreement. It is also diametrically opposed to the extensive experience of our members in relation to hourly rates. Whilst most cost disputes are settled between the parties it is exceedingly rare for that to include an agreement over the underlying hourly rates.

The DWF rates are lower than the rest of the data, in fact not much different from the 2010 GHRs. That is counter intuitive, contrary to the clear trend from the pooled data collected by the CJC and out of kilter with any of the inflationary indices. Consequently we disagree with the comment in the working group's report that the "*DWF evidence may be an indicator that the modest increases recommended in this report are sensible and appropriate*." FOCIS contends that the DWF evidence should simply be ignored.

The CJC report concluded that "the pooled data from experienced judges and professionals in Appendix H60 were, generally speaking, the best evidence upon which its recommendations should be made, the only exception being London 1 and London 2. Professors Fenn and Rickman conducted separate analysis of London data from the Business and Property Courts and FOCIS to come up with their recommendations for London 1 and 2.

The CJC working party and Professors Fenn and Rickman are to be commended for successfully gathering a credible body of data on rates claimed and assessed, and then reviewing and reporting on the assessed claim data. However, FOCIS would have liked to see an analysis of the rates claimed from the same data set. That would have given valuable insight into what the market rate is. As referred to above, and acknowledged over the years by no lesser authorities than Lord Phillips, Lord Justice Dyson and Lord Justice Jackson, the guidelines are intended to be broad approximations of actual rates in the market.

To illustrate this issue, let's take a simplified example of 10 cases for assessment, with grade A charge rates for cases 1 to 10 rising in £10 increments from £300-£390, all assessed by a judge who never allowed more than £340. The mean for the claimed rate would be £345, but the mean for the allowed rate would be £330. The former would be the average market rate, but the latter would not. So, the average of assessed rates will inevitably drag down the outcome and will not then give you a fair figure to reflect prevailing market rates. If required, there are statistical techniques to weed out any extreme outliers, both high and low, that might otherwise warp the results.

While the CJC suggests evidence on market rates is elusive, for this review they did gather both claimed and assessed data for the same 754 cases. This point is directly relevant to the circularity argument, as assessed rates are influenced by the historic GHR, which it is now widely acknowledged had fallen well behind market rates. The fact grade D rates (aside from London 1) have only had modest rises based on assessed rates, well below the level of any of the potential measures of inflation, illustrates that assessed rates are some way out of line with the real market rates that litigants pay.

To look only at the rates allowed, without considering the rates claimed, would effectively be a decision to curtate a distribution without first looking at the full spread. That would be an approach, which, as we understand it, most statisticians would consider to create an inherent bias and breach a fundamental principle of distribution theory. Only once you have considered

the full spread can an informed decision be made on whether it is appropriate to curtate and on what basis.

A further potential problem of the current data analysis is that it is unclear that it allows for the impact of reductions in rates allowed due to London solicitors working on cases in regional courts. Were those cases included within the London data analysis? If so that would drag down the mean for rates allowed or agreed for London rates. The same problem would not arise in a comparison of rates claimed for the same cases.

We wrote to the CJC and we are grateful for their helpful response and for providing tables (8a-c) summarising the claimed data which equivalent to the published assessed rate tables (1a-c). Unfortunately, they were not able to provide equivalents to tables 5c and 6 and so it was not possible to directly compare the claimed and assessed rates for London 1 and London 2. However, such claimed rates data as there was for London 1 and London 2 indicated a comparable differential between claimed and assessed rate to those applicable to London 3, National 1 and 2.

Working with Mat Knight of Harmans, we produced the following comparison table:-

Means of assessed/agreed rates and claimed rates by grade and region band (Pooled data)

