



A matter of time: guideline hourly rates

In the first of three articles, [Julian Chamberlayne](#) sets the debate on guideline hourly rates in context & discusses Civil Justice Council recommendations for reform

IN BRIEF

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The Civil Justice Council (CJC) working party on the Guideline Hourly Rates (GHR) published its hotly anticipated report on 8 January 2021 and opened a consultation period that will run to the end of March 2021 ('Guideline Hourly Rates: Working Group Report for Consultation', *bit.ly/2La2TzS*). The report runs to 100 pages including appendices. The appendices include analysis by Professors Fenn and Rickman of the data the CJC gathered. It also includes a draft revised judicial guide to the Summary Assessment of Costs at Appendix J, to update the current version that dates back to 2005. In the introduction to this report, Mr Justice Stewart, who chairs this CJC working group, quoted from and endorsed the continuing relevance of the following extract from the introduction to the 2005 judicial guide from Lord Phillips: 'The guide is intended to be of help and assistance to judges, but it is not intended

as a substitute for the proper exercise of their discretion having heard argument on the issues to be decided.'

The GHR were last updated in 2010, and even then there was significant doubt whether they were truly fit for purpose. In December 2009, Lord Justice Jackson had produced his 'Review of Civil Litigation Costs', which recommended setting up a costs council, whose remit would include setting GHR for summary assessments and detailed assessments. But those recommendations were not enacted, and the GHR still only directly applies to summary assessments.

In 2014, the CJC set up a working party headed by Mr Justice Foskett. On 28 July 2014, the Master of the Rolls, Lord Dyson, issued a detailed statement in which he concluded that he could not make any changes to the GHR because concerns expressed by that working party led him to conclude that the evidence on which its recommendations were based was not a sufficiently strong foundation on which to adopt the rates proposed.

So, both litigants and judges were left in limbo.

We then fast forward to 2019 when in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2504 (TCC)

Mrs Justice O'Farrell adopted a market rates approach and said: '...the hourly rates of the defendants' solicitors are much higher than the [Senior Courts Costs Office] guideline rates. It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London city solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome' [14].

Since then, there have been several other comments in judgments raising similar concerns. Master Whalan, in *PLK & Ors (Court of Protection: Costs)* [2020] EWHC B28 (Costs), considered the appropriate hourly rate for deputies in Court of Protection matters and allowed an inflationary component of 20% to the GHR. Likewise in *Cohen v Fine & Ors* [2020] EWHC 3278 (Ch), Judge Hodge QC, who was a member of the 2014 CJC working group, added 35% to GHR purely for inflation, applying his experience of sitting in the Business and Property Courts in London and the North West.

A 2020 survey of the members of Association of Costs Lawyers (ACL) in the wake of the *Ohpen* decision showed that 60% of costs lawyers thought the old rates were doing more harm than good (*bit.ly/3oGYDWq*).

Methodology—the expense of time, charge rates or assessed rates?

Mrs Justice O'Farrell's comments in *Ohpen* provided a much-needed catalyst for the formation of the current CJC working party in February 2020. The initial points they had to address were what the GHR intended to represent, and what methodology could realistically be applied to achieve the best approximation of that benchmark?

In his introduction to the working group's report, Mr Justice Stewart shed some light on these fundamental points, saying: '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.'

The previous CJC review in 2014 had valiantly tried to gather evidence of expense of time (EoT), but few firms submitted such data (the accurate compilation of which can be a time-consuming exercise). So, this working group 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, I responded on behalf of the Forum of Complex Injury Solicitors (FOCIS) to express concern that this exercise involves a significant element of circularity. This 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] Lexis Citation 326 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 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.

Mr Justice Stewart 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 ten 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.’

Data analysis

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.

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. The working group is of the opinion that these recommended GHR will give to the inexperienced judge a better steer, by providing a simplified scheme to assist such judges without them being a substitute for the proper exercise for judicial discretion’.

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. I will explore this in my next article in this series.

Consequently, the CJC working group’s recommendations for revised GHR (showing the % increment over current) are as shown in the table below.

Status of the CJC report & revised guidance to judges

This report is an important indicator of the likely direction of travel, but this is, for now, just the CJC working party report. The CJC invites further evidence and representations in a consultation that closes at the end of March.

The 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.’

Comment

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, I would have liked to see an analysis of the rates claimed from the same data set. To my mind, 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 us take a simplified example of ten cases for assessment, with grade A charge rates for cases one to ten 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 arguments, as assessed rates are influenced by the historic GHR which it is now widely acknowledging had fallen behind. 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.

In the second part of this series, I look at London and regional issues, plus the application of enhancements to GHR for complexity, importance and value. **NLJ**

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Area	Grade A	Grade B	Grade C	Grade D
London 1	£512 (25.2%)	£348 (17.6%)	£270 (19.5%)	£186 (34.8%)
London 2	£373 (17.8%)	£289 (19.5%)	£244 (25%)	£139 (10.4%)
London 3	£282 (13.7%)	£232 (15.8%)	£185 (11.9%)	£129 (7%)
National 1	£261 (20.2%)	£218 (13.5%)	£178 (10.7%)	£126 (6.8%)
National 2	£255 (26.78%)	£218 (23.2%)	£177 (21.3%)	£126 (13.5%)