Band	GHR 2010	GHR 2010 + CPI (23.5%)	GHR 2010 + SPPI (34%)	GHR proposed (2021)	% variance from GHR 2010	Table 8c - claimed rates	% variance from GHR 2010
London 3							
Grade A	£ 248	£ 306	£ 332	£ 282	13.6%	£ 329	32.8%
Grade B	£ 201	£ 248	£ 269	£ 232	15.5%	£ 263	31.1%
Grade C	£ 165	£ 204	£ 221	£ 185	11.8%	£ 211	27.6%
Grade D	£ 121	£ 149	£ 162	£ 129	7.0%	£ 146	21.0%
Av. all grades	**£ 184**	**£ 227**	**£ 246**	**£ 207**	**12.6%**	**£ 237**	**29.2%**
National 1							
Grade A	£ 217	£ 268	£ 291	£ 261	20.2%	£ 300	38.3%
Grade B	£ 192	£ 237	£ 257	£ 218	12.7%	£ 255	32.9%
Grade C	£ 161	£ 199	£ 216	£ 178	10.7%	£ 206	27.8%
Grade D	£ 118	£ 146	£ 158	£ 126	6.8%	£ 141	19.8%
Av. all grades	**£ 172**	**£ 212**	**£ 230**	**£ 196**	**13.6%**	**£ 226**	**31.2%**
National 2/3							
Grade A	£ 201	£ 248	£ 269	£ 255	26.8%	£ 287	42.6%
Grade B	£ 177	£ 219	£ 237	£ 218	24.5%	£ 256	44.6%
Grade C	£ 146	£ 180	£ 196	£ 177	21.3%	£ 204	39.4%
Grade D	£ 111	£ 137	£ 149	£ 126	13.5%	£ 146	31.2%
Av. all grades	**£ 159**	**£ 196**	**£ 213**	**£ 194**	**22.6%**	**£ 223**	**40.5%**

Colour coding:-

Red = less than CPI

Amber = more than CPI but less than SPPI Legal
Green = more than SPPI Legal

This comparison shows that the:-

1. allowed rates for all 3 bands and virtually all grades represent less than CPI inflation on GHR 2010 which was in itself probably below real market rates back in 2010;

2. Claimed rates for London 3 and National 1 are a better match for inflation than allowed rates, as at most grades they are between CPI and SPPI Legal.

3. Claimed rates for National 2 show the highest level of inflation, running a little above SPPI Legal, but that may simply reflect a catching up on the 2010 GHR which was likely less than the average of claimed rates back in 2010.

4. Claimed rates corroborate the closing of the gap between National 1 and 2, but with a few minor anomalies.

Further analysis of the data gathered by the CJC revealed that:-

1. there were 681 cases after excluding any where there was a miss match of data claimed and allowed;
2. rates claimed were allowed/agreed in full in just 123 (18%) of these cases, but reduced in 82% of cases;
3. 38 of those 123 cases were claimed at GHR, so 87% of non-GHR cases were reduced on assessment.

This further analysis demonstrates that most judges reduce hourly rates, even if they are below the average market rate paid by the average litigant.

The working group's current methodology, based on allowed rates, leads to proposed GHR that are 15% lower than average claimed rates. They are also lower than CPI, let alone SPPI Legal, in most bands and grades. That strongly suggests that judicial moderation[1] influenced by the legacy of GHR 2010 is out of step with market inflation. Consequently, the methodology for the currently proposed rates materially understates the average market rate and so does not, in our opinion, meet the core aim of the GHR. If it remains then the average successful litigant, who reasonably chooses to instruct a solicitor who charges the average market rate, will be left with a cost shortfall for every hour worked. However, it is easily fixed; using the same data set the average claimed rates provide a more reliable proxy for market rates that is in line with the closest matching inflationary measure, SPPI Legal.[2]

SPPI Legal Services reflects changes in the prices that law firms are able to charge other businesses, Government, non-profit institutions and (recently) consumers. The working group were unclear why there was a larger increase in the Legal Services index, but speculated that may be related to (1) the possibility that the sector has been slower to adopt cost-saving

---

[1] From the FOCIS data set the average hourly rates allowed were 87-90% of those claimed, suggesting the rates as claimed by FOCIS member firms were not excessive. However only 2 of the 49 cases had rates allowed as claimed at all grades. No criticism is intended by the reference to judicial moderation, which plays an important part in the cost assessment process, but we contend should only come into play at the later stages of assessing the costs of individual cases.

[2] If the limited London 1 and 2 dataset is inadequate to adopt this approach then we suggest the 15 % differential for the other bands be carried across. Alternatively SPPI Legal simply be applied to GHR 2010, as we know from the analysis of London 3 and National 1 and 2 that provides a reasonably close match. It is implausible that inflation has been lower in London 1 and 2 and if anything the opposite is likely to apply. As set out in this response, our impression is the London 1 data gathered significantly understates the average market rates for that heavy weight work.

technology than other professional sectors and (2) the focus for almost all of the period on 'business-to-business' services may have biased the focus towards commercial services with costs that are harder to control. They then commented that "*while this may seem to be a natural candidate for uprating GHRs, there is a potential difficulty because it effectively compensates law firms for cost increases that may largely be in their control*."

FOCIS takes issue with that perceived difficulty, because in our view that is looking through the wrong end of the telescope. GHR controls what litigants can recover from their opponents if they prove they suffered a legal wrong. GHR does not (usually) define what the clients pay their own solicitors. If set below market rate it leaves those clients having their compensation eroded to meet the resultant costs shortfall. That dilutes the full compensation principle.

The working group concluded that:

"In an ideal world, the GHRs would be reviewed and updated on a very regular basis. This is currently impracticable. If the GHRs produced in this report are accepted as being soundly based, then in the short term they could be updated annually in line with an appropriate SPPI index."

The concept of annual indexation of GHR is very important and to be welcomed. It would avoid a repetition of the unfairness that has been faced during the last 10 years, to the cost of litigants who have proved they suffered a civil wrong.

When it comes to indexation the principal of close matching is important. Providing the data source is statistically valid then the one that is the closest match will usually be the best candidate. According to analysis from KPMG, legal services contributed £60bn to the economy in 2018. Therefore, there can be little doubt that SPPI Legal has statistical validity and is the closest match for inflation of solicitors' hourly rates. Our members' impression from working with lawyers in many other jurisdictions is that the UK is ahead of the curve when it comes to modern ways of working. There is no evidence that our legal services sector is inherently inefficient but, if and when technology or process efficiencies lead to a reduction or flattening in average charge rates that will be reflected in SPPI Legal and hence would track through to GHR if linked. Until that happens, clients would likely be the losers if any other index were adopted, as they would be paying market rates but GHR would be falling behind based on an unrealised expectation of future theoretical changes.

The cost assessment bills in the data set gathered by the CJC would on average have been drawn 12 months before the date of assessment. Working back from the mid-point of the data period would take us to January 2019. From Q1 2019 to Q3 2020 (the latest available) SPPI legal has risen 6.5%. By the time the new GHR has been set and come into force the inflationary gap will be well over two years and the figure will be higher. The working group report said it was unconvinced, given the present turbulent economic times, that there should be any increase on the rates for the subsequent short time lag, assuming that they are implemented in the near future. FOCIS disagrees as the period is too long and the subsequent inflation too high to ignore. We contend that the average claimed rates need to be adjusted for inflation in the subsequent two years of 6.5% and rising. This would not be unfair to paying parties as they would still be able to raise GHR arguments against anyone who instructed the 50% of solicitors who charge above the average market rate.

Finally, we would like to address what might be perceived as an issue with any switch to a methodology based on claimed rates. That is the view often expounded by defendant personal injury lawyers that conditional fee agreements (CFAs) act to artificially inflate the hourly rates claimed upon assessment by claimants. Whilst that might have been true to some extent prior to the LASPO reforms ushered in by Lord Justice Jackson's seminal report, the personal injury market place has changed significantly in the subsequent 8 years. Once success fees became irrecoverable inter partes, most solicitors undertaking multi-track claims had to shift away

from the CFA Lite model to ensure they could continue to offer a high standard of litigation services but also ensure the financial viability of their practices.

There has however been an ongoing restrictive effect to GHR because most solicitors in this sector strive to minimise the costs shortfall their client's ultimately faced as those clients' compensatory damages are needed to meet their injury related losses and needs. In addition for children and claimants lacking mental capacity (due to traumatic brain injury or birth injuries) the costs shortfall deduction from damages has to be court approved. The same applies to work undertaken by Deputies of the Court of Protection. Hence in those claims many solicitors would either limit their charges to GHR or accept reductions to a similar effect. That was having a detrimental effect on the sustainability of that work, as was acknowledged by *Master Whalan, in PLK & Ors (Court of Protection: Costs) [2020] EWHC B28 (Costs),* who considered the appropriate hourly rate for Deputies and allowed an inflationary component of 20% to the GHR.

It is clear from the data submitted by APIL in December 2020 that the hourly rates that a personal injury claimants actually pay their solicitor for the services provided are often much lower than hourly rates which would be agreed with and regularly paid by and charged to the same individuals for other types of work at the same firm. That is also the experience of FOCIS member firms. This demonstrates that the hourly rates charged for injury claims are artificially deflated by the historic GHR, rather than inflated, when contrasted to other practice areas.

There is no need for any concern as to the validity of the rates claimed within the data set collected by the CJC, as they all relate to cases in which those rates had been confirmed by signed solicitor's endorsement on the bill of costs[3].

(ii) The recommended changes to areas London 1 and London 2.

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 to be 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 have sounded 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*."

Consequently, FOCIS accepts the reasoning behind these changes. FOCIS observes that a number of its members have offices within the City boundaries and operate practices with numerous specialist litigation areas which benefit from the close proximity to the highest courts in the land, most barristers chambers and the insurance industry. Firms offering such niche litigation services from central London offices will inevitably have charge rates in excess

[3] We acknowledge there are a few case reports where it has been found that endorsement was invalid as the rates claimed in the bill did not match the underlying retainer with the client. However, that is exceedingly rare and does not arise in the overwhelming majority of cases.

of GHR, but will continue to seek to justify the differential by relying on enhancement factors relating to the complex and high value claims they are conducting for their clients.

(iii) The recommended GHRs set out in paragraph 4.18 of this report.

As in our reply to (i) above we contend the revised GHRs should be based on the average claimed rates not the average of rates allowed. That will lead to GHRs of about 15% more than currently recommended, which are more in line with the closest matching inflationary measure, SPPI Legal. Then the average claimed rates need to be adjusted for inflation in the subsequent two years of 6.5% and rising.

(iv) Specifically, whether the rate of £186 for London 1 Grade D is too high; if so, at what rate it should be set and why?

The fact grade D rates (aside from London 1) have only had modest rises based on assessed rates, well below the level of any of the potential measures of inflation, perhaps illustrates the suspicion that assessed rates are some way out of line with the real market rates that litigants pay. As indicated by the table in (i) above the real issue with the proposed GHR for Grade D is not that they are too high for London 1, but that they are far too low for London 2-3 and National 1-2. This problem is compounded by the proposed judicial guidance currently excluding Grade D from enhancement factors. That will leave litigants, who reasonably instruct specialist solicitors for complex and high value litigation, with a shortfall for the work their solicitors reasonably delegate to Grade D. Unless that anomaly is rectified it could even create a perverse incentive for that work to instead be delegated to a Grade C fee earner, at higher cost to the paying party.

(v) The recommended changes to the geographical areas in section 5 of this report and the recommendation to have two national bands.

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 10-year period, the SPPI 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 Civil Justice Council, which reported on the Guideline Hourly Rates 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.

We agree with an observation in APIL's response, that it appears to be an anomaly that Hertfordshire and Bedfordshire are excluded from National 1 so that small legal centres such as Milton Keynes (392 law firms) and Lowestoft (105 law firms) are entitled to the higher rate, but two large legal centres, St Albans (4,376 law firms) and Luton (1,150 law firms), are excluded and therefore do not.

(vi) Should the working group recommend that the Civil Procedure Rule Committee be requested to consider amending the summary assessment form N260 and the

information provided on the detailed assessment bill - the amendment would be to require the signatory to specify the location of the fee earners carrying out the work.

Whilst we understand the logic behind this proposal we suspect its introduction may cause at least as many problems as it seeks to solve. Complex litigation typically takes 2 and 10 years and over that time scale numerous fee earners will work on the case. Each of those fee earners already has to record the phase, task, activity and a narrative for every single time entry for work on the case. As working practices evolve some fee earners may work from more than one office. They may also work from home (or even a second home) for one or two days per week. On the same case there may be fee earners working from differing locations for some or all of the time. Therefore, to fully implement this proposal might require an extra data entry[4] when time recording for every one of the thousands of time entries in complex claims. We contend that would be an unwarranted administrative burden with insufficient benefit.

If introduced we suggest it be limited to cases involving London 1 and 2 rates. National 1 and 2 are so close it would serve no purpose to introduce this requirement for such cases. The modest differential between the National bands and London 3 is not sufficient to be worth this added complexity. Likewise, it ought to be limited to a requirement to simply identify any fee earner whose principal office, from which the majority of their work was undertaken, is in London 3 or National 1 or 2.

(vii) The recommended revisions to the text of the Guide in Appendix J.

The working group's report concludes: "*Finally, if its recommendations are accepted, the working group is confident that judges who have to assess costs will have proper regard to the new GHR but will (a) appreciate that they have been and always will be no more than a guide, (b) have due regard to para 29 of the proposed revised Guide and (c) exercise skill, care and common sense in the assessment of costs*."

This report appropriately 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:

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) 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*

[4] This would likely require firms to seek changes to the software for the time recording and/or practice management systems. Such changes would take time and money to implement.

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:

"*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."

The enhancement factors remain crucial for judges to get from the GHR to what they consider a reasonable market rate for complex, high-value or otherwise important work. This is particularly important for much of the work undertaken by FOCIS members for client's with life changing disabilities, requiring evidence often from in excess of 10 expert fields and with awards frequently in the millions and sometimes in the tens of millions (notably once inherently complex periodical payments are grossed up). It is notable that the mean value of 51 cases in the FOCIS data set from period 1 and 2 was £4.3m; that is higher than the mean of just over £4m from the commercial litigation cases within the CJC's pooled data set[5].

We contend that this aspect of the guidance to Judges ought to be extended to also encompass Grade D. Firms who specialise in complex and high value claims invest in recruiting the brightest and best staff. They also invest in training, supervision and systems to enable their Grade D fee earners to undertake valuable and productive work on those cases. The actual charge rates for Grade D fee earners amongst those firms are well in excess of GHR and it ought to be within the discretion of the Judges assessing the costs in cases of high complexity and value to apply enhancements across all grades.

FOCIS

31 March 2021

[5] See 4.9 and footnote 46 of the CJC's report.

FOCIS response to FOIL update March 2021 concerning the

CJC's review of The GHR – 31 March 2021

In March 2021 the Forum of Insurance Lawyers (FOIL) issued a 5 page update relating to Guideline Hourly Rates, suggesting that the data behind the CJC's recommendations was fatally flawed. It is anticipated that these points will to a large extent be repeated in FOIL's ultimate response to the CJC. Consequently FOCIS takes the opportunity to make some observations regarding these FOIL submissions.

Whilst FOIL is critical of the data gathered by the CJC, notably the relatively small number of cases on which this data was gathered (754) it offers no constructive alternatives. FOIL and its members were in a position to submit data to the CJC and were notified of its data gathering exercise in the autumn of 2020. Having elected not to do so, their complaints concerning their perception of the alleged flaws in that data sound hollow. They suggest the CJC was wrong to exclude the DWF data from the analysis conducted by Professor Fenn and Rickman without making any attempt to explain how that exercise could be done notwithstanding the different format in which the DWF data was presented. Nor do they attempt to address FOCIS' main concern regarding the DWF data; that it is implausible that hourly rates were actually agreed between the parties in 96% of cases within that data set. FOCIS reiterates its submissions to the CJC that the DWF data should continue to be excluded from the analysis that calculates the 2021 GHR.

FOIL suggests that *'Basing GHR on past costs awards and agreements approaches the issue from the wrong angle: the focus should be on whether the rates present a reasonable return for the receiving party'.* FOCIS agrees with that contention, but emphasises that the receiving party is the successful litigant, not their solicitor. A reasonable reimbursement for litigants ought tobe benchmarked around actual market rates. In the same section, on methodology, FOIL refer to the PWC annual survey but omit to mention that over the last decade those surveys shows inflation on income per lawyer (the closest proxy for hourly rates within the PwC surveys) at more than CPI and massively more than the massively unprincipled 10% figure put forwards by FOIL.

It is unclear how FOIL seek to justify such a low figure as representing inflation over an 11 year period. The only justification put forward for their proposed 10% rate relates to evidence concerning the cost of time. That comment ignores the CJCs valid observation that obtaining reliable data on cost of time has historically proved impossible. In any event the cost of time for law firms does not determine the market rate actually paid by litigants. We reiterate the point that the focus needs to be on what is a reasonable rate to reimburse litigants for the costs they incur in pursuing a claim against an opponent who has committed a civil wrong against them.

In relation to London 1 and 2 FOIL suggest Professor Fenn and Rickman's recasting of some data from London 1 into the London 2 category was '*inherently flawed*', without explaining quite what they think the flaw was that recasting of data was entirely consistent with the CJC's proposed redefinition of London 1 as solely relating to heavyweight commercial litigation.

FOIL's proposed revised guidance in paragraph 29 of the Guide to Judges (Appendix J) is not accompanied by any explanation of why they think grade B and grade C fee earner rates would be any less worthy of enhancement than a grade A rate in the same complex litigation case? The experience of FOCIS members is that grade B, C and grade D fee earners often undertake complex and valuable work for clients involved in complex litigation. The market rate for such complex litigation at all grades is significantly higher than the CJC's proposed new GHR and hence discretion for judges to apply enhancement factors to all grades are important.

Julian Chamberlayne, Chair of FOCIS